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Article

The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation

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Abstract

In many jurisdictions, procedural rules and arrangements that govern litigation are not necessarily well-suited to the protection of collective interests, such as the environment. This idea has been flagged for a while by scholars and practitioners from different jurisdictions and was part of the reason for promoting specific regulations on access to justice in environmental matters. The protection of the climate adds a new layer of complexity, as it is increasingly clear that, even in jurisdictions where a strong rule of law is presumed to exist, barriers to access to justice remain. We depart from the idea of a mismatch between procedural rules and climate protection through courts to explore the interface between two convergent phenomena in the Latin American region: the Escazú Agreement's implementation and climate litigation. Based on data gathered through interviews with 11 legal practitioners involved in climate cases in Argentina, Brazil, Colombia, Chile, Ecuador and Mexico, this article identifies procedural barriers that plaintiffs face in the courtroom and discusses if and how the implementation of the Escazú Agreement could overcome them for the improvement of access to justice in climate matters in the region. In doing that, it highlights relevant experiences in Latin America that could be of interest to those seeking to overcome procedural hurdles in other regions.

Keywords: access to justice; climate change; climate litigation; environmental justice; Escazú Agreement; Latin America

1. Introduction

In many jurisdictions, procedural rules and arrangements that govern litigation are not necessarily well-suited to the protection of collective interests, such as the environment. This idea has been flagged by scholars (Morello and Sbdar 2007; Peñalver i Cabré 2015; Cafferatta 2021) and legal actors (AIDA 2008) from different jurisdictions. It was also part of the reason for promoting specific principles and regulations on access to justice in environmental matters, prominently the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and the 2018 Regional Agreement on Access to Information, Public

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Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement).

The protection of the climate, especially considering climate change implications for future generations, adds a new layer of complexity to access to justice. It is increasingly clear that, even in jurisdictions where a strong rule of law is presumed to exist, barriers remain. An example is the limitation on access to justice as a result of the restrictive Plaumann test on standing in European Union law.[1] As it is now recognized, climate change raises disruptive challenges for law (Fisher, Scotford and Barritt 2017: 176–183), including procedural law. In this article, we depart from the idea (starting assumption) of a mismatch between procedural rules and arrangements and climate protection through courts to explore the interface between two convergent phenomena in Latin America: the implementation of the Escazú Agreement and climate litigation.

Considered a milestone for human rights and environmental democracy, the Escazú Agreement was adopted on 4 March 2018 and entered into force three years later, on 22 April 2021, after reaching 11 ratifications. Following its entry into force, the implementation and development of this legally binding agreement began, both within its institutional framework (the first Conference of the Parties (COP) took place in Chile in April 2022) and domestic jurisdictions of State Parties. At the same time, the phenomenon of climate litigation, which developed exponentially in the Global North (predominantly, the United States, United Kingdom and Australia), emerged and started to proliferate in Latin America (Auz 2022). By May 2023, according to the Global Climate Litigation Database (Sabin Center for Climate Change Law 2022), 91 cases in eight Latin American jurisdictions exist, with a hotspot in Brazil (37 cases).[2]

The Escazú Agreement contains minimum standards provisions (Article 4.7) on the environmental democracy pillars that States Parties must nationally implement (Article 4.3). Alongside provisions on the pillars of access to information (Articles 5 and 6), participation (Article 7), and protection of environmental defenders (Article 9), the Escazú Agreement introduces in Article 8 several provisions containing procedural and institutional standards in order to guarantee effective access to justice in environmental matters (Medici-Colombo 2018; Olmos Giupponi 2019; Stec and Jendrośka 2019). In this sense, its instrumental character for environmental and climate litigation seems to be apparent but remains empirically uncharted. This research offers an initial empirical exploration of the potential contribution of the Agreement to the ongoing phenomenon of climate litigation in Latin America. To do that, we carried out online interviews with 11 legal practitioners involved in climate cases in six countries: Argentina, Brazil, Colombia, Chile, Ecuador and Mexico.

The results offer insights regarding recurrent procedural and institutional hurdles present throughout the jurisdictions of the region in environmental and climate litigation practice. Furthermore, they reveal the expectations of legal practitioners regarding the Escazú Agreement's implementation and its possible contribution to overcoming those hurdles. These insights could also be of interest to those studying or involved in environmental and climate litigation in other regions of the Global South or the Global North.

To our knowledge, this is the first study of its kind focusing on access to justice in climate matters and the Escazú Agreement. Similar research initiatives, although with different methodologies and scope, have been conducted in Europe concerning the Aarhus Convention and access to justice in environmental matters (Darpö 2013; Hatton, Castle and Day 2004; Pozo Vera 2008).

Next, in section 2, we present the methodology utilized, explain the data collection method and its rationale, and describe the selected sample and its limitations. Section 3

1 A private person (NGO or individual) only has standing to challenge a European Union measure directly before the Court of Justice of the European Union when they are 'uniquely' affected by the measure in question (Eliantonio 2011). This test is proving problematic for access to justice in climate litigation (Kelleher 2021).

2 For discussion on several of these Brazilian climate cases, see de Andrade Moreira et al. in this collection.

introduces the results in two parts. The first is devoted to the procedural hurdles in environmental and climate litigation identified by the interviewees and the second to their expectations on the implementation of the Escazú Agreement as being effective in overcoming those barriers. Section 4 proposes an interpretation of a relevant part of the results and begins a discussion on three aspects of transnational interest connected to the possible contribution of the Escazú Agreement to environmental and climate litigation (and vice versa). Section 5 concludes.

2. Methodology

This research relies on a set of semi-structured interviews conducted with legal practitioners involved in domestic climate litigation in Latin America during April, May and June 2022. Specifically, we conducted 11 online interviews with practitioners[3] from six jurisdictions—Argentina, Brazil, Chile, Colombia, Ecuador and Mexico—involved in 15 judicial cases recognized as climate litigation.[4] From each jurisdiction we interviewed two practitioners, except Ecuador where we were unable to engage with a second 'climate litigator'. All the interviewees advocated for plaintiffs, mainly individuals, groups, or non-governmental organizations, pursuing 'pro-climate' interests. **Table 1** displays jurisdictions and cases in which interviewees are or were involved.[5]

To identify the interviewees, we utilized the Sabin Center Climate Change Litigation databases (Sabin Center for Climate Change Law 2022) to select relevant climate cases. In this initial case selection, we prioritized 'public interest' cases (mainly administrative and constitutional cases) over other types of claims (for example criminal cases). We considered both decided and pending cases. Having identified relevant cases, we used personal contacts to reach out to the interviewees. In some jurisdictions, in which identifying and contacting practitioners was challenging, we asked other interviewees to provide information on known litigators involved in climate cases.

