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## Just Transition Litigation in Latin America: An Initial Categorization of Climate Litigation Cases Amid the Energy Transition

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**Authors**

Maria Antonia Tigre, Lorena Zenteno, Marlies Hesselman, Natalia Urzola, Pedro Cisterna-Gaete, and Riccardo Luporini

**JUST TRANSITION LITIGATION IN  
LATIN AMERICA:**

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**By Maria Antonia Tigre, Lorena Zenteno,  
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Cisterna-Gaete, Riccardo Luporini**

**January 2023**

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# **JUST TRANSITION LITIGATION IN LATIN AMERICA: AN INITIAL CONCEPTUALIZATION OF CLIMATE LITIGATION CASES AMID THE ENERGY TRANSITION**

**By Maria Antonia Tigre, Lorena Zenteno, Marlies Hesselman,  
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## EXECUTIVE SUMMARY

To achieve the long-term temperature goals of the Paris Agreement, states need to rapidly reduce reliance on fossil fuels and scale up the use of alternative resources. This transition away from fossil fuels will bring profound and wide-ranging shifts to our daily lives, and, in particular, affect labor forces that still rely on these sectors. In addition, as the attention of governments and investors shifts to new locations, communities, or laborers that will drive renewable energy production, transmission, and service delivery, there is a risk that new vulnerabilities will be created and locked in. Decarbonization policies may result in (new) “winners and losers,” especially if the burdens and benefits of renewable energy production and consumption are unfairly distributed. For the energy transition to succeed, alternative decent job opportunities must be guaranteed for workers in emissions-intensive jobs, and affected communities must be included in the process. This is part of the *just transition*, which requires everyone to be able to reap the benefits and participate effectively and inclusively.

This report treats “just transition” as a three-fold concept that encompasses the dimensions of (i) a clean environment, (ii) decent jobs, and (iii) affordable access to essential goods and services for the enjoyment of human rights. It also considers that a just transition must be guided by distributive, procedural, restorative, and recognition justice principles to ensure that no one bears a disproportionate burden during or as a result of the transition. Within this context, just transition litigation is arising, questioning how the burdens and benefits of decarbonization policies and projects are distributed. Building on the specialized literature that observes a rise in litigation seeking more ambitious climate change policies across the Global South, this study considers the rise of *just transition litigation* in Latin America. We define just transition litigation as such:

*“Just transition litigation questions the distribution of the benefits and burdens of transition policies and activities towards net zero-emission and climate-resilient societies amongst local communities and affected stakeholders. Litigators typically invoke human rights but may rely on other national and international laws and principles. Just transition cases are not necessarily pro- or anti-climate action. Instead, they demand that climate action is undertaken in a just and inclusive manner with attention to those in vulnerable situations.”*

Just transition litigation is a novel field representing a sub-set of climate change litigation cases that is under-researched and studied. Our novel comparative analysis of legal developments found in 20 just transition litigation cases in four Latin American countries questions whether initiatives for achieving energy transformation in the region may have erred in failing to consider key just transition principles or dimensions, leading applicants to bring legal cases to claim their rights or demand more just solutions. The cases found – limited to the energy sector – not only question decarbonization policies or projects (in typical anti-climate cases) but also challenge subsidies to fossil fuels or other incentives contrary to a just transition.

Based on this subset of cases, the report proposes an initial categorization of just transition litigation. The first set of categories identified were of a factual and practical nature, giving a sense of (i) *time* (i.e., in which year was a case filed or concluded) and (ii) *place* (i.e., in which jurisdictions was the case filed). In addition, to understand the key players in just transition litigation, we analyzed the (iii) *types of actors* involved in litigation.

## **Time**

Just transition litigation is a phenomenon that has developed in recent years, and all cases were filed since 2016, with a slight increase since 2020. This indicates how just transition litigation cases are growing as countries respond to the global long-term goal of emissions reductions agreed upon in the Paris Agreement. Despite the small sample of cases, the increase in just transition litigation cases, which has more than doubled in the past 3 years, shows a rising trend in the region.

## **Place**

In terms of geographical distribution, cases were identified in four Latin American jurisdictions: Mexico (10), Chile (5), Brazil (1), and Colombia (1). In addition, two cases were identified in France (in relation to decarbonization policies developed in Mexico), highlighting the transnational aspects of just transition.

## **Types of actors**

We further analyzed who the plaintiffs (or claimants) and who the defendants are in just transition litigation cases. We have so far observed that while the majority of cases were filed by (i) NGOs (7) and (ii) indigenous communities (4), other stakeholders have also been responsible for bringing just transition litigation cases. Cases were likewise filed by (iii) government agencies (2), (iv) political parties (2), (v) children and youth (1), and (vi) union workers (1). Concerning the defendants, the vast majority of cases were primarily filed against government agencies (15), either as sole defendants (14) or in tandem with private companies (1). Three cases were filed against private companies, and one was filed against a public company.

## **Types of (energy) industry**

We further assessed the cases according to the industry involved. Just transition litigation has so far addressed decarbonization policies leading to four types of cases: (i) decommissioning of existing fossil fuel projects (2), (ii) mining or infrastructure of new technologies (for example, lithium mining) (4), (iii) new technologies in renewable energy (10), and (iv) subsidies for fossil fuel projects (1). Although many of these cases would traditionally be considered environmental litigation – as these refer to the socio-environmental impacts of mining and energy projects – they peripherally relate to climate change with a broad decarbonization strategy for an energy transition at its core.

## **Human rights**

Given our definition of just transition as a three-fold concept that encompasses labor, human rights, and the environment the cases observed are grounded on different human rights that relate to these categories: (i) labor rights (2), (ii) indigenous peoples' rights (7, being 1 along with human rights claims and 3 with environmental rights claims), and (iii) environmental rights (11; 5 specifically related to the right to a healthy environment, 3 related to the right to a healthy environment along with other human rights and 3 related to environmental rights and indigenous rights). Plaintiffs have often used a combination of these rights to substantiate their claims, e.g., environmental rights and indigenous peoples' rights.



## **Justice angle**

Just transition is undoubtedly a matter of fairness. Different principles of justice are featured in the examined cases, as invoked by the plaintiffs or recognized by the courts. We examined and discussed two main principles of justice, distributive and procedural justice. The distributive justice principle incorporates two dimensions: intra- and inter-generational equity. The former refers to allocating burdens and resources within the present generations, and the latter focuses on alleviating future generations' burdens. Only one case refers to intra-generational equity, while five cases mention inter-generational equity in the plaintiff's reasoning.

## **Climate angle**

We further assessed how these cases refer to the climate angle, asking whether they (i) refer to long-term temperature goals of the Paris Agreement (11), (ii) refer to NDCs (8), and/or (iii) relate to policies and activities that are necessary to achieve decarbonization to net zero emissions (including renewable energy projects, or mining of minerals for renewable energy technology) (12). It should be noted that the climate angle in the cases in the last category is often not obvious. At first glance, these cases might appear similar to traditional labor rights or environmental law cases. However, because the project is pushed forward due to a decarbonization policy or law (which, in turn, is adopted in compliance with the Paris Agreement or an NDC), we consider these cases as just transition cases for the purposes of this research.

