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Global Values, Transnational Expression:From Aarhus to Escazú

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Abstract: Principle 10 of Rio Declaration embodies a key philosophy of international environmental law, that environmental decisions are best handled with the participation of those concerns. Underlying Principal 10 is a commitment to the values of democracy transparency and public participation. The earliest embodiment of Principle 10 in transnational environmental law was the Aarhus Convention, but despite the best efforts of its champions, membership of the Aarhus Convention failed to move from the transnational to the international, and in its twenty-one years it has remained largely a European venture. Instead, in 2018 The Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin American and the Caribbean (the Escazú Convention) was adopted, a bespoke Principle 10 agreement for Latin America and the Caribbean. This chapter examines how global values of environmental law (specifically, democracy, transparency and participation) find transnational expression in these sibling regional agreements, highlighting the ways in which these two instruments differ and examining reasons for this difference. Finally, this chapter reflects on the ways in which transnational environmental law, as expressed in regional agreements, allows for different legal cultures to elaborate on core values of international environmental law.

Keywords: Climate change law, environmental law, international environmental law, Global South, democracy, transparency, participation, Principle 10, Aarhus Convention, Escazú Agreement.

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Global Values Transnational Values: From Aarhus to Escazú

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I. Introduction

Democracy, transparency and public participation serve a triumvirate role in modern environmental law. The watchwords of just environmental decision-making, they are integral to the mantra of Principle 10 of the Rio Declaration – that environmental issues are best handled with the participation of all concerned citizens.[1] Each sits deep in the heart of transnational environmental law and together they are emblematic of the growing age of 'emancipatory environmental politics.'[2] They are values of great weight and moral authority, but they are also values without hard edges. They denote normative authority, but they do not prescribe precisely how they should be understood. Democracy, for example, is a value of mythologic proportions, but it lacks a concrete definition, and indeed attempting to offer one is a Sisyphean task. As guiding values therefore, they can be measured and moulded to suit different cultural, social and political contexts and are thus ripe for transnational expression.

The expressive possibilities of these values thus represent the enduring appeal of Principle 10. Before 2018, nowhere were these values more strongly articulated in transnational environmental law than in the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention' or 'Aarhus'). [3] A regional legal instrument, developed with the express purpose of protecting the procedural environmental rights of access to information, public participation and access to justice, it embodies the values of democracy, transparency and participation both in its form and formation. When Aarhus was first drafted, Kofi Annan, the then UN Secretary General, described it as the as the 'the most impressive elaboration of principle 10 of the Rio Declaration' and other commentators followed suit, praising its commitment to democracy, transparency and participation. [4]

One of the many ambitions of the Aarhus Convention was to attract membership beyond the European region and Article 15 of the Convention made specific provision for this. To

[1] Rio Declaration on Environment and Development: Application and Implementation, 10 February 1997, E/CN.17/1997/8.
[2] Arthur PJ Mol, 'The Lost Innocence of Transparency in Environmental Politics' in Aarti Gupta and Michael Mason (eds), *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press 2014), 39.
[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998 38 ILM 517.
[4] ECE the Aarhus Convention: An Implementation Guide, ECE/CEP/72/Rev.1. Foreword.

date, this has not happened.[5] Instead, the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin American and the Caribbean ('the Escazú Agreement' or 'Escazú') has emerged as a bespoke incarnation of Principle 10 for Latin America and the Caribbean.[6] The Escazú Agreement, was drafted to entrench Principle 10 in the regions legal order, but also to showcase and cement the 'considerable progress in the legal recognition of the rights of access to information, participation and justice regarding environmental issues' that had already been made.[7]

Escazú is no imitation of Aarhus, rather it is a distinctive elaboration of Principle 10 values that reflects the particular advancements and challenges of the region. There are genetic similarities between the two agreements – revealing their lineage and thus their claim to the title of Principle 10 values – but they are quite different. The emergence of the Escazú Agreement thus demonstrates both the endurance and the flexibility of Principle 10 and its composite values. Comparing the two agreements therefore provides a useful lens for looking at the core and the contours of these values, providing insight into what it is that makes them so contagious.[8]

Using the Aarhus Convention and the Escazú Agreements, as illustrations, I demonstrate the importance of a value-based approach to environmental law making. Such an approach balances the plurality of legal cultures with need for common normative standards in a shared environment. The structure of this chapter is as follows. First, I chart the journey of both the Aarhus Convention and Escazú Agreement, suggesting why the Aarhus Convention failed to attract a non-European membership. Second, I elaborate on what distinguishes Escazú from Aarhus, identifying the different priorities of each instrument. Finally, I examine the nature of the Principle 10 values and why they have such an entrenched place in environmental law, in so doing I reflect on the transnatioanlsiation of these values.

II. From Aarhus to Escazú

Now in its twenty first year, the Aarhus Convention was adopted at the Fourth Ministerial Conference of the 'Environment for Europe' process and entered into force on the 30 October 2001. To date, it has been adopted by 47 parties within the United Nations

[5] Although there has been discussion about whether China should ratify the Convention: Sean Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2017) Transnational Environmental Law 509, 511.
[6] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean Escazú, 4 March 2018, LC/CNP10.9/5.
[7] Declaration on the Application of Principle 10 to the Rio Declaration on Environment and Development (25 July 2017) A/CONF.216/13 <https://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf> accessed 12 April 2019.
[8] Natasha Affolder, 'Contagious Environmental Lawmaking' *forthcoming in* Journal of Environmental Law