The rationale for this data collection methodology is that interviews are the most effective tool for exploring 'law-in-action', with the understanding that (procedural) rules are relevant, but understanding the manner in which they work and are applied, along with how they influence strategic decision-making in the process of litigation is crucial. Regarding the sample, we assume that practitioners in this field are best situated to understand the limits and barriers of the procedural rules and arrangements with which they engage on a daily basis.

Undoubtedly, broader fieldwork that includes other relevant actors, such as judges and defendant lawyers, would have provided a richer dataset with which to work. However, time and financial constraints prevented a broader data collection exercise. We believe that this limitation does not compromise the relevance of the research results. In the end, the objective of regulations regarding access to justice in environmental matters, such as the Escazú Agreement, is to allow those 'othered' in law and governance (Grear 2014) to participate in decision-making processes, including judicial ones. Precisely because of this, the views of those who represent the 'othered' in the judicial arena are of special concern. Furthermore, we recognize that the sample is limited by the number of interviewees and jurisdictions involved. In this sense, this work should be understood as exploratory, a kick-off study on the subject in the region.

This work constitutes qualitative empirical legal research. Empirical research involves the systematic collection of information and its analysis according to some generally accepted

3 Personal data of interviewees is preserved, according to an established ethics procedure.

4 What counts as climate litigation varies between sources. In general terms, the Sabin Center database's methodology considers cases brought before judicial bodies in which climate change law, policy, or science is a material issue of law or fact. We rely on this methodology. All the cases discussed are included in this database.

5 The citation of the cases can vary according to the source. Here, we use the name as provided by the Sabin Center database and related case documents are available there.

Table 1. Jurisdictions and cases in which interviewees are/were involved

Jurisdictions	Climate cases in which practitioners are/were involved and were discussed in the interviews
Argentina	- *Asociación Civil por la Justicia Ambiental et al. v. Province of Entre Ríos et al. (Delta del Paraná* case) - *Greenpeace Argentina et al. v. Argentina et al*
Brazil	- *Instituto de Estudos Amazônicos v. Brazil* - *Six Youths v. Minister of Environment and Others* - *Laboratório do Observatório do Clima v. Minister of Environment and Brazil*
Chile	- *Private Corporation for the Development of Aysen et al. v. Environmental Evaluation Service of Chile* - *Grez et al. v. Environmental Evaluation Service of Chile* - *Mejillones Tourist Service Association and Others v. the Environmental Evaluation Service (SEA) of Antofagasta* - *Women from Huasco and Others v. the Government of Chile, Ministry of Energy, Environment and Health*
Colombia	- *Future Generations v. Ministry of the Environment et al* - *Raizal Community of Providence and Santa Catalina v. Colombia (Iota* case)
Ecuador	- *Baihua Caiga et al. v. PetroOriental SA (Baihua Caiga* case) - *Herrera Carrion et al. v. Ministry of the Environment et al. (Mecheros* case)
Mexico	- *Julia Habana et al. v. Mexico (Unconstitutionality of the reform to the Electricity Industry Law)* - *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico (Unconstitutionality of the reform to the Electric Industry Law)*

method (Cane and Kritzer 2012: 4) and is key to enhancing theoretical work so that it becomes more relevant (Landry 2016: 170). Defining this research as purely inductive or deductive would be a misleading simplification (Ritchie et al.: 6). On one hand, the data arising from the interviews is used to generate inductive knowledge. On the other hand, research questions are based on a deductive assumption (starting assumption) about the state of affairs regarding access to justice in environmental and climate matters.

3. Results

The semi-structured script utilized in the interviews consisted of two sections, each addressing one broad question: a) what are the main procedural barriers faced in climate cases? and b) what are your expectations that the Escazú Agreement's implementation will overcome these barriers?

Over the first part of the interviews, discussions addressed different procedural concerns and complexities of the entire 'litigation journey', from the very beginning (pre-litigation stage) to post-judgment (enforcement phase). Furthermore, beyond typical procedural concerns (for example standing, evidence), structural and institutional problems were raised by the interviewees. Those are also addressed here since they are intertwined with the procedural matters at the core of access to justice.

Even though the question was primarily directed to the interviewees' climate litigation practice, their broad environmental litigation experiences inevitably informed their responses. As we expose below, a clear distinction between barriers in climate litigation vis à vis environmental litigation was not observed in the responses. In that regard, a specific

question was posed about the initial presumption that climate litigation involves even harder procedural obstacles for plaintiffs than environmental litigation.

Throughout the second part of the interviews, discussions focused on the interviewee's expectations regarding the early or future implementation of the Escazú Agreement and if (and how) it could help to overcome the identified barriers. This focus was warranted given that the Escazú Agreement had only been in place for roughly a year at the time the interviews took place. As a foreword to this question, we pointed to Article 8 of the Agreement and, especially, to its subsection 3 which includes different procedural elements to be guaranteed ('considering its circumstances') by the State Parties. The question was posed similarly to all the interviewees even though the stage of implementation of the Agreement differed from jurisdiction to jurisdiction at that moment. At the time of the interviews, the Escazú Agreement was already in force in Argentina, Ecuador and Mexico, and ratification was expected in Chile as a result of the change in government. Chile's ratification was effective on 13 June 2022. An electoral change also defined Colombia's ratification (to be effective by 2023). Similarly, Brazil's ratification could be determined by the results of the presidential elections in late 2022. The diverse status of the Agreement did not significantly affect interviewees' responses, as practitioners in jurisdictions in which the Agreement was not yet in force (Chile, Colombia and Brazil) were confident that the situation would eventually change.

3.1 Procedural barriers in climate change (environmental) litigation

Several procedural and structural/institutional barriers in climate, and, more generally, environmental litigation were raised by the practitioners during the interviews, of which six were repeatedly discussed. **Table 2** shows these recurrent procedural concerns and their distribution among jurisdictions.

