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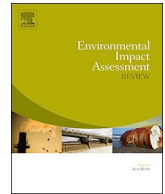
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An empirical study of EIA litigation involving energy facilities in Chile and Colombia



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ABSTRACT

In Latin America, as elsewhere, environmental and participatory rights have been expanding, and EIAs have been central to those efforts. In response, litigation against EIAs has increased as communities turn to the courts to exercise these rights, raising fears among developers that costs associated with EIAs and resulting litigation are excessive and a deterrent on economic growth. In many jurisdictions, including Chile and Colombia, these fears have prompted reforms to streamline EIA procedures. This study empirically examines the frequency and results of litigation against EIAs in Chile and Colombia for developers, communities, and state agencies. We compiled two databases of litigation against energy facilities that received EIA licenses between the 1990s/2000 (when EIAs were first required) and 2016. Because some, but not all, energy facilities are contested, this sector is ideal for examining litigation trends. Using descriptive and cross-tabular statistics, our analysis echoes recent research that finds that few EIAs are litigated in court. Litigation is a fundamental tool for civil society organizations seeking to safeguard environmental and participatory rights, although the number of cases invoking these rights remains smaller than for other reasons. Practices across Chile and Colombia differ regarding what kinds of cases individuals bring and the rate at which courts accept cases brought by civil society organizations or corporations. Past litigation trends also suggest that a shift towards renewable energy sources could lead to a decrease in litigation.

1. Introduction

In Latin America, as elsewhere, environmental rights and policies have been expanding (Anton and Shelton, 2011). Since 1980 and 1991, respectively, the constitutions of Chile and Colombia have recognized the right to live in a clean or a “healthy and balanced” environment. A primary policy used by governments to protect the environment is Environmental Impact Assessments (EIAs), required in Chile and Colombia since the 1990s (Orihuela, 2014). Among other changes, EIAs institutionalized public participation procedures for affected communities (Glucker et al., 2013). For indigenous communities, participatory rights were further strengthened in Colombia (1991) and Chile (2008) with the ratification of ILO Convention 169 that requires that affected indigenous peoples be consulted about new development projects through “prior consultation” procedures.

Yet this expansion of environmental and participatory rights has been uneven. In Colombia, for example, public participation in EIAs is circumscribed to indigenous and black communities (Toro et al., 2010).

In both countries, activists and scholars have criticized public participation in EIAs as a sham process intended to legitimize development projects rather than give communities the power to reshape or veto projects (Sepulveda and Villarroel, 2012; Tecklin et al., 2011; Zárate Yepes, 2016; Rodríguez and Muñoz Ávila, 2009). Protests against new mine, energy and highway projects have become common as the pace of construction and extraction has quickened (Bury and Bebbington, 2013), and EIAs have become key sites of contentious politics (Hochstetler, 2011; Jaskoski, 2014).

This analysis contributes to debates about the role of litigation in EIAs by asking, for a over 20-year period, has there been “too much” litigation and if so why? What can past trends tell us about future trends? One aspect of the contestation around EIAs is that developers complain EIAs are excessive, while affected communities see the review process as biased towards developers. In recent years, pressures to streamline or deregulate EIA procedures have gained ground in several jurisdictions, including Chile and Colombia (Loomis and Dziedzic, 2018; Barandiaran, 2016; Toro et al., 2010; Bragagnolo et al., 2017). In

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short, activists and concerned communities protest that EIA requirements are insufficient for protecting environmental and participatory rights, while developers and governing elites complain these are deterring economic growth. Litigation becomes a potential solution; a space within which competing claims about rights, regulation, and due process can be resolved by a third party. To the best of our knowledge, this article presents the first empirical examination of the frequency and results of litigation against EIAs in Chile and Colombia.

This analysis focuses on energy facilities that received EIA licenses between the 1990s/2000 and 2016. Energy is ideal for this research because since 2000 new energy construction grew, but with great variation: energy facilities range from small to large, and some –but not all– were met with opposition; many citizens have welcomed energy facilities that promised to improve quality of life and provide jobs. Yet many energy facilities also have tremendous environmental impacts, including water and air pollution or displacement of residents, as well as climate change impacts that make them an issue of global concern (see for instance, [Salomons and Hoberg, 2014](#)).¹ Moreover, Chile and Colombia are ideal for this comparison because they have similar EIA requirements and legal frameworks, but also differ: participation laws and mechanisms are stronger in Colombia (despite the circumscribed nature of EIA participation) and –as detailed below– this country has a reputation for “progressive” environmental courts. The countries and sector were thus chosen to maximize variability while remaining comparable.

Our results echo recent empirical work on litigation patterns done elsewhere that finds that quite few EIAs are litigated in court ([Zining, 2015](#); [Macintosh et al., 2018](#)). In other words, concerns that litigation is out of control are an exaggeration, and at least in Chile corporations have also used the courts extensively. Instead, litigation is a crucial tool civil society organizations and citizens have drawn on to exercise their environmental and participatory rights. We expected EIA-related litigation to be greater in Chile due to its larger economy and, compared to Colombia, fewer participatory mechanisms available to citizens. We also expected courts there to behave more conservatively, meaning that they would reject more cases brought by civil society groups and accept those brought by corporations or state agencies. The data largely confirm these expectations, but point also to the need to examine the details of litigation patterns –including which groups invoke what rights, what kinds of cases corporations bring, etc.– to understand how judicial behavior might evolve.

The article proceeds as follows. [Section 2](#) discusses the analytical framework. [Section 3](#) discusses the materials and methods used in the analysis. [Section 4](#) reports on our empirical results, followed by a discussion section and short conclusion.

2. Analytical framework

This section is organized into three sub-sections on participatory and environmental rights, the importance of litigation to EIAs, and requirements and practices in Chile and Colombia. [Sections 2.1 and 2.2](#) discuss the scholarly literature on judicial activism and how it applies to Chile and Colombia in light of recent patterns of energy construction, growth, and social contestation in each country. The third sub-section provides information on the forms of legal action taken against EIAs in each country.

