Bucking the Trend: Civil Society and the Strengthening of Environmental Rights in Latin America and the Caribbean

Autoría ditelliana: Stevenson, Hayley (*Universidad Torcuato Di Tella. Departamento de Ciencia Política y Estudios Internacionales*)
ORCID: https://orcid.org/0000-0002-4876-1496

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Bucking the Trend: Civil Society and the Strengthening of Environmental Rights in Latin America and the Caribbean

*Hayley Stevenson**

Abstract

In 2021, environmental procedural rights were strengthened in Latin America and the Caribbean when the legally binding Escazu Agreement came into force. This new treaty seeks to implement Principle 10 of the 1992 Rio Declaration, which promotes access to information, participation, and justice in environmental matters. The treaty is empirically and theoretically surprising: it bucks the growing trend of informalization in regional and international cooperation and is more highly legalized than institutional design theory would predict. Applying an interpretivist logic of inquiry and drawing on interviews with twenty-three participants in the negotiations, I argue that this outcome can be explained by an alignment of structural conditions that facilitated an alliance between ambitious state and nonstate actors and enabled their influence throughout negotiations. Applying theories of political opportunities and mobilization structures, I show how a network created by the World Resources Institute influenced the agreement's design and helped secure a high degree of obligation and precision in Latin America's first environmental treaty.

Keywords: Environmental rights, Escazu Agreement, legalization, Latin America, civil society, political opportunity structure

In 2021, the first regional environmental treaty came into force in Latin America and the Caribbean.[1] The Escazu Agreement (formally, the Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean) is celebrated for advancing environmental rights in the world's deadliest region for activists (Cultural Survival 2021). The agreement builds on Principle 10 of the 1992 Rio Declaration, which recognizes three environmental access rights: access to information, access to participation in decision-making processes, and access to justice (United Nations [UN] 1992). Most Latin American countries subsequently

* hstevenson@utdt.edu

1. Hereinafter Latin America, for brevity.

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incorporated Principle 10 into domestic institutions, but standards are highly uneven. Principle 10 advocates believed that a legally binding treaty would improve standards.

The Organization of American States began promoting regional cooperation on Principle 10 through soft law in 2001 (e.g., Organization of American States 2021a, 2021b). But the twentieth anniversary of the Rio Summit in 2012 (Rio+20) presented an opportunity to reinforce cooperation. Ten countries signed a Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, pledging to "launch a process to explore the feasibility of adopting a regional instrument, ranging from guidelines, workshops and best practices to a regional convention" (UN 2012). This pledge was intentionally articulated broadly; advocates wanted a treaty but recognized that insisting on this would deter potential signatories. The 2012 pledge could have generated another soft instrument. But, in 2018, after a six-year period of preparations and negotiations, states adopted a treaty in the Costa Rican district of Escazu, which came into force in 2021.

This outcome is empirically and theoretically surprising. In many areas, including the environment, the international community has been moving toward weakly legalized institutions (soft law and low-cost institutions) (Abbott and Faude 2021; Bradley et al. 2023; Roger 2020). A preference for soft environmental cooperation is prominent in Latin America; no binding regional environmental agreement had ever been adopted. On environmental access rights, Latin America had consistently favored soft law. Institutional design theories would predict that for a problem like environmental rights, even if a treaty were adopted, it would be softened to permit flexibility in its implementation (Koremenos 2016). Escazu has some softened features but, on balance, is surprisingly highly legalized.

I argue that civil society, an actor typically overlooked by institutional design theories, is key to explaining how such a highly legalized instrument was adopted. I show how an alignment of structural conditions facilitated a transnational alliance between state and nonstate actors committed to an environmental rights treaty and enabled their influence throughout the multilateral process. The Escazu story is one of strategy and serendipity, in which civil society collaborated with committed individuals representing states and the United Nations (UN).

This study applies abductive reasoning, an interpretivist logic of inquiry with a nonlinear pattern. Whereas positivist logics (deduction and induction) employ a step-by-step approach, abduction begins with a surprising phenomenon, and through a *recursive-iterative* process, the researcher moves back and forth between empirical material and possible theoretical explanations to make sense of that phenomenon (Schwartz-Shea and Yanow 2012). Rather than formulating and testing a hypothesis, the researcher is guided by their "affinity and familiarity with broader theoretical fields" to explore possible explanations (Timmermans and Tavory 2012, 173. This is "abductive" in the sense of being

led to or from somewhere. In trying to make sense of a puzzle, the researcher's attention is inferentially led toward possible explanations. The aim is not to verify or falsify a theory, but it may result in new theorizing or in revising or extending an existing theory (Schwartz-Shea and Yanow 2012). This study began with the surprising observation that Latin America adopted its first environmental treaty in a context in which weakly legalized cooperation is preferred. I initially assumed that despite it being legally binding, its content was probably soft. But applying a conceptual framework of legalization (Abbott et al. 2000) revealed a surprisingly high degree of *precision* and *obligation*, with softening limited mostly to *delegation*. Semistructured interviews with twenty-three state and nonstate participants in the negotiations (30–120 minutes each) were carried out between November 2022 and January 2023 to explore how this had been achieved.[2] Meeting documents and available webcasts were scrutinized.[3] This empirical material led my attention to the role of a transnational civil society network, which in turn led my attention toward theories explaining civil society influence on negotiations. This is consistent with abductive reasoning: different theories are considered along the way, not selected at the outset.