Economic Commission for Europe ('ECE') region. The Convention is founded on three related pillars: access to information (Articles 4-5), public participation (Articles 6, 7 and 8) and access to justice (Article 9) in environmental matters. Although the negotiation of the Convention officially began in 1996, its inception can be traced back to an ECE draft charter of environmental rights and obligations prepared in 1990.[9] This charter was never formally endorsed, in part because the inclusion of a substantive right to a healthy environment was too divisive.[10] At the second Environment for Europe Ministerial Conference in 1994, a Task Force on Environmental Rights and Obligations was established to draw up draft guidelines on the merits of procedural rights in environmental matters.[11] These guidelines—the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making ('the Sofia Guidelines')[12] – were endorsed in October 1995 and were a significant 'stepping stone' on the 'road to Aarhus.'[13]

It was after the Third Environment for Europe Ministerial Conference that an Ad Hoc Working Group was established to prepare a convention on access to information and public participation in environmental matters.[14] Once the 'draft elements' of the Convention had been drawn up, negotiations began in June 1996. Negotiations were in keeping with its participatory ambitions, thus in addition to the participation of member states, there was an 'unprecedented level' of participation from non-governmental organisations ('NGOs'). Including a coalition of environmental citizen organisations established specifically for the purpose of drafting the Convention.[15]

The Aarhus Convention was endorsed as a 'new kind of environmental agreement' not just because of the participatory nature of its negotiation but also because it was the first environmental law convention to provide citizens' rights that were directly enforceable as against the relevant Contracting Parties.[16] These 'vertical' obligations are supported by a compliance procedure that gives members of the public the ability to directly report non-compliance by the Parties to the Aarhus Convention Compliance Committee, thus enabling them to enforce their rights under the Convention.[17] Even more exceptionally, these obligations have 'diagonal' effect – not only do the obligations apply between the Parties and their own publics, but they also apply between the Parties and *all* members

[9] ENVWA/R.38 (draft ECE Charter on Environmental Rights and Obligations), annex I.
[10] Maguelonne Déjeant-Pons, Marc Pallemaerts and Sara Fioravanti, *Human Rights and the Environment* (Council of Europe Publishing 2002) 17.
[11] Ibid 17.
[12] UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, 17 January 1996, ECE/CEP/24.
[13] Aarhus Convention Implementation Guide, 2nd ed.
[14] Ibid 16.
[15] Ibid 16.
[16] Déjeant-Pons, Pallemaerts and Fioravanti,17; Svitlana Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' (2007) 18 *Colorado Journal of International Environmental Law & Policy* 1.
[17] Art. 15, Aarhus Convention; Kravchenko.

of the public.[18] This is because the Convention contains a provision which states that the rights of access to information, public participation and access to justice should apply to all without 'discrimination as to citizenship, nationality or domicile.'[19] In these ways, the Aarhus Convention was a new kind of environmental agreement, as it adopts the form of a human rights instrument rather than that of a purely environmental agreement.

From its conception, drafters of the Convention had designs to attract membership from states outside of the UNECE region, in the hopes of moving it from its regional status to an international one. However, although some non-UNECE members expressed interest in joining, none have in fact done so.[20] In some ways this seems strange, the very success of the Convention within the European region was its pliancy – states were not required to commit to controversial and costly substantive environmental rights and few states could object (publicly at least) to a commitment to more democracy. Understanding concretely why Aarhus was unable to attract a wider membership is a research enquiry in its own right, but for present purposes, I would suggest three reasons for the lack of global reception.

First and foremost, universal membership of a regionally negotiated treaty is antithetical to the very idea that the Convention professes to promote – that environmental problems are best resolved with the participation of those concerned. Just as environmental decisions require participation from those affected, so too do environmental agreements. Values as broad as democracy and transparency manifest in manifold ways, and different regions and states will have different views on how they should be understood. The ambition of Article 15 of the Aarhus Convention somehow missed the point. An agreement developed on the basis of Principle 10 need to be one crafted by those who will be bound by it. As Alicia Bárcena emphasises, what is important about the Escazú Agreement is that it was 'negotiated by and for the region.'[21]

Following on from this, the are some very European assumptions imbedded in the Aarhus Convention. For example, there are assumptions about literacy and language skills and the ease with which citizens might participates in environmental decision-making. As Sumudu Atapattu laments in her analysis of the Aarhus Convention, those who live in poor, marginalized and often indigenous communities cannot even begin to access these access rights – 'many of these communities are illiterate and cannot access the relevant information, even if the information is publicly available.'[22] Therefore, without

[18] John Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010).
[19] Aarhus Convention art 9(3).
[20] Lalanath De Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region' (2018) 2 Chinese Journal of Environmental Law 93, 93-4.
[21] Alicia Bárcea, 'The Escazú Agreement: An Environmental Milestone for Latin America and the Caribbean' (*CEPAL*, 26 September 2018) <https://www.cepal.org/sites/default/files/article/files/op-ed_escazu_final_english_final.pdf> accessed 12 April 2019.
[22] Sumuda Atapattu, 'The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide' in Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona

companion commitment to inclusion, education and eradicating inequalities, participation as envisaged by the Aarhus Convention is very Euro-centric.

Finally, the ambition of the Aarhus Convention is limited to an elaboration of procedural rights. Early attempts to develop a treaty with substantive environmental commitments proved too controversial to continue. Further, when the United Kingdom ratified the Convention, it issued a statement asserting that the reference to a substantive right in Article 1 and the preamble was 'aspirational' and not legally enforceable, stressing the strictly procedural focus of the Convention. [23] Further, although in many ways Aarhus emulates a human right treaty, it does not expressly own this status. For regions where the deep connections between environmental interests and human rights is pronounced or where there is already a rich commitment to substantive environmental rights, the Convention's vision can seem myopic.