2.1. Participatory and environmental rights in EIAs

Environmental rights include a vast set of norms and laws that vary

¹ It would be ideal to extend this analysis to more sectors, particularly mining. We did not include mining in this analysis because the histories, laws, and regulations of this sector vary significantly across Chile and Colombia, as a result of the fact that mining has dominated Chile's economy for over a century. This article can serve as a benchmark for comparing across other industry sectors.

across time and place ([Anton and Shelton, 2011](#); [Knox and Pejan, 2018](#)). Nevertheless, for many communities the right to live in a clean environment is increasingly associated with the right to participate in decisions that will impact their environment. Two major reports from early 2018 lend credence to this. Legal scholar John Knox, acting as the United Nations' Special Rapporteur for Human Rights and the Environment, released a report outlining 16 principles that “summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment” ([Knox, 2018, 7](#)). Principle 8 echoes EIAs' usual mission: it calls on states and private actors “to avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights. States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.” Knox goes on to argue for public participation and access to information as necessary for meeting environmental and human rights obligations.

At a later UN meeting, Latin American states made echo of these recommendations in a regional convention acknowledging that informed public participation promotes environmental sustainability. Article 5 of the so-called Escazú Agreement extends ‘right to know’ frameworks to the environmental arena. Further articles advocate for transparency, education, and inclusivity as obligations for states to provide environmental studies translated into indigenous languages. Most Latin American states, including Chile and Colombia, signed on although ratification has been slow ([CEPAL, 2018](#)). As of May 2019, only Guyana had ratified this agreement and neither Chile nor Colombia had initiated ratification.

Scholars of environmental conflict have been highlighting the relationship between participatory and environmental rights in EIAs for some time. In many jurisdictions worldwide, EIAs extended a formal right to participate in a public decision-making process geared at balancing economic growth and environmental protection goals ([Glasson et al., 2012](#)). In practice, however, constructing meaningful public participation procedures has been difficult. One set of challenges involve conceptual disagreements about what public participation should be and can achieve ([O’Faircheallaigh, 2010](#); [Glucker et al., 2013](#)). A closely related set of challenges has to do with the expectations and needs communities bring to participatory processes; when it comes to EIAs, most communities are the politically and economically weak party seeking to counter the proposals of powerful multinational corporations and their allies in government. Scholars have found that public participation procedures often fail to level the power asymmetries that characterize the relationships between developers, state agents and communities ([Aguilar-Støen and Hirsch, 2017](#); [Gregory, 2017](#); [Li, 2015](#); [Enríquez-de-Salamanca, 2018](#); [Sepulveda and Villarroel, 2012](#); [Londoño, 2008](#); [Rodríguez-Becerra and Canal, 2008](#); [Hurtado, 2002](#)). Too often, participation is designed to convey information rather than integrate the community's input into the final decision.

These issues of marginalization are particularly acute among indigenous communities which continue to suffer a range of political, legal, economic and social vulnerabilities worldwide. In response, in 1989 the International Labor Organization (ILO) approved the Indigenous and Tribal Peoples Convention, known as Convention 169 (C169), which seeks to guarantee indigenous peoples' rights in their living and working conditions. Because these conditions typically require a clean environment that can sustain fishing, farming, hunting or gathering activities, many indigenous communities have had to confront extractive and industrial projects that threatened their livelihoods. Chile and Colombia are two of just 22 signatories worldwide of C169. Its key provision of relevance to EIAs is the requirement for states to engage in public consultation with indigenous peoples to establish dialogue that may yield consensus decisions. C169 recognizes indigenous peoples' rights to speak for themselves (not represented by government agencies, for instance) and as a community (rather than as individuals). Research suggests that indigenous communities are using

C169 to strengthen public participation provisions in EIAs, with mixed results (López de Maturana and Rogers, 2013; Hanna et al., 2014).

2.2. The importance of litigation to EIAs and participatory and environmental rights

In response to the above frustrations with participatory procedures, affected communities –and the activists who advocate for them– have turned to litigation to hold industry and government agencies accountable, to gain time to re-analyze the studies and information collected in EIAs, or simply as a way to raise a company's operating costs (Gregory, 2017; Hershowitz, 2008; Roa-García, 2017). Since the inception of EIAs in the United States, courts have played an important role in making this policy effective (Glasson et al., 2012). Many US scholars ascribe the political importance of EIAs to judicial decisions made in the 1970s that held state agencies to high standards of review, earning them the title of “activist courts” (Milazzo, 2006).

Such judicial activism is recent in Latin America. Since 2000, a growing literature has studied the role of judges in policymaking, rights-adjudication, and the re-distribution of power among branches of government (McAllister, 2008; Sieder et al., 2005; Domingo, 2010; Uprimny, 2007). This interest follows constitutional and judicial reforms introduced across the region in the 1990s. Chile and Colombia stand out for the scope of reforms, earning them a reputation for judicial autonomy (at least in a formal sense), particularly in the area of human rights (Couso et al., 2010; Wilson, 2009). However, neither judiciary has consistently decided in favor of human rights; rather, their behavior has been dynamic and uneven. The scholarship often describes Chile as having a “conservative” judiciary whereas Colombia has a “progressive” one (Kapiszewski and Taylor, 2008). This has political importance; a systematic bias in judicial behavior would impact the effectiveness of rights-based reforms. Not only has this question not been empirically examined for EIA-related litigation, but the terms of the debate may be too reductive.

This discussion needs to consider the economic boom of the 2000s, driven by mining and the construction of energy facilities. Chile, for instance, more than doubled the number of energy facilities nationwide since 2000—mostly coal-fired power plants (which produced 44% of the nation's electricity in 2016) and hydro (27%). In Colombia, these two sources accounted for 10% and 68% respectively (plus 13% from natural gas). A critical environmental politics literature has examined resistance efforts during the licensing process and environmental policy-making; it finds that institutions and regulations favor developers and have failed to close power asymmetries that leave communities, particularly indigenous ones, vulnerable to ecologically harmful development projects (Silva et al., 2018). Scholars of Chile are particularly critical of an entrenched conservatism that is exclusionary and favors economic growth at all costs (Rodríguez and Carruthers, 2008; Carruthers, 2001).