## **Objectives of Just Transition Litigation**

In addition, we analyzed whether cases are informed by pro- or anti-energy transition sentiments or both. Whilst just transition cases may be informed by “anti” energy-transition objectives (or “anti-climate,” as the existing scholarship has characterized them) (6), we also found cases that oppose fossil fuel subsidies, policies, or projects, without opposing the energy transition as such (15). Our report thereby sheds light on a new type of climate litigation that uses just transition framing to promote more just pro-climate policies. However, it should be noted that the overall objectives of plaintiffs are not always clear from the petitions: short-term objectives may have anti-regulatory effects, which may not directly align with the long-term goals and consequences of climate litigation.

## **“Success” and remedies in Just Transition Litigation**

While most cases are still pending, we further discuss the outcomes observed so far through the lens of remedial justice, suggesting a categorization of the remedies requested by plaintiffs and provided by courts. With the limited data we have so far, we can conclude that just transition litigation cases do not pose a threat to the energy transition or broader decarbonization processes. However, they require fulfillment of certain procedural requirements, which may delay decarbonization policies in Latin America. These results show that ensuring that there is adequate participation of all stakeholders affected in the energy transition – among other substantive and procedural requirements depending on the jurisdiction – are essential to avoiding litigation and further delays to national decarbonization.

## **Conclusions**

This report concludes with initial lessons on the study of just transition litigation in Latin America for litigators, judges, and scholars while also suggesting a research agenda to complement the gaps in the existing knowledge of this field. The authors hope that others build on this report to continue filling the gap on just transition litigation, especially in other regions worldwide. A full list of the cases cited here is included in Appendix A of this paper.

## TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	1
<b>2. METHODOLOGY</b>	5
2.1. A definition of just transition	5
2.2. A definition of just transition litigation	10
2.3. Selection of just transition cases in Latin America	13
<b>3. CATEGORIZING JUST TRANSITION LITIGATION: AN INITIAL PROPOSAL &amp; FINDINGS</b>	15
3.1. The when, where, and who of just transition litigation in Latin America	16
3.2. Categorization of cases by the industry involved	22
3.2.1. Just transition litigation related to decommissioning fossil fuel projects	22
3.2.2. Just transition litigation related to mining or infrastructure in support of the deployment of new renewable energy technologies	24
3.2.3. Just transition litigation related to renewable energy projects	26
3.2.4. Just transition litigation related to subsidies for fossil fuel projects	28
3.3. Categorization of cases by rights involved	29
3.3.1. Labor rights	30
3.3.2. Indigenous peoples' rights	31
3.3.3. The right to a healthy environment and other substantive "environmental rights"	33
3.4. Categorization of cases according to the justice angle	34
3.4.1. Distributive justice	35
3.4.2. Procedural justice	36
3.5. Categorization of cases according to the climate angle	38
3.5.1. Reference to the Paris Agreement in the initial petition	38
3.5.2. Reference to the NDC in the initial petition	39
3.5.3. Reference to decarbonization policies in the initial petition	39
3.6. Objectives of Just Transition Litigation	40
<b>4. REMEDIES IN JUST TRANSITION LITIGATION</b>	43
4.1. Remedies Requested	44
4.2. "Success" of Just Transition Litigation	44
<b>5. CONCLUSIONS AND LOOKING AHEAD</b>	46
<b>ANNEX 1. JUST TRANSITION LITIGATION CASES IN LATIN AMERICA</b>	48

# 1. INTRODUCTION

The 2015 Paris Agreement has a long-term goal of stabilizing greenhouse gas (GHG) emissions in the atmosphere in such a manner that global warming can be safely kept well below 2°C and preferably to 1.5°C, compared to pre-industrial levels.<sup>1</sup> To achieve that, there is a short-term global need to rapidly reduce reliance on fossil fuels and scale up the use of alternative resources. These changes involve abandoning all plans for new coal-fired power plants in the pipeline and reducing existing coal power capacity by 50% by 2030. In turn, energy transition solutions must produce a total of 8,000 Gigawatt (GW) of renewable energy power by 2030.<sup>2</sup>

The scale of transformations needed in everyday life until 2050 is profound, wide-ranging, and likely to affect many aspects of life. In particular, it will involve significant shifts from the fossil fuel sector, depending heavily on regions with fossil fuel resources, infrastructures, and industries, as well as related labor forces, to a more high-tech, decentralized, and nimble renewable energy sector. Natural energy resources such as wind, water, solar, geothermal, and other natural energy sources are predicted to cause a drastic shift in the locations and processes for producing and extracting energy. That includes the need for mining rare minerals to support renewable energy technologies, such as lithium, copper, and cobalt for producing solar photovoltaic technologies (PV) or batteries. According to the International Energy Agency (IEA), the demand for such minerals may increase sevenfold by 2050. The IEA also notes that environmental restoration works will be needed at fossil fuel mining sites.<sup>3</sup>

In this context, it is no surprise that the International Labour Organization (ILO) estimates that the transition could create millions of new job opportunities worldwide, even if many existing jobs in different GHG-intensive sectors would be lost at the same time. The ILO and the International Renewable Energy Agency (IRENA) recently estimated that “a transformed energy sector” under an ambitious scenario associated with keeping global warming under 1.5°C could encompass a total of 112 million jobs in 2050, of which 43 million are in the renewables sector (as opposed to earlier estimates of 18 million renewable energy jobs by 2050). About half of such jobs would require primary or lower secondary education, although likely with some different skill sets compared to previous fossil fuel jobs.<sup>4</sup> In terms of prospects for Latin America, the ILO estimated recently that in fossil fuel electricity, fossil fuel extraction, and animal-based food production, about 7.5 million jobs might be lost in the transition to a net-zero carbon economy. In contrast, approximately 22.5 million new jobs could emerge in the agriculture and plant-based food production, renewable electricity, forestry, construction, and manufacturing sectors.<sup>5</sup> The ILO

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<sup>1</sup> Decision 1/CP.21 ‘Adoption of the Paris Agreement’ (29 January 2016) FCCC/CP/2015/10/Add.1.2 (Paris Agreement)

<sup>2</sup> KEY RECOMMENDATIONS AND MILESTONES TOWARDS CLEAN, AFFORDABLE ENERGY FOR ALL BY 2030 AND NET ZERO EMISSIONS BY 2050 (UNITED NATIONS AND HIGH-LEVEL DIALOGUE ON ENERGY, 2021)

[https://www.un.org/sites/un2.un.org/files/2021/09/summary\\_-\\_ministerial\\_thematic\\_forums\\_for\\_hld\\_energy\\_of\\_june2021\\_advanced\\_copy.pdf](https://www.un.org/sites/un2.un.org/files/2021/09/summary_-_ministerial_thematic_forums_for_hld_energy_of_june2021_advanced_copy.pdf) (last visited Dec 28, 2022)