Therefore, although Aarhus 'has produced rules and procedures worthy of emulation' the Convention is not the best and only expression of the values of democracy, transparency and participation.[24] It does provide helpful structures and mechanisms, for example its innovative Compliance Committee, to inspire thematic variation, but it is not a paradigm to be replicated. In wrestling with how legal ideas spread, Natasha Affolder is cultivating the nomenclature of 'contagion' to capture the different directions and vectors of travel that values, frameworks, institutions and concepts can take in environmental law. [25] Principle 10 is a highly contagious idea and it has been very effective in replicating, mutating and spreading itself. The Aarhus Convention, however, was not (although there were ideas from which the architects of the Escazú Agreement took inspiration).[26] Given Affolder's analysis, this is rightly so – environmental law is place-based and culture-based and 'transplantation' of legal ideas suppresses sensitivity to these factors.[27]

Plans to produce an agreement similarly devoted to democracy, transparency and public participation, but designed specifically for Latin American and the Caribbean, had existed since the adoption of the Rio Declaration. However, it took some time for these plans to formulate into a specific proposal.[28] In the lead up to the Rio+20 Convention, members of The Access Initiative, a group of civil society organisations, pressed for these general commitments to be concretised. The Access Initiative's campaign was successful, and at

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Raaque (eds) *International Environmental Law and the Global South* (CUP 2015), 107; see also S Krvancheko.

[23] United Nations, 'Aarhus Convention, Status of Ratifications in UN Treaties Database' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en> accessed 9 April 2019, Chapter 27 (emphasis added).

[24] De Silva, 93.

[25] Affolder is developing the language of 'contagion' as an alternative to the problematic idea of 'legal transplants' and, in her view, too passive concept of 'diffusion.

[26] De Silva, 94.

[27] Affolder.

[28] Belen Olmos Giupponi, 'Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights' (2019) RECIEL 1.

the Rio+20 conference ten states from the region agreed to start negotiations for such an agreement.[29] During the conference the states issued a declaration affirming the importance of Principle 10 and committing to ensuring the 'proper fulfilment of the rights of access to information, participation and justice regarding environmental issues' through a regional treaty.[30] Thus, recognising both the universality of democracy, participation and transparency as values, but also the need for culturally and regionally sensitive expression and implementation of them.

Arrangements for the agreement began in 2012 and significant preparatory work was done to set the tone and the spirit of both the negotiations and the agreement itself. During the preparatory phase a number of documents were produced to provide a foundation for the negotiation process, including a Road map,[31] supporting Plan of Action[32] and the Lima Vision.[33] These documents set an ambitious guiding narrative for the future agreement, emphasising the importance of a regionally tailored agreement with substantial public participation. The Lima Vision also highlighted the common values and principles that would animate the agreement, including transparency, inclusion and collaboration.[34]

Negotiations officially commenced in November 2014 after the adoption of the Santiago Decision, which reiterated the commitment to Principle 10 and its values.[35] The Negotiation Committee was composed of twenty-four countries and was led by seven Presiding Officers.[36] Support for the negotiations was provided by UN Economic Commission for Latin American and the Caribbean ('ECLAC') who acted as a technical secretariat and prepared a preliminary draft of the agreement for the parties to work with. As with the Aarhus Convention, there was substantial NGO and civil society participation. In order to facilitate public participation, the Santiago Decision required the election of two representatives of the public to 'maintain a continuous dialogue' with

[29] Chile, Costa Rica, Dominican Republic Jamaica, Mexico, Panama, Paraguay, Peru and Uruguay.
[30] Declaration on the Application of Principle 10 to the Rio Declaration on Environment and Development.
[31] Roadmap for the Formulation of an Instrument on the Application of Principle 10 in Latin America and the Caribbean (8 November 2012) <https://repositorio.cepal.org/bitstream/handle/11362/38728/S2012855_en.pdf?sequence=1&isAllowed=y> accessed 12 April 2019
[32] Plan of Action to 2014 for the Implementation of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its Road Map (17 April 2013) <https://repositorio.cepal.org/bitstream/handle/11362/38731/S2013208_en.pdf?sequence=1&isAllowed=y> accessed 12 April 2019.
[33] Lima Vision for the Regional Instrument on Access Rights Relating to the Environment (Lima, 31 October 2013) <https://repositorio.cepal.org/bitstream/handle/11362/38734/S2013914_en.pdf?sequence=1&isAllowed=y> accessed 12 April 2019.
[34] Lima Vision, 3-4.
[35] Santiago Decision (10 November 2014) <https://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1&isAllowed=y> accessed 12 April 2019.
[36] Chile and Costa Rica (the co-chairs) as well as Argentina, Mexico, Peru, Saint Vincent and the Grenadines, and Trinidad and Tobago.

the Presiding Officers[37] and in 2016 the parties adopted an agreement on 'Modalities for Participation of the Public' which reviewed and reiterated the Negotiating Committee's commitment to participation. Public participation was thus deeply ingrained in the negotiation process.