This interpretivist research design informs how the article is organized. Theory and empirics are not neatly separated and ordered but rather presented recursively. I begin by establishing that, as a highly legalized agreement, Escazu is a surprising phenomenon. This requires first introducing a conceptual framework on legalization and explaining the dominant explanations for variation in legalization, then showing that Escazu does not conform to these expectations. I then present an alternative theoretical approach that makes civil society central to the analysis and can thereby account for this outcome. Subsequent sections analyze the three phases through which Escazu was produced to show the explanatory power of this theoretical approach. Brief conclusions summarize the contribution and suggest future lines of inquiry.

Legalization: Meaning and Significance

A hard–soft binary is often used to distinguish between obligatory and voluntary agreements, respectively. Hard law is understood to take the form of legally binding treaties, while soft law takes the form of nonbinding declarations, guidelines, or memoranda. Legal form is typically perceived as an indicator of an agreement's strength. While nonbinding agreements are considered aspirational and perhaps inconsequential, binding agreements are perceived as

2. All quotes from Spanish sources (texts and interviews) are the author's own. The interviewees are referenced with anonymous codes (interviewee 1 = I.1). See Appendix A for affiliations.
3. See webcasts of preparatory meetings and negotiations, available at: https://www.youtube.com/watch?v=zhs_yjtPKgY, last accessed July 24, 2024; https://www.youtube.com/watch?v=-QtsaLvH0GE, last accessed July 24, 2024; https://www.youtube.com/watch?v=i1WbVAk7BYQ, last accessed July 24, 2024; https://www.youtube.com/watch?v=wlUmXXgYv80, last accessed July 24, 2024; https://www.youtube.com/watch?v=x-Kau48hFcA, last accessed July 24, 2024; https://www.youtube.com/watch?v=3NEqzJqk2c8, last accessed July 24, 2024.

signaling ambition and commitment (Bradley et al. 2023). The accuracy of this perception is disputed because studies of the comparative impact of binding and nonbinding agreements reach contradictory conclusions (Bodansky 2016; Köppel and Sprinz 2019). Nevertheless, the widespread perception that legal form matters makes this a central issue in negotiations. Bodansky (2016) observed how legal form became an "obsession" in the Paris Agreement negotiations simply because the actors involved *believed* that it matters. Similar perceptions can be observed in multilateral environmental negotiations more generally, including in the Escazu Agreement. The push to adopt a regional environmental rights treaty reflected a desire to *strengthen* countries' commitment to Principle 10.

In contrast to legal *form*, legal *character* concerns the strength of an agreement's provisions (Rajamani 2016). Negotiators often inject flexibility into binding commitments, and the soft–hard binary fails to capture the resulting variation in strength. To capture variation, Abbott et al. (2000) proposed a spectrum defined by three elements, obligation, precision, and delegation, each of which can be evaluated as high, moderate, or low. A high degree of *obligation* is indicated by language expressing an explicit binding rule; lower degrees are reflected in reservations, hortatory obligations, and recommendatory language. A high degree of *precision* permits narrow scope for interpretation; lower degrees are reflected in broad areas of discretion, contextual standards, or vague language that renders compliance assessments impossible. A high degree of *delegation* authorizes a third party to enforce rules and resolve disputes; lower degrees permit only mediation or soft monitoring or give states control over dispute resolution and rule implementation.

Variation in legalization is generally explained in functionalist terms (Boyle 2019; Raustiala 2005; Shaffer and Pollack 2012). Based on a given problem, states make rational choices about the advantages and disadvantages of different degrees of legalization. High legalization is preferable when parties wish to make credible commitments. Credibility is enhanced because binding agreements make commitments more explicit and visible, provide stronger monitoring mechanisms, and impose a higher cost on noncompliance (Shaffer and Pollack 2012). But credibility comes with costs: a binding agreement constrains state behavior, takes longer to negotiate and take effect, may undermine ambition, and is not easily revisable if conditions change (Bradley et al. 2023; Shaffer and Pollack 2012). Weak legalization is rational when flexibility is more important than credibility. From this perspective, states may be uncertain about their capacity to comply; they may prefer to aspire to a higher level of ambition without risking punishment for noncompliance; and they may prefer an expeditious agreement (Raustiala 2005; Shaffer and Pollack 2012).

Rational design scholars argue that the structure of a problem determines whether credibility or flexibility is more important. Different problem structure variables correlate with different agreement design variables (Koremenos 2016; Koremenos et al. 2001). Different issues present different cooperation problems

and are addressed with different agreement designs. Koremenos finds that human rights agreements are typically imprecise and permit reservations (a clause allowing parties to opt out of specific provisions). Such flexibility is rational, she argues, because human rights cooperation entails distribution problems *without* coordination problems. Distribution problems occur when states have divergent preferences about how to address an issue and about the distribution of benefits and burdens (Koremenos 2016). Coordination problems occur when parties have to agree on specific details for cooperation to be better than noncooperation.

Cooperating to protect environmental rights entails a distribution problem because states go into negotiations with different regulatory frameworks, legal systems, and ideological preferences and varying degrees of conflict over environmental issues. Participating states have a common interest in creating an agreement (for different reasons), but negotiation is required to ensure that the agreement's substance is not more burdensome for some states than others. However, once the broad substance is agreed, no coordination is required for cooperation on environmental rights to be beneficial. States are not required to adopt precisely the same procedures and standards, and cooperation is not undermined by variation in how states comply with their obligations. Rational design theory would therefore predict negotiation of a flexible agreement with imprecise language and opt-out clauses. But Escazu does not fit this prediction.