Beyond these barriers, an additional relevant hurdle recurrently raised by the practitioners was the lack of celerity in judicial responses, mainly due to the excessive caseloads that courts usually face. Brazilian lawyers were blunt, affirming that what climate justice[6]

Table 2. Procedural barriers recurrently mentioned and their distribution

Procedural concerns recurrently mentioned	Argentina	Brazil	Chile	Colombia	Ecuador	Mexico
1. Absence of independent public actors advocating for climate/environmental matters through litigation.	X		X	X		
2. Lack of sufficiently broad standing rules.			X	X		X
3. Language restrictions for affected non-dominant communities.				X	X	
4. Evidence production hurdles (burden of proof, expertise and costs).	X	X	X	X	X	X
5. Lack of knowledge about climate change (law) by judicial actors.	X	X				X
6. Ineffective mechanisms to enforce and monitor judgment compliance.	X		X	X	X	X

6 As Robert Kuehn noted, 'environmental justice' means many things to many people (Kuehn 2000: 10681). Although the use of the terms 'environmental' and 'climate justice' in this article can accommodate different understandings of them, we align ourselves with multi-dimensional conceptualizations that comprise not only distributive but also other inter-related concerns (e.g. corrective, participatory, recognition, social, etc.) (Schlosberg 2007). 'Climate justice' is one of the many faces of 'environmental justice' that focuses on multi-dimensional justice concerns related to causes, consequences, and responses to climate change (see Gonzalez 2021: 113; Schlosberg and Collins 2014). Litigation is assumed here to be a mechanism capable of advancing the different dimensions of environmental and climate justice, while procedural hurdles may affect that capability.

needs the most from the judiciary is qualitative and timely responses. Given that this hurdle clearly transcends the ambits of environmental and climate litigation we do not examine it separately here. That being said, delayed judicial responses were noted by interviewees when discussing other barriers as well. For instance, difficulties in fully understanding cases involving complex scientific facts and innovative legal arguments (such as those related to climate change) or lack of appropriate enforcement or monitoring mechanisms for judgment compliance were depicted by some interviewees as possible causes of delayed responses by courts in climate cases.

Below, following a 'litigation journey' order, we summarize the key insights on each barrier.

3.1.1 Absence of independent public actors advocating for climate/environmental matters through litigation

As a prelude to the litigation stage, practitioners from half of the jurisdictions (Argentina, Chile and Colombia) criticized the (absent) role of public entities, such as public prosecutors and ombudsmen, in advocating (*ex officio* or at request) for environmental and climate matters through the judicial system. This absence, according to the interviewees, leads to a disproportionate dependence on initiatives of civil society organizations and individuals for the judicial protection of the environment and the climate. This is obviously problematic given the limited resources that those actors have. Furthermore, they observed that private actors, who are willing and able to file an environmental (let alone a climate) claim, are usually located in big cities, leaving 'distant' communities with constrained access to justice.

In general terms, they did not identify this as a competence or regulatory problem since public entities (such as prosecutors and ombudsmen) usually have recognized legal standing to act and sue in environmental matters, but as an issue of agendas that disregard this topic, despite its indisputable public interest. In this sense, one of the Argentinean practitioners highlighted the lack of transparency and public participation that exists in the design and definition of the content of those public entities' agendas.

According to the same practitioner, the involvement of these public actors in environmental and climate litigation would be very relevant since it would allow civil society organizations to rely on the public impulse of the cases and, for instance, avoid significant costs (for example evidence production costs). In the interviewee's opinion, overcoming this passivity would be a major improvement for access to justice in climate matters.

Colombian practitioners also observed an absence of this kind of institution in advocating for environmental rights of communities living in territories far from urban centres. Particularly, one of them remarked on the apathy those actors exhibited in the face of the humanitarian crisis following Hurricane Iota on the islands of San Andres and Providencia. Asked about the causes of this behaviour, the interviewee referred to the absence of real independence from the government and remembered that they only 'showed up' when the Supreme Court accepted to hear the case.

Similarly, one of the Chilean practitioners referred to the difficulty for communities to translate their environmental problems into judicial action, being extremely dependent on the activity of NGOs and other private actors. More present public entities would help communities to react to environmental damages and injustices.

3.1.2 Lack of sufficiently broad standing rules

Arriving at the litigation phase, Colombian, Chilean and Mexican interviewees recognized concerns about probably the most discussed procedural matter: standing rules, in this case, in climate litigation.

The Colombian practitioner recalled that, in *Future Generations v. Ministry of the Environment et al*, the first instance court initially dismissed the claim. The reason for this dismissal was related, at least partly, to the challenges of alleging that future impacts

(caused by climate change, powered by Amazon deforestation) will distinctly affect the individual fundamental rights of the youth plaintiffs.[7] In a landmark judgment, the Supreme Court reviewed that decision and acknowledged the clear connection between the Amazon deforestation, climate change and the violation of individual constitutional rights of youth and future generations.

As for the Chilean jurisdiction, according to one of the practitioners, standing in cases about environmental damage is, in general terms, limited to those individuals that can be considered directly affected, meaning those that at least live 'adjacent' to the impaired environment ('theory of the adjacent environment') (Galmadez Zelada 2017: 133; Moraga Sariego and Delgado Schneider 2022: 290; Tisné Niemann 2016). This is problematic for climate litigation initiatives that seek to characterize contributions to climate change (for example GHG emissions) as environmental damage or as causes of future damage triggered by climate change. According to the practitioner, this obliges plaintiffs to seek an alternative type of environmental impairment (for example local atmospheric pollution) to comply with standing requirements, displacing climate concerns, at best, to the periphery of the legal argumentation. In this sense, pure climate cases are prevented, hampering the chances of developing a climate-relevant precedent.

Broadening standing in climate matters was the main objective of one of the climate cases with which both Mexican practitioners are involved. While *Julia Habana et al. v. Mexico* and *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico* are two identical lawsuits as regards their claims, they differ in the plaintiffs. While the second case was filed by a group of NGOs, the first was submitted by a group of 214 youths (between 15 and 29 years old). According to standing rules, the use of this constitutional claim (*amparo*) is limited to individuals with a personal, qualified and legally relevant interest or legally established NGOs. The argument behind the claim is that youths will be distinctly and more greatly affected by the future impact of climate change, giving them a legitimate interest that complies with standing requirements. While the claim filed by the NGOs was decided in the plaintiffs' favour, the claim submitted by the youth was dismissed, both in first instance and in appeal to the Supreme Court, rejecting a broader interpretation of standing rules for the protection of future generations facing climate change.[8] Notably, the Supreme Court observed that:

> given [climate change's] global nature, it is not possible to identify an 'adjacent environment' as a geographical area or specific ecosystem from which the existence of beneficiaries or beneficiary groups could be inferred, which would imply that the complainants, as young people, have a differentiated situation in relation to the rest of the country's population (para 69).[9]

Asked about the objective behind this attempt to broaden standing rules to future generations (since NGOs already have standing in climate cases), Mexican practitioners referred to diverse reasons, some axiological or symbolic and the others practical. On the one hand, the standing restriction is seen as unjust and unjustifiable, and changing the rule will empower youths. On the other hand, NGOs legally authorized to promote

7 The discussion was about the use of the constitutional action (*acción de tutela*) to protect individual fundamental rights, as the plaintiffs proposed, instead of the popular action to protect collective rights, as the first instance court understood. According to the practitioner, this could have been different with the Escazú Agreement in place.

8 This Supreme Court decision was made after the interviews were conducted.

9 'dada su característica de global, no es posible identificar un "entrono [*sic*] adyacente" como área geográfica o ecosistema específico del que pudiera desprenderse la existencia de personas beneficiarias o grupos beneficiarios, que implique que los quejosos, en su calidad de jóvenes, tienen una situación diferenciada en relación con el resto de la población del país'.

a case are few and not present everywhere in the country. Creating one requires human and financial resources not always available for communities and, particularly, youths.