Little is known about when and why communities turn to the courts to challenge development projects (Silva et al., 2018). Research has focused on high profile cases (e.g., Hershowitz, 2008; Li, 2015), such as the 2012 decision by the Inter-American Court of Human Rights in favor of the Amazonian Sarayaku tribe against the government of Ecuador over the licensing of fossil fuel exploration in their territory (Ruíz Mollada, 2015). Despite the lack of analysis of litigation trends, some developers believe that litigation has become so widespread as to be a barrier to development. For example, Chile's main daily *El Mercurio* in 2016 headlined an article with, “Industry of Conflicts: these are the networks that lead investment projects to finish up in court.”² Indeed, both Chile and Colombia have introduced reforms that streamline EIA procedures (ANLA, 2018; Zárate Yepes, 2016).³ Yet two recent *EIAR*

articles on this topic fail to find evidence of a dramatic increase in EIA-related litigation; moreover, courts uphold developers' claims more often than those brought by communities (Zining, 2015; Macintosh et al., 2018). Nevertheless, a contentious debate exists between demands to streamline EIA procedures to, among other things, reduce litigation, and demands for stronger rules and procedures to safeguard environmental and participatory rights (Salomons and Hoberg, 2014; Loomis and Dziedzic, 2018; Toro et al., 2010; Barandiaran, 2016; Bragagnolo et al., 2017).

These concerns arise in a broader context of innovation in environmental law and rights-based activism (Rodríguez-Garavito, 2018). This includes rights of nature doctrines in Ecuador and Bolivia as well as climate change litigation which are gradually changing judicial outcomes (UNEP, 2017; Cano Pecharroman, 2018; Kauffman and Martin, 2016). Colombian courts recently argued in separate cases that several rivers (Atrato, Cauca, Combeima, Cocora, and Coello), the Pisba páramo, and the Amazon basin have rights subject to protection by the state. Another legal space to watch are recent youth mobilizations for more aggressive climate action which are likely to increase litigation in Latin America and elsewhere.

This context complicates any easy diagnosis of Chilean or Colombian courts as environmentally progressive or conservative. Indeed, legal scholars have described courts' willingness to be proactive as shifting over time, jurisdiction, and issue area in response to factors such as legal cultures and language, formal and informal institutions and practices, and how judges think of their role in a democracy (Couso et al., 2010; Wilson, 2009; Couso and Hilbink, 2011; see also Kritzer, 2003). Thus, an examination of EIA-related litigation in Chile and Colombia's energy sectors contributes to the growing literature on judicial activism.

2.3. Environmental law and politics in Chile and Colombia

Chile and Colombia are strategic cases for exploring patterns in EIA-related litigation also because of similarities and contrasts in their EIA-related rules and regulations. The most common legal action citizens take against EIAs is a form of judicial review called *tutela* in Colombia and *recurso de protección* (RP) in Chile. However, the countries differ in the types of participatory rights citizens and communities enjoy (Table 1).

In Chile, a central agency administers all EIAs (called SEA). The scope and requirements of EIAs are specified in law, which requires public participation: every natural or legal person has the right to comment on a project's EIA, either in person at meetings organized by SEA for this purpose or in writing. SEA must consider and respond to every comment in the EIA permit, justifying each response (article 29, law 20.417). Though recognized in environmental law, the right to participate and be informed is not a constitutional right in Chile—by contrast to the right to a clean environment or the freedom to engage in business (López Magnaso, 2012; Cordero et al., 2017). Developers can appeal EIA decisions to a committee composed of ministers and SEA's Executive Director (article 20). But most individuals and civil society organizations have preferred to appeal with a *recurso de protección* (Navarro Beltrán, 2012).

EIAs in Colombia are administered by a national agency and 33 regional agencies; where a developer applies depends on the size and generating capacity of the proposed energy facility. EIAs require public participation in a limited group of cases: for black and indigenous populations, when projects directly affect the territories where they live (Toro et al., 2010, 257). For other groups, participation is reduced to information about the project. Although this goes against international best practices and differs from the Chilean situation, it must be understood in Colombia's broader legal context which is characterized by a constitutional right to participate and access to a range of participatory channels (Rodríguez and Muñoz Ávila, 2009). Since 1991, participation is a constitutional right, while the right to live in a clean

² By Marcelo Pinto and Oscar Delbene, pages D6 and D7 (August 28).

³ For ongoing proposals in Chile see: <http://www.fima.cl/wordpress/tag/reforma-seia/>. Accessed May 19, 2019.

Table 1
Summary of environmental law provisions in each country.

	Chile	Colombia
EIA required for energy projects	Yes	Yes
Existence of competent authority for EIA	Yes	Yes
Provisions for administrative appeal	Yes	Yes
Required public participation	Yes	Partial
Environmental rights in constitution	Yes (individual right)	Yes (collective right)
Participatory rights in constitution	No	Yes
Convention 169	Ratified	Ratified
Judicial review of EIA decisions	Yes (<i>rec. prot.</i>)	Yes (<i>acc. nul., acc. pop., acc. grup.</i>)
Alternative judicial mechanisms?	Since 2017 (Env. Trib.)	Yes (<i>tutela, acc.pop., acc.cump., acc.grup.</i>)

environment is a collective right that only becomes “fundamental” when linked to the violation of a fundamental right (such as participation). Appeals can be administrative, as in Chile, directed to the same agencies that granted the license. Most individuals, communities, or civil society organizations pursue a *tutela*, which is equivalent to Chile’s RP (Wilson, 2009; Roa-García, 2017; Páez-Murcia et al., 2017; Rodríguez and Muñoz Ávila, 2009).