Functionalist accounts recognize that negotiated outcomes may diverge from rational design and/or key state preferences. Raustiala (2005) recognized that states may face pressure to adopt a binding agreement. In such contexts, if states are uncertain about compliance costs, they will typically negotiate less-demanding commitments and/or a weaker compliance mechanism. This points to systemic trade-offs between legal *form* (binding or nonbinding), *substance/character* (demandingness), and *structure* (monitoring and compliance mechanisms). As I show in the following section, Escazu is not free of trade-offs but on balance is highly legalized.

The Escazu Agreement: Form and Substance

The Escazu Agreement is a legally binding treaty without the option of reservations. It has as its key objective to

> guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development. (Article 1)

In terms of the three elements of legalization (Abbott et al. 2000), the text reflects a high degree of *obligation* and *precision*, with a low to moderate degree

of *delegation*. Appendix B presents an assessment of the legalization of each operational article, but a few observations merit emphasis here.

Article 4 establishes the "general provisions" and explicitly obligates parties to recognize the rights included in this agreement. With very few exceptions, each clause of Article 4 states that "each Party *shall* adopt/ensure/guarantee/provide" (emphasis added). Articles 5, 7, and 8 concern obligations to ensure access to environmental information, participation, and justice, respectively, and each uses the term "shall" in almost every clause. Despite the occasional inclusion of flexibilities such as "in the framework of its domestic legislation," "considering its circumstances," and "where appropriate," the forty-two clauses of these articles are notably obligatory and precise.

An innovative feature of the Escazu Agreement is the recognition of vulnerability (Stec and Jendroska 2019). Article 2(e) defines "persons or groups in vulnerable situations" as "those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context." The agreement recognizes that such groups require targeted capacity building and communication and favorable financial treatment. Escazu sets a precedent in international law by explicitly recognizing the particular role and vulnerability of environmental human rights defenders. Article 9 is dedicated to their protection. Parties agreed to "guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters" (Article 9.1); "take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights" (Article 9.2); and to take "measures to prevent, investigate and punish attacks, threats or intimidations" against them (Article 9.3). Article 9 was drafted in highly precise and obligatory terms: "each Party shall guarantee." The expectation that environmental defenders will be recognized and protected is written in a way that leaves little scope for flexible interpretation.

A low degree of legalization is observed almost exclusively in the compliance provisions, constituted by a "Committee to Support Implementation and Compliance" (Article 18). The task of defining its rules was postponed to the first Conference of the Parties (CoP), but the agreement ensures that this mechanism will be soft. It does not have authority to enforce rules but rather to strengthen the capacity of parties to comply. Article 18.2 establishes that "the Committee shall be of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive." Additionally, the agreement includes the principle of progressive realization (Article 3), establishing that parties are expected to *progressively* (not immediately) align their domestic policies, procedures, and provisions with the agreement's obligations. This is a common flexibility mechanism in human rights agreements that recognizes that implementation may

take time and face resource-constraint delays. In practice, it can leave people "waiting" for their rights indefinitely (Young 2019).

As rational design theory has limited explanatory power for this outcome, I now present an alternative approach.

Explaining Escazu: The Role of Transnational Civil Society

Legalization is typically explained with reference to *states'* preferences. Nonstate actors are absent in Koremenos' (2016, 28) theory because, while she recognizes that they can be influential, "they are not the major force behind global order." As explained earlier, this study did not begin with the assumption that civil society had influenced the Escazu Agreement's legal form and character, but in early interviews, this emerged as a central factor. This insight strengthened as the interviews continued and eventually reached saturation point, prompting a turn to theories of civil society influence to analyze the gathered material and understand the nature and scope of influence observed. Just as the empirical material led me toward certain theories, it also led me away from others. Liberal theory of international relations recognizes civil society as potentially relevant insofar as societal actors shape state preferences. From this perspective, negotiation outcomes are the product of domestic distributional conflicts (e.g., Mansfield and Milner 2012). This switches focus from states as *unitary* actors to states as *arenas* in which state/substate entities and interest/societal groups compete to produce preferences that are then pursued internationally (Ginsburg and Shaffer 2012). Bargaining over preferences then determines outcomes (Moravcsik 1997). But, as I will show, the empirical material did not encourage this interpretation due to a surprisingly low degree of domestic politicization during the preparatory and negotiating phases. Environmental rights were not an object of public discussion; there was minimal awareness, mobilization, and contestation (Zürn 2014). Assorted industry and social actors typically engage with environmental negotiations, but this was not the case with Escazu. The negotiations had a very low profile. Domestic interest groups didn't come to perceive the issue as relevant until *after* the agreement's adoption (a point to which I return in the Conclusions). Initially, only a narrow section of transnational civil society registered interest. This prompted my turn to theories focused specifically on nongovernmental organization (NGO) influence in international (environmental) negotiations.