<sup>3</sup> Laura Cozzi & Brian Motherway, *The importance of focusing on jobs and fairness in clean energy transitions*, <https://policycommons.net/artifacts/1807341/the-importance-of-focusing-on-jobs-and-fairness-in-clean-energy-transitions/2541201/> (last visited Dec 6, 2022)

<sup>4</sup> Michael Renner et al., *Renewable energy and jobs: annual review 2022* (IRENA and ILO, 2022), <https://policycommons.net/artifacts/2685048/renewable-energy-and-jobs/> (last visited Dec 28, 2022)

<sup>5</sup> CATHERINE SAGET ET AL., EL EMPLEO EN UN FUTURO DE CERO EMISIONES NETAS EN AMÉRICA LATINA Y EL CARIBE (Inter-American Development Bank) (2020), <https://www.econstor.eu/handle/10419/222572> (last visited Dec 6, 2022) 12-13

noted that the impact of job loss in the fossil fuel sector might be limited since such jobs would represent less than 1% or even 0.1% of all jobs in most Latin American countries. Nevertheless, these jobs may heavily concentrate in certain regions or communities, meaning that local impacts could be severe.<sup>6</sup> For the transition to succeed, alternative and decent job opportunities must be guaranteed for laid-off workers in emissions-intensive jobs. Moreover, as fossil fuel sectors are dismantled, or food production systems shift to more sustainable farming practices, workers in such sectors will likely require financial support and re-employment programs. This is part of the *just* transition.

Besides affecting jobs and livelihoods, the global energy transition may affect people's ability to access affordable basic (energy) services, both positively and negatively. At present, 733 million persons worldwide still lack any basic access to electricity at home, while about 2.4 billion persons rely mostly on solid fuels for cooking, heating, or lighting.<sup>7</sup> Also, in Latin America, many households struggle to access and afford adequate, reliable, and sustainable energy services, with adverse effects on health, livelihoods, social inclusion, and development.<sup>8</sup> Moving forward on “universal access to modern, affordable, reliable energy access” – a goal set out in United Nations Sustainable Development Goal (UNSG) No. 7<sup>9</sup> – may require public authorities to adopt pro-poor policies, including (targeted) subsidies or other forms of support to ensure universal access to services, renewable energy, and energy efficiency.

Finally, as the attention of governments and investors shifts to new locations, communities, or laborers that will drive renewable energy production, transmission, and service delivery, no new vulnerabilities must be created or locked in. Decarbonization policies can impact lives both positively and negatively. The transition process may therefore result in (new) “winners and losers.” A just transition implies that the burdens and benefits of this change and renewable energy production and consumption are fairly distributed. Decarbonization policies may not be implemented in such a manner as to reinforce existing (historical) injustices, marginalization, or disadvantage amongst certain communities, such as indigenous, Black, or other marginalized groups. Instead, the transition should offer an opportunity to improve living conditions for all, inclusively. If the burdens of the energy transition are disproportionately placed on some, including those with low income, resistance against climate policies and projects may arise. This risk will effectively delay climate action.

The context for just transition in Latin America comes with particular challenges and realities, which may similarly affect other Global South countries.<sup>10</sup> The Latin American region is characterized by a complex and multifaceted relationship between needs for economic development and poverty reduction on the one hand, including as fueled by fossil fuel and

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<sup>6</sup> *Id.* at 59-62.

<sup>7</sup> UN SDG 7 GLOBAL TRACKING FRAMEWORK: PROGRESS REPORT (OECD/IEA/World Bank, 2022).

<sup>8</sup> E.g. ECLAC, ENERGY IN LATIN AMERICA AND THE CARIBBEAN: ACCESS, RENEWABILITY AND EFFICIENCY (ECLAC Statistical Brief: May 2022); Harriet Thomson et al., *Understanding, recognizing, and sharing energy poverty knowledge and gaps in Latin America and the Caribbean – because conocer es resolver*, 87 ENERGY RESEARCH & SOCIAL SCIENCE 102475 (2022), <http://dx.doi.org/10.1016/j.erss.2021.102475>

<sup>9</sup> United Nations General Assembly Resolution 70/1 (UN Doc. A/RES/70/1), Transforming Our World: the 2030 Agenda for Sustainable Development (Sept. 25, 2015)

<sup>10</sup> See e.g. OECD/ECLAC/DEVELOPMENT BANK OF LATIN-AMERICA AND EUROPEAN UNION, LATIN AMERICAN ECONOMIC OUTLOOK 2022: TOWARDS A GREEN AND JUST TRANSITION (OECD Publishing, Paris: 2022) 23, identifying as structural challenges for just transition: “fragile social protection systems; low productivity; weak institutions; and an environmentally unsustainable development model.”

renewable energy production and consumption; and environmental protection and biodiversity conservation, as well as greater social justice and protection of human rights on the other. Specifically, over the past decades, Latin American countries have already implemented many large-scale infrastructural and extractive projects, including in the renewable hydro-energy, wind energy, and biofuel sectors, that led to negative human rights impacts and conflicts. Such projects are typically driven at least partly by the need for economic growth and the fight against poverty. Still, they are also conditioned by the private interests of for-profit transnational corporations and financial institutions. It is well-known that “mega-development projects” in the region (e.g., the large-scale hydropower plants built along the rivers of the Brazilian Amazon, such as *Belo Monte*, *Jirau*, and *Santo Antonio*) led to critical deleterious impacts on local people and the environment.<sup>11</sup> Environmentally, they caused deforestation and biodiversity losses, whilst socially, they led to encroachment on indigenous lands, displacement, forced relocation of traditional local communities, and dangerous and inhumane working conditions for those working at facilities. Nearby towns equally experienced an increase in violence and illicit activities.

Building on the specialized literature that observes a rise in litigation seeking more ambitious climate change policies across the Global South (so-called “pro-regulatory” climate litigation),<sup>12</sup> this study considers the rise of a specific set of climate cases that are qualified as *just transition litigation*. Just litigation cases may effectively challenge pro-climate policies, projects or activities without, however, being “anti-climate” *per se*. For example, litigants may go to court to challenge the construction of renewable energy projects or decommissioning fossil fuel mining sites or infrastructure based on other arguments, such as workers seeking protection against lost livelihoods. Our comparative analysis of just transition arguments found in a selection of cases brought in Latin American jurisdictions considers how initiatives for achieving energy transformation in this region may have erred in the way they accounted for just transition principles or demands, leading applicants to bring legal cases to claim their rights or demand more just solutions. The Latin American perspective uniquely underscores the constant dichotomy Latin American countries face between environmental protection, biodiversity conservation, and the pursuit of socio-economic development through extractive (energy) policies and activities. The Latin American experience may also highlight aspects so far neglected in (just) transition debates,