3.1.3 Language restrictions for non-dominant communities

Overcoming standing requirements can be just the beginning of an obstacle course, particularly for groups that communicate in other than official or dominant languages. In two jurisdictions, practitioners identified the language of the proceedings as a hurdle for communities pursuing climate justice through litigation.

The Ecuadorian practitioner referred to this barrier in relation to the *Baihua Caiga* case in which plaintiffs, members of the Waonari Nation, had difficulties communicating to the judge their perceptions of climate change impacts on their territory and community due to problems with the translations in the context of a public hearing.[10] In general terms, the interviewee observed that the participation of these affected communities in judicial cases is troubling, especially when complex facts (such as climate impacts) have to be presented in the courtroom employing translation.

Similarly, one of the Colombian interviewees identified the language barrier as one of the most relevant for access to justice in environmental and climate matters. Specifically, the practitioner explained the difficulties litigating in Spanish encountered by the Raizal communities of the islands of San Andres and Providencia whose main language is an English-based Creole. According to the interviewee, although rules requiring public authorities in the region to use both English and Spanish exist, compliance with them is very limited, hindering the participation and involvement of communities in judicial processes, as in the *Iota* case.

3.1.4 Evidence production hurdles

The most widespread procedural concerns discussed during the interviews relate to evidence production, specifically to the burden of proof, the availability of expertise, and costs. All of the interviewees referred to one or various of these hurdles and offered examples in which they affected case results or decisions regarding litigation strategy.

Argentinian, Colombian, Ecuadorian and Mexican practitioners mentioned that, although doctrinal, case law or even normative developments exist in favour of reversion or dynamic burden of proof,[11] courts generally continue to apply standard rules where the burden is on the party alleging the fact (damage). Chilean practitioners observed that, in their experience, the application of reversion or dynamic burden of proof is mostly absent in their jurisdiction. They provided an example of an environmental case in which the burden of proof on the plaintiffs and the inaccessibility of complex evidence resulted in the dismissal of the case in which environmental damage (sea pollution caused by the discharge of dead salmon) was apparent (*Ilustre Municipalidad de Ancud v. Dirección General del Territorio Marítimo y Marina Mercante y otros*).

Argentinian and Ecuadorian practitioners also referred to difficulties regarding the access to scientific expertise, not only due to possible costs, but also due to a lack of information about independent environmental and climate experts willing and prepared to participate in litigation. Bureaucracy and dependence on the government were mentioned as causes for some public scientific bodies not being well-suited to this task. Furthermore, official lists of experts provided by the judicial system are deemed not to offer the kind of expertise required in this litigation, since they are usually composed by professionals (not scientists) that commonly do not have any specific knowledge on environmental or climate issues.

10 The interviewee referred to interpretation difficulties regarding a claimant's testimony on the temporal scales of climate impacts in its community.

11 For instance, in Mexico, the Supreme Court applied the reversal of the burden of proof, based on the Escazú Agreement, in the *Parque ecológico Centenario* case; the Ecuadorian Constitution establishes in Article 397.1 that 'The burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant'.

Additionally, almost every practitioner referred to the costs related to the production of evidence as a major hurdle. One of the Brazilian lawyers provided an example of an ongoing climate case. In *Six Youths v. Minister of Environment and Others*, the first instance judge asked plaintiffs for the official Portuguese translation of ten Nationally Determined Contributions (NDCs) to compare with the Brazilian one. This implied a significant economic effort given the technical nature of those documents. In the same vein, the Ecuadorian practitioner recalled that costs of evidence production almost derailed the efforts in the high-profile *Texaco-Chevron* case in Ecuador (Pigrau 2014).

Interestingly, Mexican practitioners explained that they counted on support from a United States organization to obtain scientific reports for free to be used in one of their climate cases. Similarly, the Argentinean lawyer involved in *Greenpeace Argentina et al. v. Argentina et al*. expressed the value of having an organization like Greenpeace on board to access costly reports, such as those quantifying expected emissions (including fugitive emissions) from the challenged project.

Practitioners recognized that these burdens significantly affect decisions over the design of litigation strategies (for example choosing a strategy that involves the minimum level of complex evidence) and could even determine whether the case is pursued or not. Furthermore, they identified this hurdle as the most meaningful feature of the strong disparity/asymmetry of forces between communities and NGOs and the State or corporations in access to justice in environmental and climate matters.

3.1.5 Lack of knowledge about climate change (law) by judicial actors

Practitioners in Argentina, Brazil and Mexico pointed to a lack of knowledge by judicial actors about: a) basic climate change science; b) climate change as a legal issue; and c) climate change law. In this context, the need or usefulness of environmental tribunals was recurrently discussed (see section 3.2.2).

Argentinian practitioners highlighted the lack of knowledge and awareness about environmental and climate matters by State authorities in every branch and at every level, including judges and other actors whose activity is relevant for access to justice (for example police officers in environmental-related criminal offences). As a result of a similar understanding, one of the Brazilian practitioners remarked on the relevance of introducing in lawsuits a clear and simple (as possible) explanation about the scientific background of the case and translating it into basic legal language, such as connecting climate impacts with fundamental rights violations.

Furthermore, one of the Argentinian practitioners strongly criticized the lack of legal knowledge and related that judges, particularly those from lower courts, usually ignore basic concepts and principles of environmental law, let alone climate law. In the same vein, Mexican practitioners referred to the fact that this knowledge is even less probable in subnational jurisdictions far from the capital, entailing uneven access to justice across the country. Considering this hurdle, one of the Brazilian interviewees highlighted the need to design a straightforward legal case for the judiciary, avoiding any reference that, although accurate, is not key for the resolution of the case. For example, avoiding international law arguments when national law is sufficient to sustain the claim could be, even if counter-intuitive, the smart move. Indeed, the 'astringent' nature of international climate law for domestic courts[12] was recognized by the practitioner involved in *Six Youths v. Minister of Environment and Others*, in which the lawfulness of the Brazilian NDC update was challenged due to its regressive nature.

12 Tigre (2021) warns about the difficulties of South American courts in fully engaging with international environmental law. On the contrary, Auz (2022) points to the percolation of international law into Latin American domestic judgments as a legal opportunity for climate litigation. While this percolation is probably true as regards human rights treaties, it is more disputable to what extent domestic courts (particularly first instance courts) are well-equipped to meaningfully engage with the complex international climate change regime (Bodansky, Brunnée and Rajamani 2017; Keohane and Victor 2011) with some level of detail.