Scholars typically explain variation in NGO influence with reference to structural conditions: rules of access, alliances with key states, stage of negotiations, political stakes of the issue, burden of proposed obligations, institutional precedence, and competition from other NGOs (Betsill 2008). These conditions reflect what social movement scholars call the *political opportunity structure* (POS). This was originally conceived at the municipal level and has been operationalized mostly at the national level, but scholars of transnational civil society argue that an *international political opportunity structure* (IPOS) conditions

influence at the supranational level (e.g., Betsill 2008; Dellmuth and Bloodgood 2019; de Moor and Wahlström 2022; Joachim 2003; Khagram et al. 2002; van der Heijden 2006). Drawing on this literature, as well as the original POS literature (McAdam 1996; Tarrow 2011), I identified the following favorable structural elements that shaped civil society influence in the Escazu negotiations:

- *Open formal institutional structure*. NGOs are more likely to exert influence when an institution provides access for interaction and advocacy, but high levels of access can create competition and weaken influence if a high number of NGOs with incompatible objectives participate (van der Heijden 2006).
- *Integrative informal elite strategies*. Even in an institution that permits access, informal elite strategies may be exclusive if NGOs are perceived as adversaries or a presence to be merely tolerated. NGO influence is more likely when elites in an international institution try to integrate civil society through active inclusion and facilitation, financial or administrative support, and cooperation (Kriesi et al. 1992; van der Heijden 2006).
- *Availability of influential allies*. Access and interaction increase the probability of finding influential allies inside, including state representatives, UN secretariat and agency staff, and media. Allies are particularly important for questions characterized by disagreement among parties because they allow NGOs to elevate their perspective (Joachim 2003; van der Heijden 2006).

These opportunity-based factors need to be coupled with movement-based factors because civil society's capacity to create and exploit opportunities is affected by its own mobilizing structure. Mobilizing structures are "collective vehicles, informal as well as formal, through which people mobilize and engage in collective action" (McAdam et al. 1996, 3). They are the networks that provide ideas, information, expertise, and "human, material and political resources" (Smith et al. 1997, 64). Following Joachim (2003), a mobilizing structure with the following features enhances the likelihood of NGO influence in the UN:

- *Organizational entrepreneurs*: committed individuals or organizations with vision, charisma, connections, and organizing experience
- A *heterogenous international constituency*: culturally, geographically, and politically diverse people who give the network's ideas broad legitimacy and enable it to exert pressure at different levels
- *Experts*: people with specialized and valued knowledge and affected people who can give testimony

In the following sections, I show how the Access Initiative (TAI), a mobilizing structure created by the Washington-based World Resources Institute

(WRI), contributed to creating political opportunities that would give them influence in negotiations on an environmental rights agreement. Emphasizing WRI was not a choice made at the outset; just as the empirical material led my attention to theories of civil society influence, it also led my focus to this specific actor. WRI's influence can be observed in multiple aspects of the Escazu negotiations, but my objective is to show how this network, supported by state allies, influenced the agreement's *legalization*. The IPOS and WRI's mobilizing structure explain how civil society achieved its goal of a highly legalized regional treaty.

The following sections trace the three phases of the Escazu negotiation process, identifying the structural elements that enabled civil society to influence the legalization of the Escazu Agreement.

Phase 1: The 2012 Declaration on Principle 10

In December 2009, the UN General Assembly resolved to organize a UN Conference on Sustainable Development, to be held in 2012, to assess progress and renew political commitment (UN 2010). This "Rio+20" summit aligned separate efforts by state and civil society actors to strengthen implementation of Principle 10 in Latin America.

While many civil society organizations work on human rights, and many work on environmental protection, few organizations combine these foci. An important exception is TAI, established in 1999 by the Washington-based WRI with the aim of building a strong mobilizing structure that would secure a central role for WRI's network in future negotiations on environmental access rights agreements. An essential feature of a strong mobilizing structure is *organizational entrepreneurs*. TAI is a transnational network dedicated exclusively to promoting environmental procedural rights. Long before Latin American countries began considering a regional Principle 10 instrument, TAI was already mobilizing at national and international levels, building connections with state and multilateral actors. The network's membership comprises more than 250 civil society organizations in sixty countries (United Nations Economic Commission for Europe 2008). This geographically *heterogeneous international constituency* is a key strength of the network's mobilizing strategy. The network has always had a strong presence in Latin America. In the early 2000s, TAI developed a methodology for assessing the national strength of access rights at the national level and financed assessments throughout Central and South America (I.21, I.17, I.6, I.16, I.1; Dasgupta 2004). The network's experience, geographical coverage, and diversity would prove key to its influence by lending legitimacy to its ideas and its claim to represent the public.

TAI members convened in 2010 to agree on their Rio+20 priorities and decided to push for a global Principle 10 treaty or a regional treaty modeled on the Aarhus Convention (I.1, I.23; Access Initiative 2012). The global proposal was subsequently ruled out given the improbability of securing sufficient state support. Members therefore agreed to prioritize a Latin American treaty.

They considered this region most ready for a treaty because, first, TAI had a particularly strong presence in terms of numbers and legal expertise; second, awareness among officials existed because numerous countries already had access rights legislation; and third, high numbers of environmental conflicts made implementation of procedural environmental rights particularly urgent (I.23).

Prior to Rio+20, there were signs of a favorable POS opening up to enable civil society influence. TAI's own strategies contributed to creating these opportunities, but serendipitous developments beyond its control were also relevant.

At a 2011 Rio+20 preparatory meeting organized by the UN Economic Commission for Latin America and the Caribbean (CEPAL)[4] at its headquarters in Chile, TAI, representing civil society, stressed the importance of Principle 10. It first proposed establishing a regional convention in Latin America to address access to information, participation, and justice in environmental matters and later proposed that states commit to carrying out a consultation process to explore the viability of such an instrument (United Nations Economic Commission for Latin America and the Caribbean [CEPAL] 2011). While these specific proposals did not make it into the meeting conclusions adopted by states, the conclusions did highlight the importance of Principle 10 (CEPAL 2011).