Tutela or RP are court actions that aim to protect individuals or groups from arbitrary or illegal acts or omissions by a public authority that produce a harm (Orrego Hoyos, 2003). Their popularity lies in their accessibility and affordability. In Colombia, *tutela* cases “grant broad standing, require no legal fees or lawyers, and grant very easy access to any judge in the country” (Wilson, 2009, 75). *Tutelas* are filed at any court nationwide, but are also heard by the Constitutional Court which chooses to hear *tutelas* that touch on principles of constitutional law (Roa-García, 2017). In Chile, RP are also low cost and can be filed directly with the local *Corte de Apelación*, the highest tribunal in each province. Appeals are heard directly by Chile’s Supreme Court. Reforms introduced in 2007 made filing a RP even easier, ushering in a “silent revolution” in rights-based advocacy (Navarro Beltrán, 2012). The number of annual RPs filed jumped to 30,000 a year, though only a small fraction have to do with the environment.⁴

Whereas in Chile alternative mechanisms of redress have generally been unavailable (Cordero et al., 2017), in Colombia citizens can also initiate different kinds of so-called *acciones*. *Acción popular* protect collective rights and interests. *Acción de cumplimiento* is used to request the enforcement of an administrative decision. And *acción de nulidad* can strike down an administrative decision. Nevertheless, *tutelas* are preferred because they are cheap (no fees, no lawyers) and grant broad standing.

Since 2017, Chilean citizens have had access to new Environmental Tribunals. Rolled out between 2013 and 2017, these tribunals review the legality of administrative decisions, but do not safeguard constitutional rights as RP do. Whether the tribunals will replace RP remains to be seen, and such an assessment requires greater understanding of RP uses; activist-environmental lawyers hope use of RP will not decline, given their constitutional importance and the greater access they afford (Cordero et al., 2017, 64, 70).

3. Materials and methods

To identify trends in EIA-related litigation involving participatory and environmental rights, we created a database of high court cases in Chile and Colombia that involved any challenge to an energy facility’s EIA license. We included electricity generating facilities, transmission lines, substations, and refineries that held EIA licenses, but not exploration (e.g., for oil and gas) or extraction facilities (e.g., coal, natural

gas). We focused on court cases due to the popularity of *tutela* and RP, and the growing emphasis among scholars and activists on rights-based activism. Identifying these cases involved different steps in each country, detailed next.

3.1. Data collection in Chile

We first identified conflictive energy projects through a database of EIA projects which were met with social protest. Compiled by researchers at the Climate Change and Energy Research Center (NUMIES) of the Pontifical Catholic University of Chile, this database contains 71 energy conflicts that began between 2000 and 2016 (Tironi and Percovic, 2016). To build this database, NUMIES researchers triangulated data from the government’s online register of EIA decisions (1153) and media reports of environmental conflict. To locate the subset of conflicts that entered the courts, we searched for all 71 energy conflicts in the MicroJuris database that contains Chilean case law. To reduce the risk of missing cases, we searched also for “recurso de protección” in the MicroJuris database; this returned 14 energy facilities not in the NUMIES database, of which 10 met our criteria for inclusion.

The MicroJuris search yielded 51 rulings (counting only the highest court decision for each case) belonging to 35 facilities. To put these figures in some context, by 2016 Chile had 135 energy facilities. Some of these may not be operational (e.g., due to age), and not all the litigated facilities were built (e.g., HidroAysén’s license was eventually cancelled). Nevertheless, 35 litigated facilities compared to 135 facilities nationwide or to 1153 EIA decisions involving energy projects suggests that the vast majority of energy facilities and EIA licenses have not been litigated.

3.2. Data collection in Colombia

A request for information to the National Environmental Licensing Agency (ANLA, in Spanish) returned 1133 energy, mining, and hydrocarbon projects that underwent review between 1993 and 2017. These records contained 133 energy facilities. This seemed low because the Mining Ministry reported that 200 energy facilities existed nationwide. An in-person search at ANLA’s archives yielded an additional 19 energy facilities. Triangulating across ANLA’s archives, ANLA’s digital records and the Mining Ministry’s information, we determined that 103 facilities held an EIA license. We then used three search engines operated by Colombia’s judiciary to locate possible litigation against these facilities. The first two engines are operated by the Council of State and the Constitutional Court, which hear appeals against *tutelas* and *acciones*.⁵ The third is the judiciary’s general search engine which includes lower court decisions.

Across the three engines we searched for each energy facility and used keyword searches (e.g., “energy”, “dams”, “thermoelectric plant”, etc.). This process yielded more than 5000 records of judicial

⁴ In Chile, weak RP can be dismissed without a hearing if the claim is filed more than 30 days after the alleged acts or if it fails to specify acts that violate a constitutional right. A similar provision does not exist in Colombia, and mechanisms for filtering *tutelas* are currently being considered.

⁵ Colombia’s Supreme Court was excluded from our analysis because it hears civil, criminal and labor law cases.

proceedings related to energy facilities. Most were excluded: instead of EIAs, they pertained to questions of property rights, health impacts raised outside of the licensing process, lack of electricity services or issues around mining. We also excluded ongoing cases (as of December 31, 2017). This left a database of 30 EIA-related rulings pertaining to 14 energy facilities. For some context and comparison to Chile, in Colombia we found 14 litigated energy facilities of a total of 103 operating facilities which received EIA licenses, or a total of 200 past and planned energy facilities. The Ministry's 200-figure includes projects built before 1993, when EIAs became required, and proposed projects that have yet to apply for a license. Thus, as in Chile, only a small proportion of facilities have been litigated.

In Chile we relied on a corporate database (MicroJuris) while in Colombia we relied on search engines maintained by the judiciary. Case-identification may thus be higher in Colombia than in Chile, where MicroJuris may not capture all activity in lower courts. Although this can only be remedied by visiting each *Corte de Apelación* in Chile, our case identification is in-line with findings by Chilean scholars (Tironi and Percovic, 2016; Cordero et al., 2017).

Both co-authors collaboratively codified legal cases by type of energy source, identity of the defendant and claimant, type of court, and whether the courts accepted, rejected or partially accepted the case. This information was typically reported in the rulings.