3.1.6 Ineffective mechanisms to enforce and monitor judgment compliance

As regards the last stage of this 'litigation journey', interviewees expressed concern about the enforcement and monitoring of judicial decisions in complex cases.

As far as the Mexican jurisdiction is concerned, one of the practitioners identified judgment enforcement as one of the four most relevant procedural barriers to environmental/climate litigation. The interviewee offered the example of a case regarding the construction of an 'eco-park' in a wetland area in which, even though an order—including a monitoring mechanism—was delivered in 2018, the restoration measures had not yet started (*Parque ecológico Centenario* case). Similarly, practitioners in Argentina and Ecuador expressed frustration as regards this issue over the climate cases in which they are involved. The Argentinian practitioner observed that, even though the Supreme Court was innovative and quite effective in putting in place enforcement and monitoring mechanisms in previous cases,[13] this was not happening in the *Delta de Paraná* case, as the extensive burning of the wetland ecosystem continued after the intermediate resolution issued in 2020.[14] In turn, the Ecuadorian practitioner denounced the unjustifiable delay in the enforcement of a 2020 order requiring the halting of the gas flaring activities in the *Mecheros* case.

According to one of the Chilean interviewees, not providing a straightforward enforcement mechanism could in some cases even imply the need to file a new lawsuit just to guarantee judgment compliance. In this sense, as one Argentinean interviewee commented, failing to deliver effective enforcement and monitoring mechanisms poses an excessive burden on plaintiffs and their limited human, economic and technical resources.

One of the most interesting examples regarding the relevance of adequate monitoring mechanisms is that of the famous climate case *Future Generations v. Ministry of the Environment et al*. According to one Colombian practitioner involved in that case, compliance with the judgment, ordering different public institutions to act on Amazon deforestation, was 'militarized' putting at risk and violating the human rights of farmers and Indigenous and afro-communities in the rainforest area.[15] This was raised by the plaintiffs and a new intervention by the judiciary was needed (see section 3.3.2).

3.1.7 Environmental vis à vis climate litigation

As we mentioned earlier, in general terms, a clear distinction between barriers in climate litigation and environmental litigation was not observed in the interviewees' responses and, consequently, a specific question was posed about our initial presumption that climate litigation entails even harder procedural hurdles to plaintiffs than environmental litigation. According to their responses, we can divide the interviewees into three groups: a) those who observed that the main difference is not procedural but substantive; b) those who, fully agreeing with our initial presumption, recognized specific procedural issues in which climate litigation entails an extra layer of complexity; and c) a Chilean practitioner who observed that as procedural channels to litigate classic environmental issues and climate change are the same, the hurdles are identical.

13 The interviewee mentioned the *Mendoza* case. Cafferatta (2021: 243) refers to the creation of a 'compliance monitoring micro-system'. This included, among other mechanisms: the appointment of two enforcement judges, control of the basin organization's asset management, a social control procedure (by environmental NGOs and the Ombudsman), periodic public reporting obligations (compliance level indicators) and fines for delays.

14 In its judgment of 11 August 2020, the Supreme Court did establish, as injunctive relief, a monitoring mechanism: an 'Interjurisdictional Emergency Committee' together with the requirement to submit information about the protection measures taken. However, this mechanism seems to be incapable of avoiding the ongoing environmental and health crisis.

15 The military operation/strategy designed by the Colombian government to combat deforestation was called 'Artemis'. Different voices have repeatedly denounced human rights violations and questioned its effectiveness (Dejusticia 2022; EFE 2022; Rainforest Journalism Fund 2022; VerdadAbierta.com 2022).

The Argentinian and Colombian practitioners seemed to agree that what would make climate litigation more complex than environmental litigation in general terms is the fact that judicial actors do not fully recognize climate change as a legal issue and do not know how to deal with it. This is mainly due to its novelty and the lack of domestic precedents. One of the Colombian practitioners observed that this recognition is a first step required to then consider how this acknowledgment affects the procedural field. Abstraction of climate change (that is GHG emissions and their accumulation are not visible except in scientific data), and its impacts (that is the causal link with a specific weather event) were also identified by one of the Brazilian and one of the Mexican interviewees as reasons, not specifically procedural, why climate litigation is more complex.

Within the second group, one of the Chilean and one of the Mexican practitioners agreed that complying with standard standing rules is more challenging in climate litigation than in environmental litigation, given the distinctive traits of climate-led damages, for example uncertainty in terms of victims, place and time of occurrence. Similarly, the Ecuadorian practitioner observed that what makes climate litigation more complex from the procedural perspective is how to prove the effects of climate change on certain rights, and especially those of Indigenous communities. One of the Brazilian practitioners agreed, referring to the distinguishable procedural treatment that climate cases require as was recognized by the Federal Regional Court of the Fourth Region in the case *Instituto de Estudos Amazônicos v. Brazil* (Tigre, Carvalho and Setzer 2021), as regards connection rules of similar cases and jurisdiction.

3.2 Escazú Agreement contribution to climate (and environmental) litigation

All of the interviewees identified the Escazú Agreement as a more than welcome development with the ability to positively affect and reinforce access rights enforcement, including access to justice, in their jurisdictions. One of the Argentinian practitioners highlighted that the expectations of the Agreement were raised due to the public campaign accompanying its adoption and ratification process, and identified the Agreement as more of a political milestone than a legal one: people, and not only legal actors, own it. According to the practitioner, this was not the case with other relevant treaties, such as the Paris Agreement or other environmental or human rights treaties.

Beyond this general positive perception, as we mentioned earlier, in the second part of the interviews we specifically inquired about the interviewees' views on the early (or future) implementation of the Agreement. Two broad topics were discussed. First, how they imagine implementation will unfold (for example regulatory-led, precedent-led or something else). Second, what procedural practices or arrangements do they observe as instrumental in overcoming the aforementioned barriers and, in this way, achieving access to justice in environmental and climate matters.

3.2.1 The expected implementation of the Escazú Agreement in domestic jurisdictions

Less predictable than the common positive perception of the Agreement were the responses regarding what they expected from its implementation. Interestingly, a dominant answer was that, instead of regulatory change, the Agreement's implementation will mainly unfold through the intervention of courts, meaning through judicial precedents directly interpreting and applying the Agreement.

In the responses of the Argentinian, Colombian, Mexican and Ecuadorian practitioners, this perception was connected, at least partially, to the recognition that the Escazú Agreement, after being ratified, directly occupies a high position in the hierarchy of laws, integrating into the so-called block of constitutionality, and prevailing over domestic laws.[16]

16 In Argentina, the Agreement has a supra-legal hierarchy but requires a specific process to be considered of constitutional hierarchy. One of the Argentinian practitioners commented that an initiative exists to give to the Escazú Agreement this special hierarchy in the terms of Article 75.22 of the Argentinian Constitution.