After nine negotiating sessions, and six virtual intersessional meetings, the final text was agreed and, on the 4 March 2018, the Escazú Agreement was adopted, opening for signatories on the 27 September 2018. The Agreement emerged as a distinctive Principle 10 instrument to much fanfare. At the opening ceremony it was described by Costa Rican Vice-President, Epsy Campbell Bar, as 'an enormous leading step to make environment democracy a reality'[38] and ECLAC Executive Secretary Alicia Bárcena predicted that it would 'become synonymous with greater democracy, transparency and well-being.'[39]

Like the Aarhus Convention, the Escazú Agreement is structured around three rights: the right of access to information (Article 5 and 6), the right of the public to participate in environmental decision-making (Article 7) and the right of access to justice in environmental matters (Article 8). However, even with this structural similarity there are important differences between the two agreements. These differences relate not only to the demands of their respective legal cultures, architectures and socio-political backgrounds – for example the specific protection for environmental human rights defenders in Article 9 of Escazú – but also to the different point in environmental law history at which each agreement was introduced. The Aarhus Convention emerged as an early adoption of Principle 10, whereas Escazú grew gradually and in some ways more organically out of a region where significant strides towards environmental constitutionalism and to developing environmental rights jurisprudence have been made.[40] In the following section I highlight five of features of the Escazú which distinguishes it from the Aarhus Convention. Indoing, I pave the way for examining how global values find transnational expression.

III. Variation on a Theme

In many ways the Escazú Agreement is very similar to the Aarhus Convention. Both impose vertical obligations on States towards their citizens, both ensure that environmental NGOs are able to access procedural rights to further environmental protection goals and both empower the public to access an independent compliance mechanism. However, there are a number of ways in which Escazú exceeds the ambition

[37] Santiago Decision, Decision 6.
[38] Press Release: 'Fourteen Countries Sign New Generation Agreement at UN Headquarters on Access to Information, Public Participation and Justice in Environmental Matters' (*CEPAL*, 27 September 2018) <https://www.cepal.org/en/pressreleases/fourteen-countries-sign-new-generation-agreement-un-headquarters-access-information>.
[39] Bárcea.
[40] Olmos Giupponi, 3-4.

and vision of the Aarhus Convention, pursuing a more substantive agenda for Principle 10 values. These differences draw attention to the movement of contagious legal ideas and the importance of regional negotiation of global values in order to take into account influence of legal culture and socio-political context.

For the purposes of this contribution, I identify five key differences. First, both in terms of visual appearance and linguist approach, Escazú is drafted in a far more accessible manner that Aarhus. Second, more attention is paid to the difficulty of accessing information for those who experience language barriers or are unfamiliar with bureaucratic machinery. Third, there is less deference to commercial interests in relation to information access. Fourth, the legal recognition of substantive environmental rights is more straightforward. Fifth and foremost, the Escazú Agreement makes explicit reference to its status as a human rights treaty. It is likely that more differences will emerge as the Agreement grows into its setting. This will be particularly so, as the Escazú Agreement interacts with other institutions in the region, such as the Inter American Commission on Human Rights and the Inter American Court on Human Rights, just as the values of Aarhus Convention's status began to solidify with its interaction with Court of Justice of the European Union and the European Court of Human Rights. For present purposes, these five differences are intended to illustrate the claim of this contribution, that global ideals need transnational expression.

First, Escazú is aesthetically and linguistically distinctive from Aarhus. Its presentation is such that is far more accessible than the cramped, typewriter type of the Aarhus Convention and it is drafted in language that is straightforward, stripped of the linguistic affectations of an international legal instrument. For a treaty committed to ensuring participation and wide access to information, these seemingly surface level details are important. Legal documents are not just difficult to read because of the proclivities of legal drafters, but also because lawyers are not necessarily versed in the significance of font choice and typesetting or the use of space and imagery to make documents more readable. Visual presentation can and does improve the accessibility of written materials and the efforts made in the presentation of the Escazú agreement, for example using a sans serif font, should not be underestimated. [41]

Similarly, the choice of language in Escazú lends authority to its commitment in Article 4(5) to ensuring that members of the public can meaningfully access the rights promoted in the Convention. Contrast for example, the diplomatic obfuscation of Article 1: 'in order to contribute the protection of the right…' with the direct simplicity of Article 4(1): 'Each Party shall guarantee the right.' The awkward construction of Article 1 arises because of the need for compromise between the Contracting Parties to the Aarhus Convention, but

[41] See for example the work of the human right organization Change People on making written documents accessible to disabled people: 'How to Make Information Accessible' https://www.changepeople.org/Change/media/Change-Media-Library/Free%20Resources/How-to-make-info-accessible-guide-2016-Final.pdf accessed 18 March 2019.

this subtext is not obvious to a lay-reader and makes Article 1 a complex provision to understand. To take a less contentious provision, the access to justice commitment of Escazú in Article 8, opens with a simple statement that each Party is to 'guarantee the right of access to justice in environmental matters.' Whereas the companion provision in Aarhus – Article 9 – fails to state this aim simply. Access to justice, is of course the implication of the Article, but in the worlds of Jane Austin's Marianne in Sense and Sensibility – 'it is every day implied, but never professedly declared?'[42] The failure to simply state the aims of any given article, may be convention in legal drafting, but the need to interrogate and interpret even the most basic aims, makes much of Aarhus inaccessible to a non-lawyer.

Second, drafters of the Escazú agreement recognise that not all people have the capacity to access information, without a special effort from the keepers of that information. Numerous factors can make meaningfully accessing information difficult – illiteracy, language barriers, unfamiliarity with bureaucratic processes, lack of access to technical experts[43] and a lack of time given 'other pressing daily challenges'.[44] Referring to a 2016 study by the National Institute of Social Research, Lorenzo Squintani, highlights that participatory rights are largely only exercised by highly educated groups in society.[45] Therefore without explicit consideration of the needs of those living in poverty environmental access rights can only be accessed by privileged groups in society, thus exacerbating existing inequalities.