4. Results

4.1. Descriptive statistical summary

Hydroelectric dams were the most litigated form of energy (68% of total, Table 2). In Chile cases against coal-powered plants followed, and in Colombia those against transmission lines. A handful of cases were repeatedly litigated—this is true of 8 facilities in Chile and 4 in Colombia. Two dams stand out as particularly litigious: HidroAysén in Chile (7 rulings) and El Quimbo in Colombia (12 rulings).⁶ The presence of these highly litigious projects suggests that communities do not object to energy production per se, but to specific projects they consider to be particularly harmful to society or a locale. Litigation is also unevenly distributed over time: it increased in 2008 from between 0 and 2 cases per year to 5 or more since then (Fig. 1).

In Chile, corporations were the most frequent claimant (43% of cases, Table 3), followed by civil society organizations (CSOs) and individuals. However, as explained in the next sub-section, the cases brought by individuals were often similar to those brought by CSOs; together, these actors were more frequent claimants than corporations (33% and 20%). Regarding defendants, state agencies were the most common target (71%), typically because of their role in the EIA process, either as decision-maker, reviewer, or land-use planner. Chile's Water Agency was also a frequent defendant because of its role granting water rights (Bauer, 1998). Corporations were defendants (28% of cases) when accused of poor practices concerning compensation, safety, provision of environmental information, or acting in ways that violate free enterprise.

The situation in Colombia is different: there, CSOs (23%) and individuals (53%) acted as claimants more frequently than other actors (Table 3). As analyzed in the next section, the cases brought by individuals were significantly different from those of CSOs. In terms of defendants, corporations were most targeted, either on their own (40%) or together with a state agency (27%). This is common in *tutelas*, with plaintiffs typically demanding in the same lawsuit stricter review or monitoring from state agencies and compliance with EIA obligations

⁶ Other litigious cases are: in Chile, Bocamina (4), Alto Maipo (2 rulings), La Higuera (4), Osorno (2), Pacifico (2), Rucatayo (2), and Tocopilla (2). In Colombia, Urrá I (5), Anchicayá (2), and San Marcos Guachal y San Marcos Codazzi (2).

Table 2

Litigation by Energy source, 1998–2016.

	Chile		Colombia		Total	
Hydroelectric dam	33	65%	22	73%	55	68%
Coal-fired power plant	13	26%	1	3%	14	17%
Transmission line	2	4%	6	20%	8	10%
Wind	2	4%			2	2%
Biomass	1	2%			1	1%
Electrical station			1	3%	1	1%
Total	51		30		81	100%

Number and percentage, rounded to nearest whole number.

from corporations. Many of the cases with joint state/corporate defendants reflected a special type of case prevalent in Colombia: litigation about census counts concerning the El Quimbo Dam (Fig. 2). Here, individuals and communities sought to be counted within the dam's impact area to qualify for compensation. Similar cases, though in smaller numbers, were brought against other dams.

Litigation initiated to defend the right to live in a clean environment was also common (Fig. 2). At first sight, descriptive results confirm each judiciary's reputation. Chilean courts rejected most cases (63%), while Colombian courts accepted half the cases they reviewed (Table 4). Accept and partial accept here mean judicial recognition that the claimants had a valid complaint, either wholly or in part. In cases that invoked environmental or participatory rights, "accept" or "partial accept" indicate that courts agreed that a violation of those rights had taken place (in subsequent sections we collapsed "accept" and "partial accept" due to the low numbers in this category). "Reject" means the opposite, with courts denying the claims for substantive or procedural reasons.

4.2. What did claimants set out to do, and how successful were they?

CSOs brought most cases invoking the rights to live in a clean environment and to participate in environmental decision-making (Fig. 3).⁷ Though cases involving these rights were not the most common type of litigation, they were the most important for CSOs. A cross-tabulation reveals that in Chile individuals also brought many cases involving these rights, justifying that individuals and CSOs be counted together in this case (Table 5). By contrast, in Colombia individuals brought many cases about the census issue, while CSOs exclusively took the lead on participation—for instance, every case they brought invoked C169. The other claimants analyzed, state agencies or corporations, rarely invoked environmental or participatory rights.

Given that CSOs are the primary organizations fighting for environmental and participatory rights in court, their rate of success matters a great deal for society. Overall CSOs and corporations had similar rates of success and failure in court (Fig. 4). But the variation by country suggests that Colombian courts are more likely to accept claims made by CSOs than Chilean courts. Counting Chilean CSOs and individuals together, courts accepted 7 and rejected 21 of these cases (Table 6). By contrast, in Colombia, CSOs won 6 out of 7 cases they brought to court. In summary, without correcting for mitigating factors like the quality of the cases or a facility's characteristics, environmental and participatory rights cases have been typically brought by CSOs, with higher rates of acceptance in Colombia than in Chile. Notably, in Chile (but not in Colombia), individuals have also brought many cases invoking these rights.

Also noteworthy is Chilean corporations' high rate of acceptance when acting as claimants: courts accepted 12 of their cases and rejected 10 (Table 6). These cases were about property rights (particularly

⁷ Because of the small number of cases in cross-tabular analysis, we report number of cases rather than percentages.

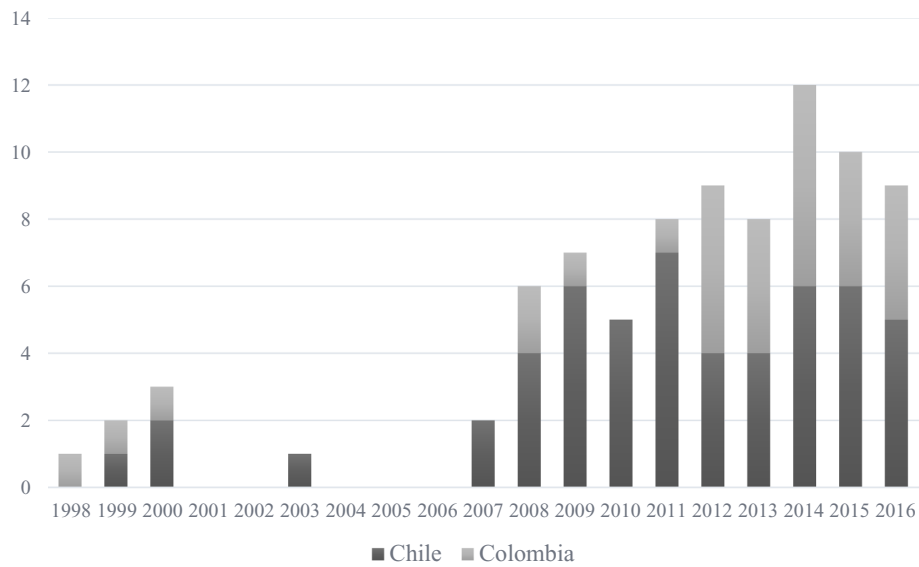


Fig. 1. Total cases, 1998–2016.