Interviewees from Argentina, Mexico and Ecuador referred to lawsuits and judgments that have already referred to the Escazú Agreement as a relevant legal ground, regardless of the seeming need for some regulatory or normative intermediation or even before its entry into force.[17] In this understanding, practitioners from various jurisdictions expressed their intentions to pursue the implementation of specific standards of the Agreement through litigation, including climate litigation. Indeed, this was specifically the case in *Julia Habana et al. v. Mexico (Unconstitutionality of the Reform to the Electricity Industry Law)* and its failed attempt to broaden standing rules for future generations, as was previously mentioned.

Beyond this widespread perception, some interviewees mentioned or predicted regulatory intermediation to implement the Agreement. For example, one of the Brazilian practitioners observed that, together with judicial precedents, the Agreement's implementation will require changes in the internal rules of courts and procedural law as well as some activity from the National Council of Justice (Conselho Nacional de Justiça). In turn, one of the interviewees ventured that in Argentina the implementation could take place through a currently ongoing process of adoption of an act on collective processes, based on the Ibero-American Model Code of Collective Processes (Instituto Iberoamericano de Derecho Procesal 2004), and the enforcement of a recently enacted act (Act No. 27.592, 'Ley Yolanda') that asks for the training of public servants from the three branches of the State in environmental matters 'with special emphasis on climate change' (Article 2).

Remarkably, the Chilean interviewees highlighted that prospects of implementation of the Escazú Agreement in this jurisdiction would be deeply affected and defined by the results of the process of constitutional reform. They observed that the constitutional draft text was closely intertwined with the Escazú standards and included many arrangements that would allow for a straightforward implementation. In this understanding, the implementation process in this jurisdiction would look very different depending on the outcomes of the constitutional referendum. For example, the proposed text of the new Chilean Constitution provided for the establishment of an Ombudsman for Nature, decentralized in regional offices, that would pursue an active judicial agenda, including climate matters (Articles 119.8, 148–50) (Convención Constitucional 2022). On 4 September 2022, Chileans voted to reject the new constitutional text, casting doubts on the future constitutional outlook (*The Guardian* 2022).

3.2.2 Good practices for the implementation of the Escazú Agreement: public hearings and environmental courts

Finally, we asked interviewees for some examples of good practices, developed or not in their jurisdictions, that they consider crucial for effectively implementing the Agreement. A variety of procedural rules and arrangements were elaborated with more or less detail, some of which are obvious from the results described in section 3.1 (for example broadening standing rules, reverting the burden of proof and so on). Below, we detail two insights that were not previously discussed: public hearings and environmental courts.

Public hearings, according to the interviewees, could be useful in overcoming various hurdles in climate cases. For example, they could be a valuable mechanism to introduce complex scientific evidence into courtrooms with the participation of experts. In this sense, they offer judges the opportunity to learn while also directly resolving any technical doubt. According to one of the Brazilian practitioners, they allow judges to 'appropriate' the space of scientific debate. Furthermore, this same interviewee observed that public hearings could play the very relevant role of civil education through the courtroom, producing enriching debates under rules that guarantee evidence-based arguments. Both functions are

17 Notably, in Mexico, the aforementioned judgment in the *Parque ecológico Centenario* case.

exemplified by the public hearings developed in the climate cases *PSB and Others v. Brazil (on Amazon Fund)* and *PSB and Others v. Brazil (on Climate Fund)* before the Federal Supreme Court of Brazil.

A third relevant utility of public hearings mentioned by one of the interviewees was their possible use for monitoring the enforcement of complex judgments. As already observed, the compliance process of the landmark judgment in the *Future Generations v. Ministry of the Environment et al.* case in Colombia is anything but simple and requires regular judicial intervention to avoid violation of the human rights of communities living in the rainforest. According to the practitioner involved in that case, before this situation, the court utilized public hearings to control authorities and provide affected communities (Indigenous peoples, afro communities, farmers) the opportunity to be heard and to participate in the design of the compliance measures, a crucial component in polycentric cases (Osofsky 2016: 331–34; Ugochukwu 2018). In these hearings, a public scientific body (Instituto de Hidrología, Meteorología y Estudios Ambientales, IDEAM) was also engaged to provide scientific assistance to the judges on environmental matters.

Beyond all these benefits, practitioners showed some prudence regarding the possible overuse of public hearings and the impact they could have on the celerity of processes. In this sense, they observed that they should be used with discretion and mainly employed in complex and polycentric cases.

A second instrument recurrently mentioned as instrumental to effectively implement the Escazú Agreement was the establishment of environmental courts in order to overcome barriers such as the lack of specialized knowledge and celerity. However, at the same time, some practitioners were reluctant or cautious with this idea due to some concerns about specialized environmental courts applying law in a manner that would be too formalistic or 'administrativy' (attached to administrative law), which could be counterproductive. In this sense, widespread agreement exists regarding the relevance of constitutional and human rights law for environmental (and climate) protection in the region.[18] The experience of the mostly administrative environmental tribunals in Chile, which are integrated by an environmental non-legal expert and two lawyers (not judges), could offer relevant lessons (Costa Cordella 2014). Indeed, one of the Chilean interviewees commented that the text of the proposed (failed) Constitution sought to redesign this specialized jurisdiction (Article 333) (Convención Constitucional 2022).

4. Discussion

A wide range of topics that deserve attention was developed in the previous section. Most of them provide opportunity for jurisdiction-specific analysis that could confirm or negate the practitioners' perceptions described in this exploratory inquiry.[19] In the following section, based on the results elaborated upon above, we comment on three issues of transnational interest connected to the starting question about the possible contribution of the Escazú Agreement to environmental and climate litigation—and vice versa—in Latin America.

4.1 The implementation of the Escazú Agreement: action points and the role of litigation

Alongside concerns related to other pillars of the Escazú Agreement (access to information, participation and, prominently, environmental defenders), our inquiry identifies

18 For discussion on the role of Latin American constitutionalism in climate claims, see Carvalho et al. in this collection.

19 Indeed, there are a number of studies addressing what the ratification of the Agreement entails for specific jurisdictions in terms of access rights regulations and practices (FIMA 2020; Melo Cevallos, Espinosa Mogrovejo, Valenzuela Rosero 2019).

some recurrent procedural and institutional barriers that affect access to justice (in this case, litigation) in environmental and climate matters in the region. **Table 2** detailed the jurisdictional distribution of the issues as discussed or mentioned by the interviewees.

It is worth beginning this discussion by clarifying that a lack of mention of a barrier must not be interpreted as suggesting that such a barrier is not present or was overcome in the jurisdiction, but simply that it was not a key concern of the interviewees as regards their climate and environmental litigation experience. Not only were questions not intended to obtain an all-encompassing response, but also the sample was too small to reach that conclusion.