These barriers are acknowledged in the Escazú Agreement, Articles 5(3) and (4) impose a duty on Parties to the Agreement to ensure people or groups in vulnerable situations have assistance in accessing information, both in terms of formulating requests for that information and also in processing the information once received. Whilst there is a requirement in the Aarhus Convention to support organisations that promote environmental protection, in terms of direct support for individuals, the overtures of Aarhus are more limited reflecting some of the social and cultural assumptions imbedded in the Convention.

Third, Escazú appears to be less deferential to 'market liberal norms' and the interests of private actors than the Aarhus Convention.[46] In an assessment of transparency under the Convention, Michael Mason describes the information disclosure provisions as being 'significantly infected and compromised'[47] and the access to justice provisions as

[42] Jane Austen, *Sense and Sensibility* (Richard Bentley 1883), 158.
[43] Svitlana Kravchecnko, 'The Myth of Public Participation in a World of Poverty' (2009) 23 Tulane Environmental Law Journal 33, 36.
[44] Sumuda Atapattu, 'The Significance of International Environmental Law Principles in Reinforcing or Dismantlint the North-South Divide' in Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Raaque (eds) *International Environmental Law and the Global South* (CUP 2015), 107.
[45] Lorenzo Sqintani, The Aarhus Paradox: Time to Speak about Equal Opportunities in Environmental Governance' (2017) *Journal for European Environmental & Planning Law* 3, 4.
[46] Mason, 87.
[47] Ibid, 88.

'diluted'[48] in favour of 'market liberal norms of governance.'[49] Therefore, the 'commitment to public empowerment' is tempered with a 'deference to market liberal norms' exempting private entities from democratic accountability, thus limiting the social justice potential of the Convention.[50]

Escazú meets this challenge in a number of ways. Firstly, there is no special protection of commercial secrets and intellectual property in relation to access to information, as can be found in Article 4(4)(d) and (e) of the Aarhus Convention. In the Escazú agreement the only valid reasons for failing to supply environmental information relate to risks to the environment, life, health and safety of individuals, national security and crime, a far more limited set of exceptions. This is significant, because it means that environmental needs are not prioritised in favour of commercial ones, as they are in Aarhus. Further, Article 6(12) of the Escazú Agreement contains a requirement that Parties 'take the necessary measures through legal or administrative frameworks… to promote access to information in the possession of private entitles.'[51] No such commitment is included in the Aarhus Convention. And indeed, during the negotiations of the Convention's 2009-2016 strategic plan, the European Union blocked a proposal by Norway to grant the public access to information held by private actors.[52]

There is also deep recognition throughout the Agreement of the need to unravel inequalities – through the commitment to actively including indigenous communities, repeat references to those in vulnerable situations and a commitment to ensuring equal conditions. In a region where commercial interests have at times been prioritised over the needs of local and indigenous communities, these commitments are critical. Finally, the protection for environmental human rights defenders acknowledges the horrifying reality that corporate actors in the region can resort to and benefit from human rights abuses in pursing commercial interests, such as mining and logging activities. [53]

Fourth, Escazú takes an entirely different approach to the notion of substantive environmental rights to Aarhus. In Article 1, Aarhus carefully constructs a distance between the procedural rights it guarantees and the substantive right it aspires to. Thus, although procedural rights are deemed to contribute to a substantive right, no such substantive right is guaranteed. By contrast, the Escazú Agreement explicitly recognises the existence of a substantive right. Article 4(2) states that each party shall guarantee the right of every person to live in a healthy environment.' This commitment also appears in the preamble and introductory statements. In a region where several states already

[48] Ibid, 97.
[49] Ibid, 88.
[50] Mason, 87.
[51] Escazú Agreement, Article 6(12).
[52] Mason, 96.
[53] See for example: Nina Lakhani, 'The Canadian Company Mining Hills of Silver – and the People Dying to Stop It' (*The Guardian* 13 July 2017) <https://www.theguardian.com/environment/2017/jul/13/the-canadian-company-mining-hills-of-silver-and-the-people-dying-to-stop-it> accessed 12 April 2019.

guarantee progressive environmental rights, the approach of Aarhus to substantive environmental rights would be out of step with the legal and cultural context of the region.

Fifth, Escazú owns its status as a human rights instrument. The human rights tinge of the Aarhus Convention is implied by virtue of the fact that it guarantees vertical rights between states and their publics, rather than just horizontally between states as is the usual pattern of environmental agreement, but this status is not explicitly acknowledged. In the Preface to the Escazú Agreement, Bárcena claims the status of human rights treaty for Escazú, making explicit the mixed human rights/environmental nature of the Agreement. Going further, the Escazú Agreement also offers specific protection of environmental human rights defenders in Article 9. This is significant, because the Agreement recognises that procedural rights are not enough if the social-political context makes it difficult for those rights to be exercised. Whether that is because the information is mentally difficult to access and process, or because accessing and acting on information can be physically dangerous.[54] In these important ways, Escazú demonstrates the necessity of regionally negotiated manifestations of even seemingly universal values.

Much of the comparison between these two agreements reads like an eviscerating critique of the Aarhus Convention. In some ways it is. However, it is important to remember that the drafters of the Escazú agreement had the benefit of 20 years of the experience of Aarhus Convention from which to draw inspiration, as well as to appreciate some of the gaps. Since coming into force Aarhus has been 'at the forefront of elaborations on the scope and content of procedural environmental rights' and these advancements are not to be sniffed at.[55] What the advent of the Escazú does, is advance the scope and content of these rights, developing an approach to Principle 10 better attuned to the needs and priorities of that region. Underpinning the differences between these two agreements, is a broader problem with international environmental law, that is, the failure both in scholarship and practice 'to appreciate and address the tensions between Northern environmental priorities and Southern needs and aspirations.'[56] For example, if environmental problems are treated as purely technical issues to be solved by the hive mind, procedural environmental rights will suffice. However, if environmental problems are also viewed in terms of social justice, procedural rights can lack 'a compelling moral narrative.'[57] Therefore, even seemingly universal values such as democracy, transparency and participation, can be expressed quite differently in different regional and cultural contexts.