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<sup>11</sup> See, among the others, PAUL E. LITTLE, MEGA-DEVELOPMENT PROJECTS IN THE AMAZON REGION: A GEOPOLITICAL AND SOCIO-ENVIRONMENTAL ANALYSIS WITH PROPOSALS OF BETTER GOVERNMENT FOR THE AMAZON, (Derecho, Ambiente y Recursos Naturales - DAR, 2014), [https://www.dar.org.pe/archivos/publicacion/145\\_megaproyectos\\_ingles\\_final.pdf](https://www.dar.org.pe/archivos/publicacion/145_megaproyectos_ingles_final.pdf) (last visited Dec 29, 2022)

<sup>12</sup> JACQUELINE PEEL AND HARI OSOFSKY, CLIMATE CHANGE LITIGATION REGULATORY PATHWAYS TO CLEANER ENERGY (CUP 2015); Jacqueline Peel and Jolene Lin (eds), Symposium: ‘Transnational Climate Litigation: The Contribution of the Global South’ 114 AJIL UNBOUND (2020); Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 56–60 (2020), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/climate-change-litigation-in-the-global-south-filling-in-gaps/3A50045D80FCA2B898CDF89D4B391494> (last visited Dec 6, 2022); Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNATIONAL ENVIRONMENTAL LAW 77–101 (2020), <https://www.cambridge.org/core/journals/transnational-environmental-law/article/climate-litigation-in-the-global-south-constraints-and-innovations/C2FE951D203AC61414E72C9244125258> (last visited Jan 12, 2021); Hari M. Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, 114 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 61–66 (2020), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/geography-of-emerging-global-south-climate-change-litigation/7648DFF90588072308C87E5A7C497DA2> (last visited Dec 6, 2022); Juan Auz, *Human rights-based climate litigation: a Latin American cartography*, 13 JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 114–136 (2022), <https://www.elgaronline.com/view/journals/jhre/13/1/article-p114.xml> (last visited Jul 26, 2022); IVANO ALOGNA ET AL., CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES (BRILL, 2021); F. SINDICO & M. M. MBENGUE, COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS (Springer International Publishing, 2021), <https://link.springer.com/book/10.1007/978-3-030-46882-8> (last visited Dec 6, 2022)

such as high levels of labor informality, lack of implementation of (environmental) laws, and (strong) participation of indigenous and ethnic communities.<sup>13</sup> These experiences are not unique to Latin America. They may be relevant to other Global South countries, as well as some Global North countries (e.g., participation of indigenous peoples or other marginalized groups). As such, the lessons learned here expand beyond the regional context identified.

This study contributes to a perceived gap in the literature by increasing the visibility of affirmative actions for a just transition from the Global South. In addition, it improves our understanding of the phenomenon of just transition litigation through exciting novel developments, specifically in Latin America. This report is structured as follows. Section 2 introduces the methodology used to select, categorize, and analyze the cases according to our definition of *just transition* and *just transition litigation*. The section includes our proposed description of both, building on existing scholarship. Section 3, forming the core of this report, presents the just transition cases according to a set of categories identified by the authors, notably: (i) the when, where, and who of litigation (including actors of just transition); (ii) the (energy) industries involved; (iii) the human rights involved (as related to the just transition dimensions of decent work, environment and access to services); (iv) the just transition principles and dimensions of justice angle applied; (v) the climate angle; and (vi) the objectives of just transition litigation (anti- or pro-regulatory litigation). Section 5 discusses the outcomes of cases in terms of their “success” rates<sup>14</sup> and the types of remedies granted to applicants so far. Finally, section 6 concludes with lessons learned, looking ahead to the future of just transition litigation. The report includes an annex with a list of cases analyzed here.<sup>15</sup>

It should be noted at the outset of this report that while just transition litigation may target loss of jobs or undue distributions of burden and benefits in different GHG-intensive sectors – e.g., traditional food, agriculture, or transportation sectors – our study has focused primarily on litigation affecting the fossil fuels and renewable energy sector, including rare mineral mining.

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<sup>13</sup> E.g., consider Mauro Pucheta et al., *Just transition and workers’ rights in the Global South: The recent Argentine and Chilean Nationally Determined Contributions*, 13 SUSTAINABILITY: SCIENCE PRACTICE AND POLICY 9616 (2021), <https://www.mdpi.com/1245358>.

<sup>14</sup> The term “success” is taken lightly here. In climate litigation, success is often perceived as when the plaintiffs receive a positive response from the court. However, success in climate change litigation often involves a more extensive analysis of goals and consequences beyond a decision, which are beyond the scope of this report.

<sup>15</sup> With a few exceptions, cases are included in the Sabin Center for Climate Change Law’s Global Database of Climate Litigation, <http://climatecasechart.com/> (last visited Dec 29, 2022).

## 2. METHODOLOGY

This study is based on research on just transition litigation in the Latin American region. It aims to identify and categorize cases systematically, although we do not claim that the method and findings presented here are exhaustive. The report relied on the extensive set of cases outlined in the global database of climate change litigation of the Sabin Center for Climate Change Law, the *Global Climate Case Chart*, until December 2022. Additional resources include the regional climate litigation database maintained by AIDA, *Plataforma de Litigio Climático para América Latina y el Caribe*,<sup>16</sup> as well as original research into just transition litigation across Latin American countries. The present section discusses the concept of just transition and just transition litigation in further detail, then introduces the methodology for selecting, categorizing, and analyzing the cases.

### 2.1. A definition of just transition

The concept of just transition emerged in the early 1970s through the work of labor and social activist movements.<sup>17</sup> Since the 2000s, this concept emerged as the object of scholarly studies on energy transition, climate change, and sustainable development. More recently, it started to permeate the work of international organizations, including the ILO,<sup>18</sup> the United Nations Framework Convention on Climate Change (UNFCCC),<sup>19</sup> and the European Union. So far, few scholarly publications in the legal discipline have been explicitly devoted to the concept, and as such, there is significant headway to be made in this area.<sup>20</sup> As unpacked in this section, the authors define just transition as follows:

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<sup>16</sup> AIDA, PLATAFORMA DE LITIGIO CLIMÁTICO PARA AMÉRICA LATINA Y EL CARIBE, <https://litigioclimatico.com/es> (last visited Dec. 29, 2022)

<sup>17</sup> Xinxin Wang & Kevin Lo, *Just transition: A conceptual review*, 82 ENERGY RESEARCH & SOCIAL SCIENCE 102291 (2021), <https://www.sciencedirect.com/science/article/pii/S2214629621003832>

<sup>18</sup> ILO, GUIDELINES FOR A JUST TRANSITION TOWARDS ENVIRONMENTALLY SUSTAINABLE ECONOMIES AND SOCIETIES FOR ALL (ILO: Geneva 2015)

<sup>19</sup> UNFCCC, JUST TRANSITION OF THE WORKFORCE, AND THE CREATION OF DECENT WORK AND QUALITY JOBS (Technical Paper, 2020)