Favorable POSs typically involve the *presence of influential allies*. Three states (Chile, Jamaica, and Brazil) initially showed support for evaluating the feasibility of a regional instrument (I.23). Brazil as summit host was keen for a substantive outcome (but was hoping to pursue a global treaty) (Orellana 2014); Jamaica was receptive due to its close connections with TAI (the network's director had previously worked in the Jamaican government and had direct access to "the political players") (I.23). But Chile's support was most crucial for launching the initial consultation and then later for leading the preparatory and negotiating processes. When TAI approached Chilean representatives to gauge their interest in pushing for a regional agreement at Rio+20, it discovered that Chile had been exploring the possibility of proposing a regional agreement modeled on Aarhus since 2010 (I.1). During its process of acceding to the Organisation for Economic Co-operation and Development (OECD), Chile's environmental standards came under scrutiny. Based on OECD recommendations in 2005, Chile had reformed its environmental legislation and incorporated parts of the Aarhus text on access to information. But the OECD continued to press the issue, pushing Chile to show political will and significant technical capacity in this area and questioning why the country did not accede to Aarhus. Conversations were held with the Aarhus secretariat, but Chile decided instead to propose a Latin American instrument (I.5). The government official in charge of discussions with the OECD over environmental standards and later with the Aarhus secretariat was Constance Nalegach, a lawyer who had written her master's thesis on the topic of Principle 10, comparing Chile's legislation with the

4. This institution is more commonly known by its Spanish acronym, CEPAL (for La Comisión Económica para América Latina y el Caribe), which is what I use in this article.

Aarhus Convention (I.5). During interviews, multiple state and public representatives stressed the importance of Nalegach's individual leadership and personal commitment to the issue as key for producing this agreement (I.1, I.6, I.23).

In late 2011, Chile assumed the presidency of the newly created Community of Latin American and Caribbean States (CELAC). This role presented bilateral and multilateral opportunities for promoting the idea of a regional instrument on Principle 10, including at the first CELAC summit and in the 2013 European Union–CELAC summit (CEPAL 2014b). But the nascency of this institution made it an unviable option for hosting formal talks on this proposal. Although it had little prior experience with environmental rights, and no experience with multilateral treaty negotiations, CEPAL was receptive to the proposal and facilitated consultations ahead of Rio+20. Being the regional partner to the UN's Economic Commission for Europe, which is secretariat to the Aarhus Convention, also made CEPAL an obvious institutional choice. While the Organization of American States had already adopted Principle 10–related soft law agreements, and had a mandate for promoting democracy and human rights in the region, it wasn't considered a viable institutional option for pursuing a new instrument partly because it showed no interest in doing so and partly because politicization and the presence of the United States made it less attractive to those committed to a treaty (I.1, I.23). CEPAL agreed that if ten countries were to support the regional instrument proposal, it would take the initiative forward. Together with Nalegach's bilateral efforts, pressure by TAI member organizations was crucial for securing the support of Costa Rica, Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, and Uruguay, which together signed the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development at Rio+20 (I.1, I.6, I.7, I.16, I.23; UN 2012).

Choosing CEPAL to host ongoing talks contributed to creating a favorable political opportunity structure for civil society influence. CEPAL's leadership was conducive to an *integrative informal elite strategy*. Most international institutions have mechanisms for civil society participation; these norms are particularly strong in UN institutions and are considerably stronger in CEPAL than in other multilateral institutions in Latin America (Stevenson 2023). But inclusion does not necessarily translate into influence. Influence is more likely when actors try to *integrate* civil society through active inclusion and facilitation, financial or administrative support, and cooperation (Kriesi et al. 1992; van der Heijden 2006). An institution that formally permits access may informally function in an exclusive manner if civil society is perceived as an adversary or presence to be tolerated. This was not the case because CEPAL had limited resources and expertise. CEPAL enthusiastically supported negotiating a new instrument but recognized that this would have to be achieved on a shoestring budget. Funding had to be found within the institution's existing budget, meaning that success would hinge on the dedication of a small number of actors. In this context, integrating civil society was crucial because it provided an important source

of expertise. CEPAL also had relatively limited experience with environmental matters and no experience in facilitating treaty negotiations. As an economic commission, CEPAL has few lawyers, and although it was able to recruit one for this process, a significant lack of knowledge remained. Multilateral negotiations and treaty law require specialized expertise, which was not available within the institution itself (I.3). This context facilitated an integrative informal elite strategy, and TAI was well positioned to benefit from this.

Phase 2: Preliminary Meetings, 2012–2014

The declaration signed at Rio was drafted in deliberately broad language to increase its appeal to as many countries as possible. Signatories declared their "willingness to launch a process to explore the feasibility of adopting a regional instrument, ranging from guidelines, workshops and best practices to a regional convention" (UN 2012). Civil society was pleased to see reference to a convention as one possible outcome but recognized the political necessity of including softer options (I.23). From the outset, the intention of TAI, Chile, and CEPAL was to eventually adopt a legally binding treaty, and anything short of this was considered inadequate; moreover, dedicating time and money to producing another piece of soft law was considered senseless (I.1, I.3, I.5, I.6).