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[54] Article 19, *A Deadly Share of Green: Threats to Environmental Human Rights Defenders in Latin America* (2016), Chapter IV.
[55] Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) Journal of environmental Law 1, 5.
[56] Sumudu Atapattu and Carmen G Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues' in Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Raaque (eds) *International Environmental Law and the Global South* (CUP 2015), 12.
[57] Atapattu and Gonzalez, 13.

IV. Global Values

The pedigree of democracy, transparency and participation as global values of environmental law is well documented. They litter environmental legal instruments, entrenching the global commitment to Principle 10. Their power lies in the combination of symbolic authority and definitional ambiguity, thus an instrument that claims to be an expression of environmental democracy, for example, is making a normative commitment, without committing to a concrete outcome. I am not suggesting that Aarhus and Escazú have wildly different visions of these values. Rather, that the textual, visual and purposive differences between them embody distinct expressions of the values of democracy, transparency and participation within their permissive potential and that this plurality of expression is necessary for addressed the profound challenges of protecting the planet. Therefore, although both agreements purport to be promoting all of these things, they are quite different instruments. Take for example the different approach to substantive environmental rights that each agreement adopts. On one view of democracy, it is necessary that certain substantive goods, such as environmental quality and social equality, be preserved in order to achieve genuine democratic engagement – the Escazú approach.[58] Whereas on a 'thin' view of democracy, all that is needed is are procedural rights that directly relate to the machinery of democracy e.g. the right to vote – the Aarhus approach.[59] In what follows, I outline the nature of each value and the role that they serve in producing just environmental decisions to help explain why they are so deeply entrenched in environmental law. In the final section, I reflect on how each agreement represents an individual, transnational elaboration of these values, paving the way for other regions to develop their own approach to Principle 10.

A key claim of this contribution is that transnational environmental law is suffused with global values that are normatively powerful but practically malleable, capable of adapting to different socio-political contexts. I do not offer neat definitions of these three concepts; indeed, I believe that such a project is folly – a driving headlong into an 'impenetrable thicket of ideas.'[60] Rather my aim is to highlight their normative core along with their inherent flexibility. Each value is like playdough – immediately recognisable from its bright yellow pot, sticky scent and plasticky feel, but uncontainable in its potential to be shaped and reshaped according the players imagination. I do not make any claims about the goodness of this flexibility – values with no limits are open to abuse, for example, collective decisions procured through deceit or force should not be awarded the moral authority of the term democracy. Instead I recognise this flexibility as a political fact that permeates environmental law-making.

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[58] Michael Saward, 'Must Democrats be Environmentalists?' in Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought* (Routedge 1996), 95.
[59] Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Henry Holt and Company 2008), 21.
[60] Robert Dahl, *On Democracy* (Yale University Press 2000), 37.

Democracy is what Walter Galle has described as an 'essentially contested concept.'[61] It is a concept that can be shaped according to the methodological and ideological ambitions of its author and thus many different structural arrangements and normative visions are described as democratic. A first-past the post voting system is very different to a discursive decision-making process, for example, but both approaches claim the title of democracy. They do this not just because they each represent forms of collective decision-making, but also because, whether by default, historical fact or deep truth, democracy connotes a morally superior form of decision-making implying that democratically made decisions meet some standard of justice and legitimacy.

Transparency is a similarly slippery idea. Burnished with the moral authority of its association with ideas of honesty and openness and of its potential to achieve accountability and empowerment, it is a concept capable of meaning all things to all people. It is, as Elizabeth Fisher warns, 'a scholar's worst nightmare' because it 'is used by different scholars' commentators and decision-makers in different ways for different reasons.'[62] Nevertheless, transparency has 'strong normative undertones' and its associations with the pursuit of truth and openness, represents a compelling moral narrative.[63]

Unlike democracy and transparency, the idea of participation is not existentially complex. The flexibility inherent in the idea of participation instead related to the forms that participation can take. Participation might simply be offering one's view on a planned project, or it might require intimate involvement in all aspects of a decision. Participation is distinct from democracy because it is focused more on listening to the voices of those effected by a decision than necessarily following the view of the majority. Strong participation and thick vision of democracy may coalesce around the same vision of decision-making – active and meaningful citizen involvement – but they are not necessarily the same idea. The animating moral ideals of citizen participation, therefore, relate more to human flourishing and dignity than necessarily with producing good group decisions.[64]

Inevitably there are overlaps between these ideas – democracy requires both participation and transparency to operate well and a failure to infuse transparency mechanisms with a democratic imperative can embed existing inequities. In spite of these overlaps, there is utility in viewing these values separately, not just because they are viewed as distinct ideas in scholarship and doctrine, but also because they represent

[61] Walter B. Gallie, 'Essentially Contested Concepts' [1955] 56 Proceedings of the Aristotelian Society 167.
[62] Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 Current Legal Problems 272, 272.
[63] Mol, 51.
[64] Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge 2016), 82-4.

distinct facets of the pursuit of just decision-making and a failure to recognise these differences make these values even more unwieldy.