<sup>20</sup> E.g. IÑIGO DEL GUAYO ET AL., ENERGY JUSTICE AND ENERGY LAW (Oxford University Press, 2020); Edouard Morena, *Securing workers' rights in the transition to a low-carbon world: The just transition concept and its evolution*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 292–298, <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315312576-21/securing-workers-rights-transition-low-carbon-world-edouard-morena>; J. Timmons Roberts, *Undermining a Weak Agreement: Fossil Capitalism, Neoliberal Climate Governance, Paris and a Just Transition after Trump*, 33 CONN. J. INT'L L. 425 (2017), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/conjil33&section=23](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/conjil33&section=23); Raphael J. Heffron, *Applying energy justice into the energy transition*, 156 RENEWABLE AND SUSTAINABLE ENERGY REVIEWS 111936 (2022), <https://www.sciencedirect.com/science/article/pii/S1364032121012016>



### Box 1: Definition of Just Transition

Transitions are inherently disruptive and affect many people in distinct ways. Entire communities and workers are currently dependent on carbon-intensive economies, and moving towards decarbonization will undoubtedly impact them in ways yet to be seen. This report treats “just transition” as a three-fold concept that encompasses the dimensions of (i) a clean environment, (ii) decent jobs, and (iii) affordable access to essential goods and services for the enjoyment of human rights. It also considers that a just transition must be guided by distributive, procedural, restorative, and recognition justice principles to ensure that no one bears a disproportionate burden during or as a result of the transition.

In international and regional law, the concept of just transition is still relatively novel and just beginning to take hold. For example, the Glasgow Climate Pact adopted at the 26<sup>th</sup> Conference of the Parties of the UNFCCC (COP26) in 2021 firmly noted that States must accelerate the transition towards low-emissions systems, including “efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies while providing targeted support to the poorest and most vulnerable in line with national circumstances and *recognizing the need for support towards a just transition.*”<sup>21</sup> It also affirmed the need for just transitions that promote sustainable development, poverty eradication, decent work, and quality jobs.<sup>22</sup> In addition, the Sharm el-Sheikh Implementation Plan adopted at the 27<sup>th</sup> Conference of the Parties of the UNFCCC (COP27) in 2022 specifically outlined measures in just transition as part of the energy transition, including the need to ensure “meaningful and effective social dialogue and participation of all stakeholders.”<sup>23</sup> Specifically, the plan emphasized that “just and equitable transition encompasses pathways that include energy, socioeconomic, workforce, and other dimensions, all of which must be based on nationally defined development priorities and include social protection to mitigate potential impacts associated with the transition, and highlights the important role of the instruments related to social solidarity and protection in mitigating the impacts of applied measures.”<sup>24</sup>

A few years before, in 2019, the European Commission’s Green Deal explicitly underscored that the “transition must be just and inclusive”: a (socially) just transition entails reducing GHG emissions, creating decent jobs, (green) growth, addressing energy poverty, reducing external energy dependence and improving health and well-being.<sup>25</sup> The Green Deal currently drives all further European Union (EU) legislative energy and climate law reforms.

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<sup>21</sup> UNFCCC, Glasgow Climate Pact, Decision 1/CP.26 (1/CP.26) advance unedited version, para. 20 <https://unfccc.int/documents/310475> (last visited Dec. 29, 2022)

<sup>22</sup> *Id.*, para. 52.

<sup>23</sup> UNFCCC, Sharm el-Sheikh Implementation Plan, COP27 (FCCC/CP/2022/L.19), para. 28. See also paras. 9-10.

<sup>24</sup> *Id.*, at para. 29.

<sup>25</sup> See e.g. Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, (COM/2019/640 final) Dec. 11, 2019; EUROPEAN COMMISSION, DELIVERING THE EUROPEAN GREEN DEAL, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en) (last visited Dec. 29, 2022); EUROPEAN COMMISSION, JUST TRANSITION FUND, <https://www.europarl.europa.eu/factsheets/en/sheet/214/just-transition-fund> (last visited Dec. 29, 2022)

In Latin America, a significant development occurred through the adoption of Resolution No. 2021/3, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, by the Inter-American Commission on Human Rights (IACHR) and its Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA).<sup>26</sup> The resolution devotes a specific section to just transition and lists several relevant policies and measures in the context of human rights. It affirms, *inter alia*, that “States must take into account their human rights obligations, including labor and trade union rights, when designing and implementing policies for a transition to a carbon-free future.”<sup>27</sup> Especially, States must comply with their “human rights obligations related to the mitigation and adaptation of climate change” and “reduce the risk of potential conflicts associated with a sudden transition,” as well as a general lack of “adequate planning, which could delay efforts to establish an economy compatible with a stable climate.”<sup>28</sup>

This mandate resonates with calls by trade unions and civil society organizations in the region. For example, the Trade Union Confederation of the Americas (*Confederación Sindical de las Américas*, CSA) called for a just transition in the face of the triple challenges of climate change: protection, preservation, and public access to common goods, and the upholding principles of environmental justice.<sup>29</sup> For CSA, just transition represents a political tool for building bridges between social, labor, and ecological demands. It transcends the traditional division between the trade union and ecologist movements, as well as the rural and the urban, and supports broad socio-environmental civil society coalitions.<sup>30</sup>

Finally, at the international level, the United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights published a thematic report on the human rights dimensions of just transition. The report outlines how just transition encompasses various GHG-intensive sectors, including energy, food, mobility, and buildings.<sup>31</sup> In this sense, just transition litigation may also target other sectors beyond energy.<sup>32</sup> Specifically, the UN Special Rapporteur stated that *human rights-compliant “just transition”* processes should aim at transition policies and projects that capture the “triple dividend” of (a) cleaner environments, (b) decent jobs; and (c) improved access to affordable goods and services, to promote human rights enjoyment.<sup>33</sup>

In our definition of just transition, we further build on these three dimensions, i.e., decent work to sustain livelihoods, a clean environment, and access to essential goods and services, such as energy, transport, and water, as depicted in Figure 1 below.

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<sup>26</sup> Inter-American Commission of Human Rights, Resolution 3/2021 *Climate Emergency: Scope of Inter-American Human Rights Obligations* (Dec. 31, 2021), paras. 11-12, 30, 48-57. See Pedro Cisterne Gaete and Maria Antonia Tigre, *Inter-American Commission on Human Rights First Resolution on the Climate Emergency: Implications for Climate Litigation* (CLIMATE LAW BLOG OF THE SABIN CENTRE FOR CLIMATE CHANGE LAW, April 11, 2022), <https://blogs.law.columbia.edu/climatechange/2022/04/11/guest-commentary-inter-american-commission-on-human-rights-first-resolution-on-the-climate-emergency-implications-for-climate-litigation/>

<sup>27</sup> *Id.* at para. 48

<sup>28</sup> *Id.*

<sup>29</sup> GUÍA DE FORMACIÓN SINDICAL: LA TRANSICIÓN JUSTA COMO MARCO PARA UNA RECUPERACIÓN SOSTENIBLE EN MÉXICO (ILO, 2021) 28-29, [https://labordoc.ilo.org/discovery/delivery/41ILO\\_INST:41ILO\\_V1/1286117120002676](https://labordoc.ilo.org/discovery/delivery/41ILO_INST:41ILO_V1/1286117120002676)

<sup>30</sup> *Id.*

<sup>31</sup> HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS: JUST TRANSITION (UN Doc. A/75/181/Rev.1.), Oct. 7, 2020

<sup>32</sup> However, as noted below, this report only focuses on cases related to the energy transition.