Table 3
Claimants and defendants.

	Chile		Colombia	
	Claimants	Defendants	Claimants	Defendants
Civil society (CSOs)	17	33%	7	23%
Individuals	19	20%	1	2%
Corporation	22	43%	16	53%
State agency	2	4%	3	10%
State & Corporation			12	40%
			4	13%
			10	33%
			8	27%

Number and percentage, rounded to nearest whole number. No total is given because each case may have involved more than one claimant.

water), rules and regulations, and fines. In four of these cases corporations obtained from the courts a reduction or cancellation of fines imposed by state agencies for violating environmental codes. The Colombian situation is altogether different. Corporations were claimants in just three cases, two of which involved substantive issues about the same project (Anchicayá Dam). Finally, Colombia's state agencies

Table 4
Court decisions.

	Chile		Colombia	
	Number	Percentage	Number	Percentage
Accept	17	33%	15	50%
Partial accept	2	4%	1	4%
Reject	32	63%	14	47%

Number and percentage, rounded to nearest whole number.

successfully argued 3 (of 4) cases on the census issue at El Quimbo Dam.

4.3. Did results vary by defendant or type of energy?

Given that state agencies are often the defendant in these cases, it is significant (and expected given the trends described thus far) that the cases against them tended to be rejected by courts, particularly in Chile (Table 7). A typical case required the court to assess if state agencies had considered sufficient evidence in granting EIA licenses to rule out potential environmental impacts. Chilean courts tended to defer to state

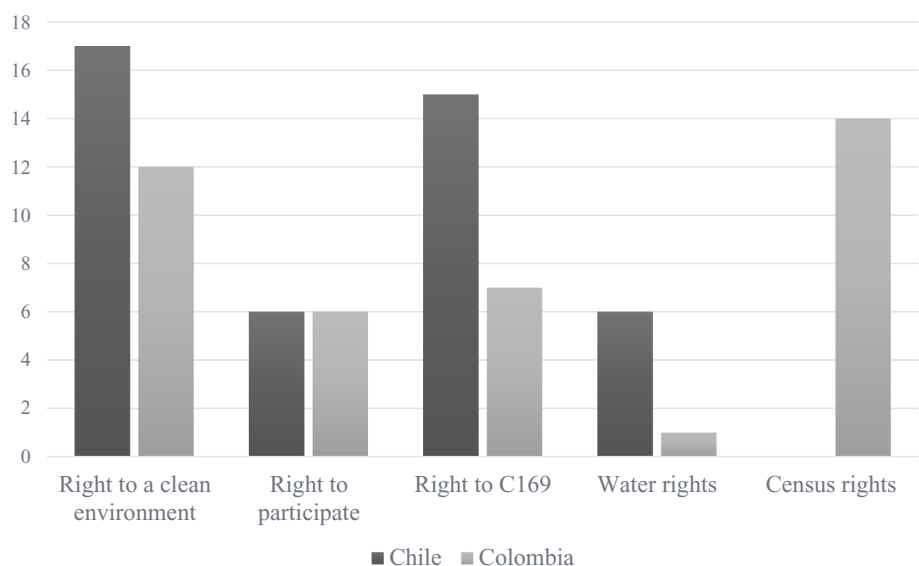


Fig. 2. Rights invoked in Chile and Colombia.

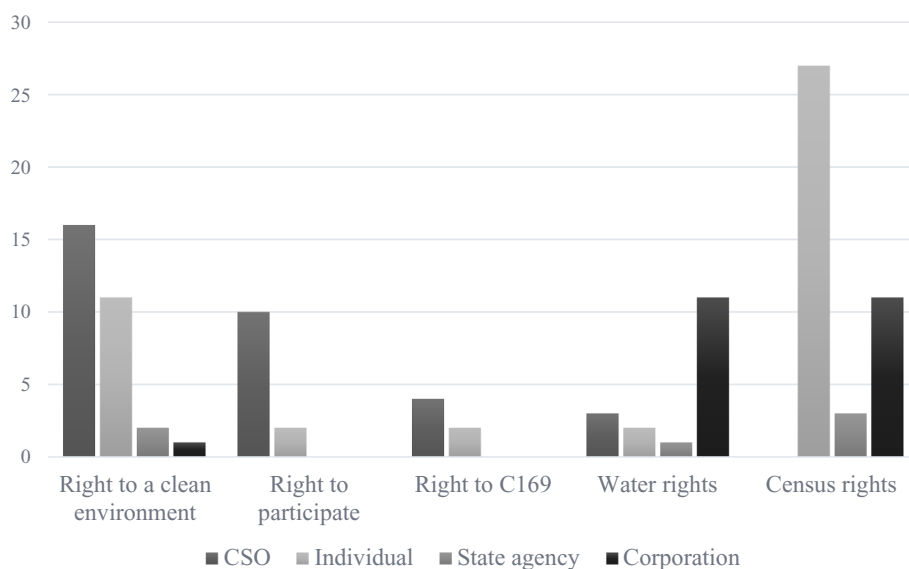


Fig. 3. Rights invoked by Claimant (country aggregates).

Table 5 Rights invoked by claimant.