The democratic emphasis of environmental law (supported by transparency and participatory mechanisms) can be attributed to four complicating features of environmental decision-making: the volume and diversity of environmental interests; the plurality of environmental values involved; the uncertain nature of environmental knowledge; and the complex nature of environmental risk.[65] When making environmental decisions, there is no 'silver bullet'[66] and 'equally [environmentally] contentious citizens' can hold opposite views.[67] This has given rise to a strong emphasis on democratic approaches to environmental decision-making, promoting both transparency and participation. Understanding these complicating features is central to understanding why Principle 10 has reached global ascendency and thus the role that democracy, transparency and participation play as global values of environmental law. The Stockholm Declaration 1972 set a high ambition environmental law, whereas Principle 10 of the Rio Declaration offered a way to navigate the difficulties in environmental decision-making – recognising that achieving the best environmental outcome is rarely straightforward.

V. Transnational Expression

Both the Aarhus Convention and the Escazú Agreement were developed to implement Principle 10 of the Rio Declaration, recalling it in their respective preambles, each agreement commits to and embodies the values of democracy, transparency and participation. These values are recognised both explicitly in the text of the treaties and implicitly in the rights that they promote. Take transparency for example, Article 3(a) of the Escazú Agreement requires that implementation should be in accordance with the 'principle of transparency' and in the preamble of the Aarhus Convention, there are two references to transparency in relation to decision making and governance. The right to access information, which both treaties guarantee, is foundation to the notion of transparency, because information access is an important step in making the unseen visible. Participation and democracy are similarly present in each treaty – both impose the right of the public participation in environmental decision-making (across a variety of different levels) and both have been applauded for their ambition in promoting specifically environmental democracy.

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[65] For further discussion of these complicating features see: Emily Barritt, 'Diplomacy, Democracy and Impossible Ideas' in Stephen Minas and Vassilis Ntousas (eds), *EU Climate Diplomacy, Politics, Law and Negotiations* (Routledge 2018), 24-5.
[66] Veerle Heyvaert and Thijs Etty, 'Introducing Transnational Environmental Law' (2012) Transnational Environmental Law 1, 2.
[67] Aldo Leopold, *Sand County almanac: and Sketches here and there* (OUP 1949), 168.

These two agreements therefore provide a useful lens for looking at how global values can manifest in different regional contexts, thus demonstrating their disposition for transnational expression. They also help highlight some of the challenges identified by Affolder concerning intentionally contagious legal ideas, in particular the problem of 'false claims of universalism that conflate different manifestations of ideas.'[68] It is very easy to assume that there is some universal understanding of transparency, for example, but in spite of its abundant use, it is 'fundamentally contested political terrain.'[69] By charting the history of these two agreements, it is evident that although they promote seemingly universal values of democracy, transparency and participation, how these values manifest is shaped by their respective legal cultures and socio-political stories. In drawing this contribution to a close, I offer some reflections on these differences, emphasising the broader political projects each agreement was motivated by as well as the role that their legal cultures and socio-political demands play in shaping their expression of these values.

The ulterior project of each agreement is very different. For Aarhus it was to bring former Soviet states into conformity with European political standards[70] and for Escazú it is to establish social justice and sustainable development in the region.[71] Similarly, the legal context of each agreement is very different, not just in terms of their respective legal cultures, but also because the legal backdrop to each agreement is very different. When the Aarhus Convention was being drafted, environmental rights were relatively novel concepts and the negotiating states were collectively experimenting with what they might look like and how they should operate. Whereas in Latin America and the Caribbean, a number of states already have sophisticated environmental rights framework, through novel constitutional protections and jurisprudential developments (in national courts and in the Inter-American Commission and Court on Human Rights).[72] Therefore, the starting point for each agreement is quite different.

The socio-political context also influences the expression of these values and between the two regions there are a number of crucial differences. First, by contrast to Europe where there remains only one indigenous group – the Sami people, with an approximate population of 100, 000[73] – there are around 50 million indigenous people in Latin America and the Caribbean.[74] Further, the colonial past of Latin America and the

[68] Affolder.
[69] Gupta and Mason, 9.
[70] Michael Mason, 'So Far but No Further: Transparency and Disclosure in the Aarhus Convention' in Aarti Gupta and Michael Mason (eds), *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press 2014), 84.
[71] Escazú Agreement, Foreword and Preface.
[72] Olmos Giupponi, 3.
[73] Sami in Sweden (*Sweden*, 22 February 2019) <https://sweden.se/society/sami-in-sweden/> accessed 12 April 2019.
[74] Political Participation by Indigenous Peoples in Latin America Still Low – UN Report (*UN News* 22 May 2013) <https://news.un.org/en/story/2013/05/440312-political-participation-indigenous-peoples-latin-america-still-low-un-report> accessed 12 April 2019.

Caribbean intrenched injustices that are yet to be remedied, for example a lack of legal recognition for indigenous lands.[75] Second, near universal literacy rates in Europe have existed since the 1800's, whereas in Latin American and the Caribbean the progress towards universal literacy only started in the second half of the 20th century and low rates still exist in poorer countries, for example in Haiti only half the population are deemed to be literate.[76] Similarly, disparities are evident in terms of levels of extreme poverty – in Europe 0.7[77] people live in extreme poverty compared to in Latin American and the Caribbean there are 62 million.[78] Finally, whereas in Europe a concern for environmental and human rights is often applauded, Latin American is the most dangerous place in the world to be an environmental human rights defender.[79] Like the broader political goals and legal cultures of each agreement, these underlying socio-political realties are critical to shaping the vision of Principle 10 that each is designed to realise.