Now with Brazil on board, the first meeting of signatories to the 2012 declaration was held in November 2012 to define an implementation "roadmap" (CEPAL 2012, 2013). They established two working groups to clarify instrument options: the first to assess training and finance needs and formulate a capacity-building proposal, the second to deepen knowledge on access rights and formulate proposals on legal form and substance (CEPAL 2013). Participation was open to all signatories, with nonsignatories having the option of attending as observers; however, few countries chose to be actively involved at this stage. CEPAL was tasked with preparing a report on possible legal options, a task it delegated to Marcos Orellana, given the lack of in-house expertise. Orellana was then an independent consultant and expert in international law, human rights, and the environment (CEPAL 2014b). He established a typology of international legal instruments, including nonbinding options (declarations of principles, programmatic guidelines, interpretations of treaty standards, and guiding principles) and binding options (treaties expressly crafted with the intention that their obligations be governed by international law, irrespective of whether they are called a pact, convention, agreement, or protocol) (CEPAL 2014b). The report was descriptive rather than prescriptive, but during Q&A with the working group, Orellana advocated for a legally binding agreement, arguing that issues of human rights require adequate domestic legislation and strengthened institutional capacities, which would be difficult to achieve without a binding commitment (CEPAL 2014a). CEPAL summoned a second international legal expert, Concepción Escobar, to respond to states' questions about legal options, and she also advocated for a legally binding treaty. Escobar argued that the role

of soft law is to establish agreed principles, which existing instruments already do; adopting another soft law instrument would be inefficient (CEPAL 2014a). Moreover, strengthening access rights requires that states adopt new domestic measures, and only a binding instrument can guarantee that it will take effect at the national level. Only a binding agreement would provide a stable institutional basis to support the progressive provision of access rights and to harmonize standards across the region (CEPAL 2014a). Unlike a soft instrument, she argued, a binding agreement could reduce social conflict and litigation by obligating states to recognize access rights and establish formal mechanisms for channeling claims and demands (CEPAL 2014a). All these arguments contributed to bolstering the case for a binding agreement, but one argument made a particularly strong impact. Responding to questions about whether states should first decide the substance of the agreement or its legal form, Escobar indicated that they could leave the type of instrument undecided until the end but *proceed as if* they were going to adopt a legally binding treaty. This, she argued, would facilitate the negotiations without prejudging the outcome (I.1, I.3, I.23, I.5, I.6, I.7). This argument proved successful, and while there were delegates who either never questioned that they were negotiating a legally binding treaty or were determined to see this outcome, the precise form of the agreement was undecided until the end. By that time, the text was structured and drafted in a way that was compatible with a legally binding treaty, thus increasing the pressure to adopt it in this form.

During this preparatory phase, Orellana's and Escobar's inputs were key to bolstering expectations about the legal form of the instrument under discussion. But beyond these individuals, it was TAI that established a central role as representing the public. Orellana's and Escobar's expert arguments complemented rather than competed with TAI's, and the latter's constant presence throughout the talks helped to sustain the influence of these arguments. CEPAL and the states promoting a regional instrument decided at the outset that the talks and negotiations would be open and inclusive (UN 2012). Almost without exception, interviewees commented on the unprecedented degree of meaningful civil society participation.[5] But unlike other UN environmental meetings, which often attract thousands of NGO representatives, public participation in these talks was limited in number and diversity. As one official explained, "the table was served for whomever wanted to join the dinner. . . . Everyone was invited" (I.3). But although the process was formally open to anyone who wanted to participate, participation was limited in part because the initiative had a very low profile and in part because the fusion of environment and human rights was still very nascent and few NGOs worked on both.[6] Some interviewees

5. One interviewed negotiator (I.8) took umbrage with this claim, recalling the Convention on the Rights of Persons with Disabilities.
6. Later, in 2017, Human Rights Watch established an Environment and Human Rights Division, and Orellana was its inaugural director. This reflects growing interest in merging concern for the environment and human rights.

explained the limited participation with reference to the perceived technical or abstract nature of the topic, which many environmentalists apparently considered disconnected from their work. Interviewees observed that it is easier to attract interest for substantive rather than procedural issues (I.5). One official explained, "It's not as if you're saying, 'We're going to end, say, the trafficking of species,' and people see the birds and they say, 'Yes, we're going to put an end to this.' . . . People can't immediately identify with [access rights], but it's the tool with which you achieve those other things" (I.3). Another official explained how she organized a national consultation with breakfast for 100 people and only two turned up (I.5). Environmentalist groups and Indigenous peoples gradually became involved, but the preparations and negotiations began with the involvement of groups dedicated to civic participation, namely, TAI (I.3). For individuals and organizations unaligned with TAI but interested in procedural environmental rights, the talks' low profile impeded participation. One public participant with extensive experience with the Aarhus Convention explained how he "arrived late to the dance" because he didn't hear about the negotiations until halfway into the process (I.10). He observed that apart from him and TAI members, no one else participated, not because their participation was obstructed but because they were unaware of the negotiations (I.10).

A "public mechanism" was created allowing interested individuals to register as participants in the talks. Civil society was permitted to comment and contribute proposals at any stage of the preparatory meetings (and later in the negotiations), but its participation would be channeled through six elected representatives (Sanhueza and Napoli 2020). Nominations and voting were open to all registered individuals, the overwhelming majority of whom were TAI affiliates. This allowed the network to coordinate its six nominations and establish a voting strategy that got all of them elected (I.7).