	Chile				Colombia			
	Env.	Part.	C169	Water	Env.	Part.	C169	Census
CSO	12	4	4	3	4	6	7	
Individual	5	2	2	2	6			11
Corporation				10	1			
State	1			1	1			3

Number of cases. Key: Env. = Clean environment; C169 = ILO Convention 169 on Prior Consultation for Indigenous groups; Part. = Right to participate in EIA decisions; Water = Water rights; Census issues. No total is given because each case may have involved more than one legal claim.

agencies' judgement, arguing they had considered sufficient evidence and thus rejecting claimants' arguments that the project would cause negative impacts that had been insufficiently evaluated during the EIA process. The results by country again suggest that Colombian courts tend to be more progressive in the sense that they rejected half the cases

Table 6 Court decisions by claimant.

	Chile		Colombia	
	Accept	Reject	Accept	Reject
CSO	5	12	6	1
Individual	2	9	6	10
Corporation	12	10	1	2
State	1	1	3	1

Number of cases.

against state agencies, which means an implicit or explicit acceptance of the claims made by CSOs (which tended to be about environmental and participatory rights). This trend is also true of cases targeting both corporations and state agencies, which were common in Colombia. Nevertheless, in both countries, about half the cases brought against corporations were dismissed.

Finally, we analyzed how the type of energy project correlates to the legal claim made and the results. Because some sources of energy can

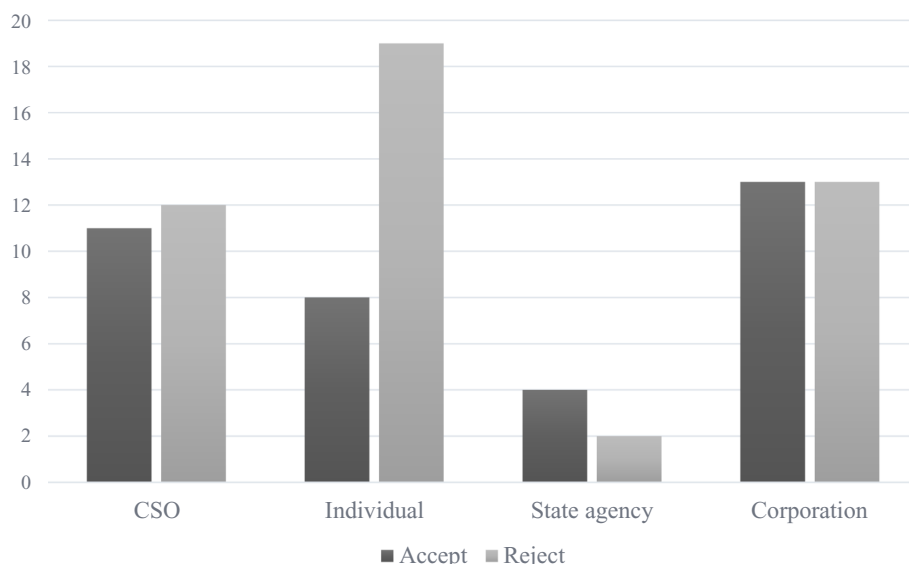


Fig. 4. Court Decisions by Claimant (country aggregates).

Table 7
Court decisions by defendant.

	Chile		Colombia	
	Accept	Reject	Accept	Reject
State and corporation			5	3
Corporation	7	7	6	6
State agency	11	25	5	5
Individual	1			

Number of cases.

dominate, the type of development may be a central driver of litigation trends. Indeed, rejection rates were higher for cases against hydroelectric dams (Fig. 5). In Chile, courts tended to accept more cases brought against coal-powered plants (7 of 13 cases, Table 8), which is significant because 7 of these cases were about environmental rights and a quarter about participatory rights (Table 9). By contrast, many cases against hydroelectric dams in Chile were about water rights, not environmental rights. In Colombia, environmental and participatory rights figured most in cases against transmission lines, whereas cases against dams tended to be about census questions (Table 9).

5. Discussion

At first glance, this data suggests that litigation against energy infrastructure increased between 2000 and 2016, as denounced by business and political elites in each country. However, disaggregating the numbers according to the types of energy and claims being made reveals a number of factors that help explain this increase. First is rising discontent with one form of energy in particular: hydroelectric dams. After decades of dam construction, communities across Latin America have been contesting these mega projects that cause displacement and ecological destruction (AIDA, 2009). In addition to environmental and participatory rights, however, dams were also highly litigated because of water rights in Chile and census issues in Colombia. Therefore, many cases that appear to be about EIAs are in fact about other issues which play a role in the licensing decision but are not central to environmental impact review.

Second, litigation increased during a period in which the construction of energy facilities also increased. In Chile, this translates into several cases against coal-powered plants, and in Colombia into cases against transmission lines. The temporality of cases reflects economic cycles of investment as well as legal changes. Using this analysis as a benchmark, we expect future litigation trends to fluctuate. Litigation may increase due to new judicial mechanisms outlined in Section 2, but may decrease as both countries switch away from dams to renewable energy facilities.⁸ Water rights or census issues should be far less important to wind and solar facilities. If this switch includes also a decline in coal and distributed facilities that do not require long-distance transmission lines, then litigation patterns would significantly deviate from this record.

CSOs are taking the lead in litigating against energy facilities for infringing environmental and participatory rights; though the total number of cases remains low when compared to the number of projects submitted for EIA review or as a proportion of EIA-related litigation, nevertheless they are significant. In particular, cases invoking C169 are still few: just 6 in Chile (of 51) and 7 in Colombia (of 30). How these trends are shaped by the configuration of participatory mechanisms, which differ greatly in each country, requires further interrogating issues related to mobilization, legal advice, and judicial access.

⁸ Since 2013, all but 7 of Chile's 22 new energy facilities were either wind or solar. Progress in Colombia has been slower, but as of writing the government was working to award 23 contracts for renewable energy projects.

Across several indicators, this data shows that CSOs and individuals bringing environmental and participation rights cases have had a hard time in Chilean courts, which rejected many of the claims brought by CSOs and individuals (21–7) as well as claims made against state agencies (25–11). Moreover, they accepted 12 of 9 cases brought by corporations, leading in four of these cases to environmental fines being reduced or eliminated. Colombian courts, by contrast, accepted 6 of 7 cases brought by CSOs. This conforms with a scholarship that has labeled Chilean environmental politics, courts included, as “conservative” because of a propensity to reject claims that invoke environmental or participatory rights and instead defer to state authority in EIA decisions or corporate demands. Colombian courts appear to offer a perfect contrast, making progressive decisions that uphold environmental and participatory rights.