<sup>33</sup> Human Rights Council, *supra* note 31 at paras. 8-12, 20, 24-25, 27-29, 55-57.

**Figure 1: Three-fold dimensions of just transition**



Each of these dimensions is also directly supported by international and regional human rights law. For example, decent work is protected through labor rights in ILO treaties and standards, the human right to work, and the right to decent working conditions established in human rights treaties.<sup>34</sup> A clean, healthy, and sustainable environment is indirectly protected through a range of human rights, including the right to life and health. At the regional level, it is recognized directly in the law of the Organization of American States (OAS).<sup>35</sup> At the international level, it was recently recognized by the Human Rights Council (HRC)<sup>36</sup> and the United Nations General Assembly (UNGA).<sup>37</sup> Human rights treaties more generally provide for protection for socio-economic and cultural rights, including a “right to basic public services.” In addition, special protection exists for the lives and livelihoods of indigenous communities, e.g., through rights set out in ILO Convention No. 169<sup>38</sup> and the UN Declaration on the Rights of Indigenous Peoples.<sup>39</sup> More generally, relevant rights are legally protected in various international human rights treaties, OAS treaties, and national constitutions of Latin American states. The discussion below shows that such rights are also invoked in just transition litigation.

In addition to these three *dimensions*, various principles may be associated with just transition, e.g., principles of *distributive justice*, *procedural justice*, and *restorative justice*.<sup>40</sup> Distributive justice concerns the fair distribution of benefits and available resources within society and protecting and empowering individuals and groups most affected by given policies. This principle lies at the very core of the notion of just transition and is key to the definition of just transition

<sup>34</sup> See e.g., Article 6 of the International Covenant on Economic, Social and Cultural Rights; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html> (accessed Dec. 30, 2022)

<sup>35</sup> See e.g., OAS San Salvador Protocol to the American Convention on Human Rights, art. 11, 1988; Inter-American Court of Human Rights, Advisory Opinion OC-23/17 on the Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) (Nov. 15, 2017) Serie A. 23; Inter-American Court of Human Rights, Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Judgment, (Feb. 6, 2020) Serie C. 400.

<sup>36</sup> Human Rights Council Res 48/L.23/Rev.1, U.N. Doc. A/HRC/48/L.23/Rev.1 (Oct. 5, 2021).

<sup>37</sup> United Nations General Assembly Resolution 76/300 (UN Doc. A/RES/76/300) on The Human Right to a Clean, Healthy and Sustainable Environment (Jul. 28, 2022)

<sup>38</sup> ILO Convention No. 169, Indigenous and Tribal Peoples Convention (adopted in 1989, entry into force 1991) C-169.

<sup>39</sup> United Nations General Assembly Resolution 61/295 (UN Doc. A/RES/61/295), Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007).

<sup>40</sup> See *infra* section 3.4 for a categorization of the selected cases on the basis of the “justice angle.”

litigation.<sup>41</sup> The principle incorporates both an intra-generational and an inter-generational dimension. At the same time, just transition should be based on fair processes whereby those directly affected by decisions are involved and participate in decision-making. In those cases in which transition policies and activities interfere with the rights and interests of specific individuals and groups, the harm must be repaired and restored.<sup>42</sup> Such principles tie in with accepted human rights concepts and international legal principles, such as procedural rights to information, public participation, and access to justice, free, prior, and informed consent (FPIC), the right to a remedy and reparations, and the principle of inter- and intra-generational equity. Figure 2 visually represents three main principles associated with just transition.

**Figure 2: Principles for just transition**



The principles added here are not exhaustive, and others might be applied to just transition litigation beyond the focus chosen in this report. Heffron, for example, additionally points to *recognition justice* and *cosmopolitan justice*.<sup>43</sup> Principles emerging from debates on energy justice or energy democracy are of interest too.<sup>44</sup> The concept of “recognition justice,” especially, refers to the need to fully understand who may be affected by certain policies or activities and involves full recognition of whose rights and interests are “ignored or misrepresented.”<sup>45</sup>

Based on our understanding of just transition and the analysis of cases, we consider important affected persons and entities to encompass: workers, indigenous communities, as well as people

<sup>41</sup> See *infra* section 2.2 and box 2 on “definition of just transition litigation.”

<sup>42</sup> See among others: JOHN RAWLS & JOHN RAWLS, *A THEORY OF JUSTICE*, REVISED EDITION (Harvard University Press) (1999); SERENA OLSARETTI, *THE OXFORD HANDBOOK OF DISTRIBUTIVE JUSTICE* (Oxford University Press) (2018); THEO GAVRIELIDES, *ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE* (Routledge) (2018); SIMON CANEY, *CLIMATE JUSTICE*, (Stanford Encyclopedia of Philosophy, 2020), <https://plato.stanford.edu/entries/justice-climate/> (last visited Dec. 29, 2022).

<sup>43</sup> Heffron *supra* note 20: “recognition justice” refers to the “recognition of rights of different groups and in particular local and/or indigenous communities;” “cosmopolitan justice” refers to the fact that “we are all citizens of the same world and therefore the crossborder effects from the energy activities need to be considered.”

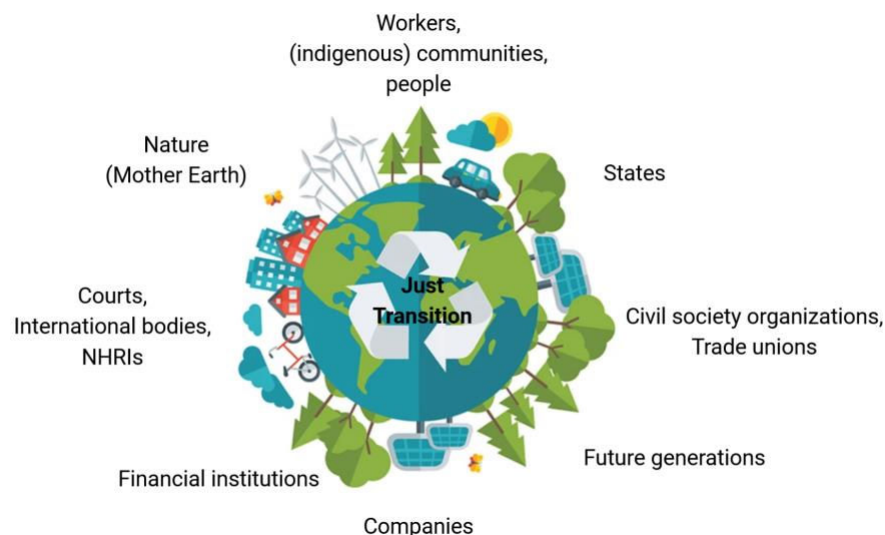
<sup>44</sup> Raphael J. Heffron & Darren McCauley, *The concept of energy justice across the disciplines*, 105 *ENERGY POLICY* 658–667 (2017), <https://www.sciencedirect.com/science/article/pii/S0301421517301593>; Kirsten Jenkins et al., *Energy justice: A conceptual review*, 11 *ENERGY RESEARCH & SOCIAL SCIENCE* 174–182 (2016), <https://www.sciencedirect.com/science/article/pii/S2214629615300669>; Raphael J. Heffron, *Applying energy justice into the energy transition*, 156 *RENEWABLE AND SUSTAINABLE ENERGY REVIEWS* 111936 (2022), <https://www.sciencedirect.com/science/article/pii/S1364032121012016>; Kacper Szulecki & Indra Overland, *Energy democracy as a process, an outcome and a goal: A conceptual review*, 69 *ENERGY RESEARCH & SOCIAL SCIENCE* 101768 (2020), <https://www.sciencedirect.com/science/article/pii/S2214629620303431>.