The relative lack of competition from other civil society networks favored TAI's position, but its own internal characteristics were also key to its success. The network has benefited from the leadership and involvement of individuals committed to access rights. Backing from the well-respected WRI also helped TAI to secure the funding necessary for coordinating public participation. The Ford Foundation provided an initial grant, and the Open Society Foundation provided ongoing funding throughout the preparatory and subsequent negotiating phases (I.23). While CEPAL covered the cost of elected public representatives to participate in the preparatory meetings and negotiations, the role was *ad honorem* (I.3), which necessitated the support of the representatives' own organizations and TAI.

Phase 3: Negotiations, 2015–2018

The negotiations set a new standard for civil society inclusion in multilateral negotiations; as one public participant explained, "the order in which people

could speak was the order in which they requested the floor, whether it was a government or member of the public" (I.7). But only state representatives could introduce text into the negotiating drafts and decide on the final wording.

While civil society and CEPAL could try to push the negotiations along, the political will of states (or, more accurately, the individuals representing their foreign affairs and environment ministries) had a crucial influence on progress (I.3). The *integrative informal elite strategy* promoted by CEPAL was therefore crucial but insufficient to enable TAI to influence the nature and content of the negotiating text. Not all state elites shared CEPAL's integration style. Some interviewees observed that state delegations were mostly dominated not by environment ministries but by foreign affairs ministries, which do not typically have the same culture of integration (I.21, I.15). In many cases, reluctance to integrate civil society was mitigated by TAI's legal expertise. As the director of TAI observed, the members really knew the law in their countries, often better than governments themselves. Government representatives generally recognized and respected their expertise (I.23). Technical expertise also gave members credibility when presenting their proposals to states with the aim of getting them incorporated into the negotiating text. Knowledge of international law allowed them to draft and justify text, drawing on legal arguments and examples from different countries' national law (I.11).

As observed earlier, existing connections between TAI members and Jamaican state officials were key to securing that state's backing of the Rio +20 declaration. Such connections were also a crucial source of influence in the negotiations. This was facilitated by a "revolving door" between TAI and governments. TAI's influence was strengthened by the presence of individual state officials who were committed to access rights and in some cases had previously worked professionally on this agenda from within civil society. A notable feature of the network is the close connections between individual members and national ministries. In multiple countries, TAI had people who had worked in ministries themselves or personally knew key people in government who shared their interest in access rights (I.23). In the case of Costa Rica, Panama, and Guatemala, former TAI affiliates were working in government at the time of the negotiations, including Costa Rica's head negotiator, who played a leading role (I.17). This alliance strongly impacted the negotiations.

During interviews, several participants commented on the importance of individuals: the disposition and even position of delegations sometimes changed when the chief negotiator changed (I.6, I.11). For example, the Brazilian delegation shifted from hostility toward civil society participation (questioning its presence, given the mandate of states to represent their citizens) to proactive inclusion (requesting its proposals and providing advice to increase the likelihood of their acceptance by other parties) (I.11). International relations theory places little importance on the role of individuals, but in this case, the impact of individual decisions is evident. A TAI member from Brazil observed how the chief negotiator minimized the impact of President Bolsonaro's position by

making himself absent when certain items came up on the agenda (e.g., "it's time for a coffee"). This was part of a damage minimization strategy conducted by a "clandestine resistance network" within the Brazilian diplomatic community during the Bolsonaro administration (I.11; Chade 2022). This strategy curtailed a softening of the Escazu Agreement's legalization.

Bolstered by the arguments presented by Orellana and Escobar, those most committed to access rights argued strongly in favor of a highly legalized agreement. A unique argumentative strategy was devised based on the dual nature of the topic under discussion, combining human rights and environmental concerns. Framing the talks around international human rights law, they argued that guaranteeing access rights would require an agreement capable of activating changes in domestic planning and public policy, and only a binding instrument could ensure this. A common practice when adopting human rights treaties is to permit reservations, allowing a party to indicate which articles will not apply to them. These are common in human rights treaties because, unlike other multilateral treaties that govern relations between states, human rights treaties aim to regulate states' domestic practice (Koremenos 2016; Zvobgo et al. 2020). While considered controversial by some, reservations can help achieve universal ratification, which is the aspiration of human rights treaties (Koremenos 2016; Zvobgo et al. 2020). In the final days of negotiations, Colombia proposed including the option of reservations, but TAI and its state allies rejected this as inappropriate. Framing the talks around international environmental law, they argued that reservations are inappropriate for a multilateral environmental agreement (MEA) because MEAs aim to promote consistent implementation across states. Indeed, reservations are prohibited in prominent MEAs (United Nations Environment Programme 2007) and have not appeared in any MEA adopted during the past twenty years (I.3, I.5, I.17). This argument prevailed, securing a high degree of obligation.

One of the most ambitious and highly legalized features of the Escazu Agreement is Article 9, dedicated to protecting environmental defenders. This article did not appear in the original draft (CEPAL 2015). Costa Rica drew on the pioneering work of the Inter-American Human Rights System (Borràs 2015) to advocate for additional provisions to protect environmental defenders. Costa Rica's chief negotiator, Patricia Madrigal Cordero, had previously been affiliated to TAI and worked closely with civil society, Marcos Orellana, and UN Special Rapporteur on Human Rights and the Environment John Knox to draft and promote these provisions in highly obligatory and precise terms.[7] Peru, Panama, Paraguay, and Chile also supported this proposal. The support of individual state delegates was crucial for securing inclusion of Article 9, but during interviews, state and public actors insisted that this should be understood as a victory for civil society. One public representative explained, "All or much of the noise made about environmental defenders came from civil society" (I.21). For

7. See https://www.youtube.com/watch?v=wlUmXXgYv80, last accessed July 24, 2024.

example, during a negotiating session in 2016, TAI launched the book *Emerging Practices of States on the Protection of Environmental Defenders in Latin America and the Caribbean* (Mexican Center for Environmental Law 2016; I.21). Later, the network facilitated a Brazilian environmental defender's attendance at the negotiations and provided simultaneous interpretation of their testimony from Portuguese to Spanish (I.11).