However, these terms fail to capture the full import of these decisions and obscure potential dynamism in these judicial behaviors. First, courts accepted claims invoking environmental and participatory rights for a range of reasons, including simple failure to comply with existing rules and regulations, and typically prescribed re-doing parts of the EIA. For example, courts often required agencies or developers to re-do a specific aspect of the impact studies or participatory meeting, or to expand compensation measures. Rarely did courts send a project back to the drawing board to consider alternative locations, designs, or energy sources that might significantly reduce or eliminate certain impacts, nor cancel a project altogether. Similarly, courts rejected some claims for reasons that raise questions about how effective access is even for RP and *tutela* cases. For instance, some cases were rejected because claimants could not prove they would suffer a harm, had missed time-limits, presented a legally deficient case, or lacked evidence. These issues point to a need to close the gaps in financial resources and access to scientific evidence between corporations and CSOs. But they point also to the need to seriously consider an ongoing demand made by CSOs and affected communities for stronger oversight of projects through EIAs, including the ability for public authorities (including communal ones) to veto projects or require thorough vetting of siting and design decisions.

Second, these are very recent behaviors—prior to 2008, there were almost no cases against EIAs. And this area of law is rapidly changing thanks to new doctrines, like C169 or rights of nature, and the very recent Escazú Agreement. Were this to be ratified EIA-related litigation would change—increasing if states refuse to comply with treaty obligations which require stronger participatory rights than currently exist in either Chile or Colombia, or decreasing if communities feel the state is guaranteeing their rights. Escazú's future notwithstanding, this analysis suggests that efforts to reduce litigation by streamlining EIA procedures are misguided: there is no evidence of a barrage of unfounded litigation nor of over-zealous courts indiscriminately pushing environmental or participatory rights. Rather, relatively few facilities were litigated by groups seeking to democratize energy decisions or prevent environmental harms. In Chile, but not in Colombia, corporations are also frequent claimants.

6. Conclusions

This article assessed environmental and participatory rights in Chile and Colombia by examining the frequency and results of litigation involving EIAs. Our analysis allowed us to delineate more nuanced observations regarding EIA-related litigation in Latin America based on variables such as who were the claimants and the defendants, what legal claims were they mobilizing, and what type of development projects were they challenging. In Chile and Colombia, few EIAs are litigated, hydroelectric dams are most litigated, and the rights invoked vary widely. Therefore, litigation is unlikely to have posed a barrier to economic growth: indeed, many cases from 2000 to 2016 involved issues like water rights or census counts that were unrelated to the substance of EIAs nor to environmental and participatory rights. In Chile,

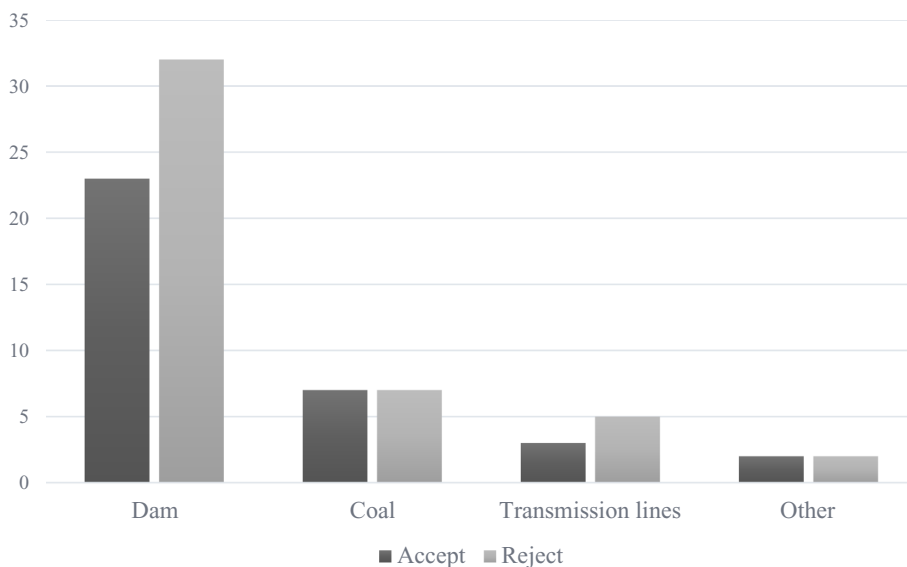


Fig. 5. Court Decisions by Energy source (country aggregates).

Table 8
Court decisions by energy source.

	Chile		Colombia	
	Accept	Reject	Accept	Reject
Coal	7	6		1
Dam	11	22	12	10
Transmission lines		2	3	3
Other	1	2	1	0

Number of cases.

Table 9
Rights invoked by energy source.

	Chile				Colombia			
	Env.	Part.	C169	Water	Env.	Part.	C169	Census
Coal	7	3	1		5	4	5	14
Dam	9	2	3	15	6	1	1	
Transmission lines			1					
Other	1	1	1		1	1	1	

Number of cases. Key: Env. = Clean environment; Water = Water rights; C169 = ILO Convention 169 on Prior Consultation for Indigenous groups; Part. = Right to participate in EIA decisions. No total is given because each case may have involved more than one legal claim.

corporations were also avid users of the courts, which rejected a majority of claims—this rate was particularly high for CSOs and individuals. In Colombia, CSOs took the lead on environmental and participatory rights cases, and courts accepted most of the cases they brought.

Courts are a key forum for the defense of participatory and environmental rights, and will continue to be so as new environmental doctrines are negotiated and adopted. These include recent legal developments such as the UN Special Rapporteur for Human Rights and the Environment report on the links between the right to a clean environment, participation, and access to information, as well as the Escazú Agreement. The volume of litigation and judicial behavior are likely to change in response to these advances as well as a growing preference for renewable energy over hydroelectric dams.

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Declarations of competing interest

None.

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