<sup>45</sup> Jenkins et al *supra* note 44.

in vulnerable situations, including women, children, Black people, minorities, or those experiencing intersectional disadvantage (e.g., women workers). Law and litigation in Latin America also increasingly embrace “Nature” as a possible entity directly affected by climate action.<sup>46</sup> As such, Nature might be recognized as a separate legal entity in just transition policy-making and activities. The same counts for protecting the rights and interests of (unborn) “future generations.” In all cases, representative civil society groups, including trade unions, play a significant role in demanding the protection of rights and interests on behalf of affected natural or legal persons.

Further vital actors with a crucial function in promoting or frustrating just transition through transition policies or activities include State actors and companies, as well as (private) financial institutions responsible for financing the transition in a just manner. Independent courts and other international and national (quasi-)judicial bodies to protect the rights of those involved and affected (e.g., National Human Rights Institutions) or that can otherwise provide for accountability and redress also contribute to a just transition. Figure 3 provides a non-exhaustive visual representation of the actors involved in and directly affected by (un)just transition policies and activities.

**Figure 3: Actors for the just transition**



## 2.2. A definition of just transition litigation

The following section explains how cases were selected, categorized, and analyzed in the present study against the backdrop of our definition of just transition litigation. The concept of just transition litigation is not yet well defined and has only been marginally addressed in the literature. An initial description of just transition litigation was offered by Savaresi and Setzer, who described

<sup>46</sup> Erin Daly, *The Ecuadorian exemplar: The first ever vindications of constitutional rights of nature*, 21 *REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW* 63–66 (2012), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/reel21&section=9](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/reel21&section=9); Alex Putzer et al., *Putting the rights of nature on the map. A quantitative analysis of rights of nature initiatives across the world*, 18 *JOURNAL OF MAPS* 89–96 (2022), <https://doi.org/10.1080/17445647.2022.2079432>

it as cases that “rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net-zero emissions.”<sup>47</sup> Heffron similarly considered how elements of (energy) justice feature in case law relate to the energy transition. He took an expansive view and assumed the justice dimensions of litigation that address any of the “five stages of the energy life-cycle,” either from the perspective of human rights and/or relevant energy justice principles.<sup>48</sup> These five stages include extraction energy, energy production, energy supply, energy consumption, and decommissioning and waste management. Heffron’s definition, therefore, consists of all energy transition related litigation broadly understood, including litigation that targets fossil fuel activities in a way that traditional climate litigation would generally envision.

In our view, just transition litigation will typically target pro-climate policies and activities by questioning how they are carried out or may negatively impact the enjoyment of human rights. As explained below, such litigation is, however, not necessarily “anti-climate” or “anti-transition” in nature. As noted by Savaresi and Setzer, there is no systematic data on just transition cases yet. As such, scholarship on *just transition litigation* still represents a gap in the existing literature.<sup>49</sup> This report aims to contribute to filling that gap by providing a first (partial) review of existing cases that qualify as just transition litigation in the Latin American region. The aim is to study their characteristics and thereby offer initial insights into what just transition litigation looks like or might hope or aim to achieve.

In terms of situating just transition litigation within the wider body of climate litigation, it is helpful to note that the overall body of climate litigation has often been categorized as either “*pro-regulatory*” or “*anti-regulatory*” in nature.<sup>50</sup> Pro-regulatory cases would involve claimants approaching courts to influence climate and decarbonization goals, policies, or activities in a *positive sense*. Anti-regulatory cases attempt to limit the progress achieved by pro-climate laws and policies or pro-regulatory lawsuits.<sup>51</sup> Analysis by Peel and Osofsky shows that most of the anti-regulatory cases have been brought by corporations as a response to more stringent laws that affect their business-as-usual.<sup>52</sup> However, a small subset of climate cases deals with myriad claims against pro-climate policies or activities from a perspective of seemingly unrelated issues (i.e., labor, property rights, poverty relief), which are not *per se* anti-regulatory in nature. Still, these could have an *anti-regulatory effect on energy transition* if successful (at least temporarily),

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<sup>47</sup> Annalisa Savaresi & Joana Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, 13(1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 7–34 (2022), <http://dx.doi.org/10.4337/jhre.2022.0002>

<sup>48</sup> For Heffron (2022), these principles include redistributive, procedural, restorative, recognition and cosmopolitan justice. The latter are concerned with the “recognition of rights of different groups and in particular local and/or indigenous communities” (recognition justice) with the fact that “we are all citizens of the same world and therefore the crossborder effects from the energy activities need to be considered (cosmopolitan justice).” *Supra* note 20.

<sup>49</sup> Heffron (2022) identified and analyzed a first set of 100 cases but seemingly takes an expansive view of justice considerations in energy-related decision-making, e.g., both in response to fossil fuel activities and renewable energy activities. His paper includes cases that would normally be identified as “climate litigation” in relation to the energy sector, e.g., against the construction of oil pipelines. *Supra* note 20

<sup>50</sup> David L. Markell & J. B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLORIDA LAW REVIEW (2012), <http://dx.doi.org/10.2139/ssrn.1762886>; Peel and Osofsky (2015) *supra* note 12 at 5.

<sup>51</sup> Peel and Osofsky (2015) *supra* note 12

<sup>52</sup> Navraj Singh Ghaleigh, “*Six honest serving-men*”: *Climate change litigation as legal mobilization and the utility of typologies*, 1 CLIMATE LAW 31–61 (2010), <https://content.iospress.com/articles/climate-law/cl003> (last visited Dec 6, 2022)



because they can frustrate or stall pro-climate action, e.g., the construction of a new wind energy park.