For the Aarhus Convention, the elaboration of the Principle 10 values is narrowly focused on democracy in a formal sense, establishing the minimum procedural requirements to facilitate public participation in environmental decision-making. Motivated by the desire to ensure that the infant democracies emerging in Europe set clear commitments between the newly elected governments and their citizens, such an approach is understandable.[80] This is evident in preambulatory commitments to enhance accountability of public authorities and to improve public awareness. Another influence on how the Convention frames these values, is the European commitment to a market liberal society, for example, private actors continue to be exempt from mandatory information disclosure obligations.[81] For Mason, this 'reflects a structural imbalance… between social welfare and market liberal perspectives' and thus displaces the potential more ambitious social goals.[82] Whilst, I agree with this criticism, the lack of an explicit social justice component to the Convention, merely reflects the distinct portrait of Principle 10 values that the Aarhus Convention paints. One where transparency and participation, serve to promote democratic architecture rather than social justice landscaping.

By contrast, in a region contending with colonial injustices, rising levels of extreme poverty and a poor history of respect for indigenous communities, the service of the

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[75] Article 19, n Chapter IV.
[76] Max Rosner and Esteban Orti-Ospina, 'Literacy' (Our World in Data, first published in 2013; last revision 20 September 2018) < https://ourworldindata.org/literacy> accessed 10 April 2019.
[77] Max Rosner and Esteban Orti-Ospina, 'Global Extreme Poverty' (Our World in Data, first published in 2013, substantive revision 27 March 2017) <https://ourworldindata.org/extreme-poverty> accessed 10 April 2019.
[78] Press release, Poverty in Latin America' (ECLAC 15 January 209) <https://www.cepal.org/en/pressreleases/poverty-latin-america-remained-steady-2017-extreme-poverty-increased-highest-level> accessed 10 April 2019.
[79] Article 19, Foreword.
[80] Mason, 87.
[81] Ibid, 96.
[82] Ibid, 85.

Principle 10 values looks quite different. Rather than focusing on just facilitating citizen engagement in a technical sense, the Escazú Agreement makes provision for the social conditions necessary to enable meaningful participation and engagement with environmental information. For example, Articles 4(5), 5(3) and 6(6) all acknowledge the specific needs of those in vulnerable situations and Article 7(14) require that vulnerable groups are identified and given support to engage with participatory processes. Specific attention is also paid to the needs of indigenous communities – Article 7(9) provides that decision resulting from an environmental impact assessment should be carried out through appropriate means, which includes 'customary methods' and Article 8(4)(d) recognises the need for materials to be produced in non-official languages. Therefore, the Principle 10 values are directed towards the broader project of addressing 'the scourge of inequality and a deep-rooted culture of privilege.'[83] The vision of democracy, transparency and participation that Escazú holds is thicker and imbued with an even broader set of values and commitments.

The difference between these two agreements demonstrates the expressive potential of Principle 10 and its attendant values. Thus, showing how contagious global values can find transnational expression – reflecting the socio-political, cultural and legal priorities of different regions, whilst allowing them to share in the moral authority of these global norms. It also reveals the naivety of the original drafters of the Aarhus Convention in imagining that they could present a vision of Principle 10 that was universally applicable. Faced with the profound complexities of making just environmental decision-making in local, national and global contexts, expansive normative ambitions must be balanced with appropriate regional elaborations.

VI. Concluding Thoughts

Democracy, transparency and participation are not the only global values of environmental law, nor are they the only values that instruments such as Aarhus and Escazú serve to promote. They are however values that are central to the emancipatory focus of environmental law which recognizes the profound practical and ethical complexities of environmental decision-making. Public participation recognises the needs of individuals, transparency can ensure that participation is informed, and democracy suffuses decisions with legitimacy and authority. Environmental decisions wrought in the fires of democratic accountability are thus perceived to emerge as just ones.

For the purposes of this contribution, I have not addressed the question of *whether* these values should be given the importance that they have been given. I appreciate that this is a necessary and vexed question. These values can be controversial – for example,

[83] Escazú Agreement, Preface.

transparency is undesirable when information sharing is directed towards corporations rather than publics and poorly designed participation exacerbates inequalities and enforces privilege.[84] But for better or worse, these values do play a fundamental role in global environmental law. Therefore, it is necessary to understand how they emerge in transnational frameworks designed to implement them, thus helping to understand 'the complex overlaps and interactions of legal norms.'[85]

In some ways this contribution reads like a tale of lost love. When the Aarhus Convention was first drafted, it was bathed in praise for its impressive elaboration of Principle 10 and its ambitious commitment to environmental democracy.[86] Now that the Escazú Agreement is on the scene, with its bolder, less inhibited vision of environmental rights and its unabashed pursuit of social justice, Aarhus can look anodyne. However, the differences between these agreements, illustrate the importance of shared values, rather than hard commitments, in shaping transnational environmental law. A prescriptive account of democracy, for example, would eventually stagnate by failing to account for new challenges and realities.[87] Transnational expression of global values, can breathe new life into how those values operate and dispenses with the fiction that there is a single, best way to do things. It also allows international environmental law, to better account for the differing needs and priorities of the Global South. Both the Aarhus Convention and the Escazú Agreement should therefore serve as encouragement to other regions to adopt their own Principle 10 instruments, allowing them to reflect the needs, priorities and ambitions of their region, whilst laying claim the high moral status of these values.

[84] See scholarship on critical transparency studies: Aarti Gupta and Michael Mason (eds), *Transparency in Global Environmental Governance: Critical Perspectives* (MIT 2015).
[85] Affolder.
[86] Aarhus Convention Implementation Guide, 2nd ed. Foreword.
[87] Perhaps the problem that now confronts the United Kingdom and the United States.

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