There was some resistance to Costa Rica's highly legalized proposed text on environmental defenders, notably from a Mexican delegate who argued that anyone promoting environmental protection is an "environmental defender," including himself, and therefore it made no sense to establish special rights for this category.[8] However, resistance was subdued by the evident gravity of the situation and the presence of UN agencies. The high-profile murder of Honduran activist Berta Cáceres, ordered by executives of the Honduran energy company DESA, had heightened attention to environmental defenders' vulnerability and made it difficult for states to oppose the proposed text (I.21). One public representative explained that under the international community's gaze, states could not evade the topic or negotiate "light" text; they wanted to be on the right side of history (I.21; also I.11).

Participants in the negotiations, both state and public, were conscious of potential trade-offs in legalization (I.1, I.23, I.5, I.16). Chile's chief negotiator and TAI members insisted on seeking a substantially ambitious treaty (I.1, I.5). This was a challenge because, as one TAI member observed, some governments evidently wanted to avoid amending their laws (I.23). Compromises between ambition and flexibility can be observed in several parts of the text where obligation and precision are softened, for example, the occasional use of "shall seek to," "shall endeavour to," and "to the extent possible." The most significant compromise is the soft and loosely defined compliance mechanism. But this was a conscious compromise: civil society recognized that "push[ing] everything at once" would push down ambition (I.21; also I.23). It also recognized that states would not accept a punitive compliance mechanism (Orellana 2014). While some trade-offs were inevitable, on balance, the Escazu Agreement is a highly legalized instrument, representing a victory for TAI and its allies.

Conclusions

Explaining how soft law on environmental rights in Latin America was upgraded with a binding treaty requires understanding civil society influence on legalization. The POS presented favorable conditions: access, influential allies, and integrative informal elite strategies gave civil society an advantage not typically observed in multilateral settings. These conditions aligned with—*and were partly the product of*—TAI's own mobilizing structure. The network established a strong alliance with state and UN representatives and thereby

8. See https://www.youtube.com/watch?v=wlUmXXgYv80, last accessed July 24, 2024.

secured a central role throughout the three multilateral phases: proposing a new instrument, preparatory work on legal form and substance, and negotiating the text. They used this position to successfully push for an ambitious treaty.

States may increasingly prefer soft cooperation, but the Escazu Agreement shows that legalization is sometimes shaped by civil society mobilization, not just by state preferences. Future research should test whether legalization in other areas of cooperation can also be explained by political opportunity and mobilization structures.

This article focused on the conditions that produced the Escazu Agreement, but other aspects of the agreement merit attention, including ratification and implementation. The agreement was opened for signature in 2018 and entered into force in 2021, upon reaching the minimum ratification threshold. But fewer than half of eligible countries have ratified, despite the region having a strong record of ratifying human rights and environmental agreements. In some cases, this is because the issue became politicized *after* the agreement's adoption, when domestic actors became aware of its potential implications (Miranda 2020). This suggests that the victory of a highly legalized agreement has come at the expense of ratifications (I.10). Koremenos (2016, 13) anticipated such a problem, writing, "Compliance will be forthcoming only if the design of an agreement corresponds to its underlying cooperation problems. . . . Without the correct design provisions, states will often not even ratify the agreement, regardless of how heavily involved they were in the discourse leading to it." Analyzing whether strong legalization has deterred ratification, as well as where, how, and why, will deepen our understanding of how civil society influence affects international cooperation.

On implementation, future research should consider the dynamic nature of opportunity and mobilization structures. The open, inclusive, and integrative approach of the Escazu negotiation process set a new standard for civil society inclusion in multilateral negotiations. Yet, it remains to be seen whether this multilateral space will remain open during the implementation phase, especially in a context of ideological swings (with left-leaning presidents being replaced with right-leaning ones, and vice versa). At the first CoP, Bolivia sought (unsuccessfully) to revise the rules of procedure and limit civil society participation (I.6). Even if the formal institutional structure remains open, participation will continue to evolve as civil society interest grows. There are now more than 8,000 individuals registered in the public mechanism. This will inevitably affect TAI's role and influence in implementation and compliance monitoring. In recent elections for new public representatives, TAI used the same voting strategy and managed to elect its members for most of the six representative roles, but it will be increasingly difficult to maintain this central role. CEPAL's initiative to establish an Annual Forum on Human Rights Defenders in Environmental Matters in Latin America and the Caribbean should facilitate closer involvement of Indigenous peoples, which in turn should have a positive impact on achieving the objectives of the Escazu Agreement. As participation dynamics

change in the coming years, research from a more normative perspective (e.g., Stevenson and Dryzek 2014) will be valuable to evaluate the extent to which public participation meets the standards of democratic (global) governance.

Hayley Stevenson is associate professor of international relations at the Universidad Torcuato Di Tella (Buenos Aires, Argentina). She is the author of Global Environmental Politics: Problems, Policy and Practice (2nd ed.; forthcoming).

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