Instead, a plausible interpretation of the results would be to describe the six identified hurdles as action points that require attention in the context of the implementation of the Escazú Agreement regarding access to justice in environmental and climate matters. Particularly, hurdles related to evidence production and judgment enforcement and monitoring seem to be of widespread concern throughout the region. The results not only point to those barriers but also offer some nuances about their causes and possible mechanisms to overcome them.

As **Table 3** shows, the Escazú Agreement includes standards regarding all the identified procedural and institutional barriers. This speaks to the wide-ranging approach taken by the negotiators of the Agreement regarding access to justice in environmental matters[20] and the opportunity to address the barriers directly through the Agreement's implementation, both through its institutional framework and at the national level.

Thanks to the fact that the Escazú Agreement, following the Aarhus Convention and other environmental treaties, established an institutional framework, the identified hurdles could be addressed by the bodies empowered to monitor and promote State Parties' implementation: the COP (Article 15) and the Committee to Support Compliance and Implementation (Article 18). On the one hand, the COP will deliver recommendations to the State Parties containing suggestions or detailed interpretations of provisions (Prieur 2021: 321), including those related to access to justice. On the other hand, considering the performance of the Aarhus Compliance Committee (Bétaille 2021), the role of the Escazú Committee can be significant in monitoring the enforcement of and in developing the Agreement's standards, including those of interest here, through its

Table 3. Barriers identified and the related Escazú Agreement provisions

Barriers identified (Action points)	Escazú Agreement provisions
1. Absence of independent public actors advocating for climate/environmental matters through litigation.	Article 8.5
2. Lack of sufficiently broad standing rules.	Article 8.3(c)
3. Language restrictions for affected non-dominant communities.	Article 8.4(d); Article 10.2(e)
4. Evidence production hurdles (burden of proof, expertise and costs).	Article 8.3(a); Article 8.3(b); Article 8.3(e)
5. Lack of knowledge about climate change (law) by judicial actors.	Article 8.3(a); Article 10.2
6. Ineffective mechanisms to enforce and monitor judgment compliance.	Article 8.3(f); Article 8.3(g)

20 The draft text of the Escazú Agreement was developed based on a comprehensive investigation of practices, laws and institutions on access rights across the region by the UN Economic Commission for Latin America and the Caribbean (ECLAC) (Jendrośka 2021: 75).

rulings.[21] For the role of the latter body, COP Decision I/3 is noteworthy. It defined the composition of the committee by independent experts, stipulated the (significant) participation of the public in its functions and allowed the public to directly submit communication of non-compliance (UN ECLAC 2022).

Implementation at the national level can vary between jurisdictions according to the rules governing the incorporation of international law and the hierarchy within domestic legal orders (Tigre 2021).[22] Indeed, some interviewees—Argentina, Colombia, Mexico and Ecuador—recognized that the Agreement *directly* occupies a high level in the normative pyramid and, in some cases, even forms part of the block of constitutionality.[23] Auz (2022) has described this *porosity* of Latin American legal orders to international law (particularly human rights law) as an important feature contributing to the possible success of climate litigation initiatives. As he emphasizes, most Latin American States are monist and treat international law as being equivalent to domestic law and therefore as being directly enforceable in domestic courts (Auz 2022).[24]

This explains, at least partly, one of the remarkable insights arising from the exploratory inquiry: the interviewees' widespread expectation about the relevant role that courts will play in the implementation of the Escazú Agreement, even surpassing regulatory action. We can speculate (based on some interviewees' comments) that this idea is also nourished by: a) a possible bias based on the activity of the interviewees themselves; b) some scepticism toward the activity and celerity of legislative and administrative regulators; c) the perception of the existence of a broad legal (normative, doctrinal and case law) basis that precedes the Agreement and is poised to be re-interpreted or adjust by courts; and d) the conviction that the main problem of access to justice, and access rights in general, is not normative but practical, which indicates a lack of or defective enforcement.

Be that as it may, this points to a significant contribution not only of the Escazú Agreement to the prospects of litigation, but also of litigation for the effective implementation of the Agreement. This makes legal practitioners involved in climate and environmental litigation, rather than mere receptors of the Agreements standards, active players in its implementation and development, by proposing to courts in their cases re-interpretations and adjustments of domestic law, theories and practices.

As regards the particular standards mentioned in **Table 3**, it should be noted that not all of them are directly enforceable or entail the same level of obligation for States Parties. On the one hand, some of the mentioned clauses contain programmatic obligations that inevitably need regulatory/institutional intermediation. For instance, Article 8.3(a) requires 'competent State entities with access to expertise in environmental matters' and Article 8.5 requires the establishment of support mechanisms for vulnerable groups or persons (Esain 2022). On the other hand, all the identified clauses incorporate terms that provide certain flexibility to States Parties in the implementation process. Formulas, such as 'considering its circumstances'; 'in accordance with domestic legislation'; 'when appropriate

21 Academic commentators give different views on the legal nature of the rulings of the Aarhus Compliance Committee, particularly on its legally binding nature. It is worth mentioning that some authors observe that an endorsement of the Committee findings by the COP may constitute a subsequent agreement between the State Parties in the terms of Article 31(3)(a) (authoritative interpretation) or Article 31(3)(b) (subsequent practice) of the 1969 Vienna Convention on the Law of Treaties (Fasoli and McGlone 2018; Samvel 2020).

22 Particularly, this could significantly differ between civil law and commonwealth countries, as Andrade-Goffe and Excell (2021: 3) explain 'for the majority of commonwealth countries, with the exception of Suriname and Haiti, the provisions of the Escazú Agreement must be incorporated into domestic legislation to be enforceable in national law by an affected party'.

23 The same could be said for Brazil (Pereira and Silva Júnior 2016). As for Chile, the current constitution does not specify the mechanism for incorporating international norms into domestic law, nor the obligation of the courts to apply them, giving rise to doctrinal discussions, not entirely resolved by the case law, for example regarding the self-executing nature of treaties (Díaz Tolosa 2022: 85).

24 Tigre (2021) offers a more nuanced view on the application of International Environmental Law by South American Courts.

and as applicable'; 'when necessary'; and 'in line with its capacities' are very, and maybe excessively (Jendrośka 2021: 82), recurrent. A jurisdiction-specific case-by-case analysis, which is beyond the scope of this work, will determine the particular consequences of each provision for the State Parties' obligations.

4.2 Hurdles in climate change litigation: standing rules

As was mentioned earlier, a clear-cut difference between procedural hurdles in environmental and climate litigation was not expressed by most of the interviewees. Even though almost all of them recognized climate litigation as more challenging, only a few identified a specific procedural barrier in which this difference is plainly revealed: standing rules. Here we can find a possible contribution of the Escazú Agreement specifically to climate litigation.

Chilean and Mexican practitioners observed that the special features of climate change make it very difficult to justify standing for actors who must prove to be distinguishably or uniquely affected. This assertion is in line with what was highlighted by Kelleher (2021) in her study on standing for 'systemic climate litigation' in jurisdictions of (European) Parties of the Aarhus Convention:

> the 'indirect, intergenerational and community-wide nature of climate change' means that these rules, which require the identification of an individually affected litigant, can be a major barrier in systemic mitigation climate cases (Kelleher 2021: 107, 108).

As noted by the interviewees, the consequences of this barrier are not trivial but substantial to access to justice in climate matters and affect not only the entrance to the judicial process but also how that entrance is made possible. In Mexico, communities are obliged to appeal to NGOs mostly situated in the capital and not always available or willing to engage in a case of this kind. In Chile, plaintiffs that want to claim for climate damages (for example GHG emissions or climate change-induced damages) have to seek alternative environmental arguments (to comply with the theory of the 'adjacent environment') to get access to the judicial process, limiting climate litigation strategies and precluding the possibility of obtaining a pure climate precedent.

Kelleher claims that a purposive interpretation (Barritt 2020) of the Aarhus Convention's provisions is enough to resolve the standing challenges posed by the special nature of climate change, and what European institutions need to do is take their procedural human rights obligations seriously (Kelleher 2021). Although there is no space here to replicate her analysis in the context of the Escazú Agreement, we believe that the clear mandate provided by Article 8.3(c) ('broad active legal standing'), consistently interpreted with the Agreement's principles (Article 3, including intergenerational equity and non-discrimination), purposes (Article 4.8) and focus on vulnerable groups (for example Article 4.5) provides strong arguments to resolve the standing conflict posed by climate change in an affirmative manner.

The 2022 decision by the Mexican Supreme Court in *Julia Habana et al. v. Mexico* however, casts doubt on that prospect, with the Court failing to engage (at least not expressly in its judgment) with any provision of the Escazú Agreement nor any relevant judgment of other jurisdictions addressing the same issue. Approaches like those taken by the Supreme Court of Colombia in *Future Generations v. Ministry of the Environment et al.* (recognizing the infringement of individual fundamental rights of youth and future generations as the result of climate change), or by the German Federal Constitutional Court in *Neubauer and Others v. Germany* (acknowledging the restriction in freedoms that an 'unambitious' climate policy can imply for future generations), could have affected the Mexican Supreme Court opinion about the 'unqualified' interest of the plaintiffs.

4.3 Good practices and the 'transnationalization' of procedural law through the Escazú Agreement and climate litigation

As explained, interviewees highlighted some practices and rules that could be useful to overcome the identified hurdles. For instance, public hearings as elaborated in previous sections or reversal of the burden of proof (see, for example, complaint of 10 August 2020 in *Institute of Amazonian Studies v. Brazil* [*Instituto de Estudos Amazônicos v. Brazil*]). These practices are mainly perceived as limited to the jurisdiction in which they were deployed, given the traditional idea that procedural law is prominently local. This makes references to comparative procedural law mostly absent in judicial cases. With what follows, we want to start a discussion about this idea and the impact on it of the two convergent phenomena here addressed.

The implementation stage of the Escazú Agreement entails the beginning of a continuous process of assessment and improvement towards the full and effective implementation of access rights in the region. This process, as was highlighted earlier, has a double strand: one internal process that should be developed by domestic authorities of the three branches of the State; and another external process carried out by the institutional structure of the Agreement, with the COP mandate of periodically examining and promoting the implementation and effectiveness of the Agreement, based on reports from the States Parties and recommendations by the Committee to Support Implementation and Compliance.[25]

Internal and external strands are entangled. National developments within the jurisdictions of each of the States Parties will inform the task of the Agreement's bodies that, at the same time, should affect national implementation. As a consequence of this process, procedural rules, arrangements and practices that define access to justice in environmental and climate matters leave behind their entirely local/domestic nature to become elements of transnational interest and character.

Litigation is, of course, part of this 'round-trip' process. Good practices and experiences that prove to be useful to overcome significant hurdles constitute key inputs for the assessment and improvement course. In this sense, climate litigation that, given the special features of climate change, pushes the boundaries of procedural law becomes especially relevant. Developments stimulated by climate litigation in one jurisdiction could lead to a transnational improvement of litigation as a mechanism to advance climate justice in the entire region.

Thus, we believe that it makes perfect sense for Latin American climate litigators to anticipate and start asking in their lawsuits, as happens with substantive (rights and duties) arguments, for the replication of beneficial procedural standards from other jurisdictions in order to guarantee effective access to justice in climate matters, under the auspices of the Escazú Agreement.

5. Conclusion

Our inquiry has explored the interface between the convergent phenomena of, on the one side, the Escazú Agreement implementation and, on the other, the proliferation of climate litigation in Latin America. The results of interviews conducted with climate litigators from across Latin America revealed their perceptions regarding the main procedural and institutional hurdles affecting access to justice in environmental and climate matters and their expectations about whether—and how—the implementation of the Escazú Agreement could assist in overcoming those hurdles.

Despite the limits of the sample, the results offered interesting initial insights regarding the pressing action points on which the States Parties and the Agreement's bodies

25 A third element of this process is the synergy with the Inter-American System on Human Rights (Medici-Colombo 2022).

should work in order to promote access to justice in environmental and particularly climate matters. Six action points were identified: a) absence of independent public actors advocating for climate/environmental matters through litigation; b) lack of sufficiently broad standing rules; c) language restrictions for affected non-dominant communities; d) evidence production hurdles; e) lack of knowledge about climate change (law) by judicial actors; and f) ineffective mechanisms to enforce and monitor judgment compliance. All of them, given the comprehensiveness of the Escazú Agreement, can be addressed as part of its implementation.

Additionally, results shed light on the expected unfolding of this implementation and the key role that courts and litigation (including climate litigation) could play. In this sense, litigators and judges were depicted not as mere receptors of the Agreement's standards but as active participants in their development. Finally, the inquiry allowed for some reflection on the idea of *transnationalization* of good practices and, more generally, procedural law and the use of comparative law experiences in climate litigation, under the auspices of the Escazú Agreement.

We hope that these insights and reflections encourage further research and discussion on the topic, both in the region and beyond. For instance, a relevant connected issue that has not been addressed by this work is the role that the Inter-American System of Human Rights and its bodies could (will) play in this setting.[26]

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Authors' contribution to the article

Dr Gastón Medici-Colombo was responsible for the design of the research and the drafting of the article. The interviews and the analysis and discussion of the results were conducted by both Dr Gastón Medici-Colombo and Dr Thays Ricarte.

26 For an analysis on climate litigation under the Inter-American Human Rights System, see Auz in this collection.

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