Just transition litigation will typically fall within this small subset of cases. Despite not being against climate action *per se*, and often being brought by actors who may consider themselves “pro-climate action” and “pro-energy transition,” these cases nevertheless represent claims that will negatively affect pro-climate legislation and action if successful. It may be argued that in addition to being pro-climate, these cases are also pro-human rights, pro-people, pro-labor, or pro-traditional communities.<sup>53</sup> As noted by Setzer and Higham, just transition litigation cases challenge “climate policies, actions or projects based on the way in which they were developed or on their impacts on specific groups of communities.”<sup>54</sup> While they do not necessarily oppose climate action as their main objective, they may delay the finalization or implementation of climate policy responses.<sup>55</sup> This position is clearly reflected in a statement made by civil organizations representing indigenous groups in Oaxaca, Mexico, who resist the construction of a large wind energy park by the French company EDF. ProDESC, European Center for Constitutional and Human Rights (ECCHR), and *Terre Solidaire* supported that:

... while the climate emergency must prompt governments all over the world to take radical action, especially in the energy sector, the energy transition can only be legitimate and sustainable if it respects the rights to land, natural resources, and fundamental rights of local communities. [...] Even though the [EDF] wind park addresses the critical topic of climate change, this should never happen at the expense of human rights.<sup>56</sup>

We suggest that just transition litigation cases can, at best, be qualified as having an anti-regulatory *effect*, but they are not anti-regulatory *per se*. Therefore, we propose adding a third category to the traditional categorization of climate litigation as anti-regulatory or pro-regulatory, notably: just transition cases. So far, the issues have been considered separate and disconnected from the mainstream scholarship on climate litigation, which has failed to assess these cases.<sup>57</sup> We propose to remedy this and include just transition litigation as part of the current climate litigation debate. Adequately considering the justice dimensions of climate action will only strengthen the objectives and outcomes of decarbonization rather than weaken them. Although justice transitions may complicate decisions on energy transition, they will ultimately lead to better results. Building on the foregoing, our definition of just transition litigation is as follows:

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<sup>53</sup> Peel and Osofsky (2015) *supra* note 12

<sup>54</sup> JOANA SETZER AND CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 23 (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> (last visited Dec. 29, 2022)

<sup>55</sup> *Id.* at 7

<sup>56</sup> EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR). PRODESC AND TERRE SOLIDAIRE, CASE REPORT: WIND FARM IN MEXICO: FRENCH ENERGY FIRM EDF DISREGARDS INDIGENOUS RIGHTS (Sep. 2020), [https://prodesc.org.mx/wp-content/uploads/2020/10/20201002\\_Case-report-EDF-V2\\_LOGOS\\_EMBARGO\\_including-Guillermos-edits\\_Logos-1.pdf](https://prodesc.org.mx/wp-content/uploads/2020/10/20201002_Case-report-EDF-V2_LOGOS_EMBARGO_including-Guillermos-edits_Logos-1.pdf) (last visited Dec. 29, 2022)

<sup>57</sup> Joana Setzer & Lisa C. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, 10 WILEY INTERDISCIPLINARY REVIEWS. CLIMATE CHANGE e580 (2019), <https://onlinelibrary.wiley.com/doi/10.1002/wcc.580>

## Box 2: Definition of Just Transition Litigation

*Just transition litigation* questions the distribution of the benefits and burdens of transition policies and activities towards net zero-emission and climate-resilient societies amongst local communities and affected stakeholders. Litigators typically invoke human rights but may rely on other national and international laws and principles. Just transition cases are not necessarily pro- or anti-climate action. Instead, they demand that climate action is undertaken in a just and inclusive manner with attention to those in vulnerable situations.

This next section analyzes the general threads of just transition litigation based on the examples found in this research.

### 2.3. Selection of just transition cases in Latin America

As aforementioned, the study of cases was primarily based on the global database of climate litigation of the Sabin Center of Climate Change Law, the *Global Climate Case Chart*, and complemented by AIDA's regional climate litigation database, the *Plataforma de Litigio Climático para America Latina y el Caribe*. This research was supplemented by the database maintained by the Business and Human Rights Resource Center, *Lawsuit Database*,<sup>58</sup> and the Brazilian climate litigation database, *Plataforma de Litigância Climática no Brasil*.<sup>59</sup> The authors have also carried out additional original research into several selected jurisdictions, especially countries with forward-looking approaches to policy-making or the inclusion of notions of just transition in their nationally determined contributions (NDCs) to the UNFCCC. These countries include Chile and Colombia.<sup>60</sup> In some instances, cases were identified based on ongoing research of the individual authors. These countries include Mexico and Brazil.

Due to limited resources and given the evidence of novel developments on just transition taking place in the Global South context of Latin America, this survey has only been focused on case law related to energy-related projects and policies aimed at GHG emissions reductions. This narrower approach represents the first step in understanding just transition litigation. Given the significance of the just transition concept and its importance for decarbonization policies worldwide, other cases will likely exist in different regions of the world. Furthermore, they may arise in relation to other sectors, such as food/agriculture. Claims may also relate to the distribution of burdens and benefits associated with adaptation policies and activities. The authors may thus expand this report in the future to include other jurisdictions, sectors, or types of climate action, as noted in the research agenda proposed in the conclusion.

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<sup>58</sup> BUSINESS & HUMAN RIGHTS RESOURCE CENTER, LAWSUIT DATABASE <https://www.business-humanrights.org/en/from-us/lawsuits-database/> (last visited Dec. 29, 2022)

<sup>59</sup> PLATAFORMA DE LITIGÂNCIA CLIMÁTICA NO BRASIL, <https://www.litiganciaticlimatica.juma.nima.puc-rio.br/> (last visited Dec. 29, 2022)

<sup>60</sup> MAURO PUCHETA & ANA BELÉN SÁNCHEZ, JUST TRANSITION IN THE GLOBAL SOUTH: PERSPECTIVES FROM LATIN AMERICA (2022), <https://papers.ssrn.com/abstract=4243526> (last visited Dec 28, 2022)



The cases in the *Climate Case Chart* are selected based on two criteria following the Sabin Center’s methodology.<sup>61</sup> First, cases must generally be brought before judicial bodies (though in some exemplary instances, matters brought before administrative, quasi-judicial, or investigatory bodies are also included). Second, climate change law, policy, or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate or decarbonization laws, policies, or actions in a meaningful way are not included. In general, cases that may directly impact climate change, but do not explicitly raise climate issues, are also not included in the database. Examples include challenges about local air pollution or the development of fossil fuel infrastructure based on harm to human health and/or the environment generally. The intent of the litigants with regard to the climate-related consequences of such cases is not considered during the assessment process.

The first step in the methodology followed in this report began with a broad search through the databases mentioned using the term “just transition.” The Sabin Center’s database also specifically categorizes certain cases as just transition cases.<sup>62</sup> However, because just transition is not yet a term commonly used in litigation, we have expanded the search with original research in English, Spanish and Portuguese by using broader search engines with the term just transition, combined with other search terms such as “climate,” “energy,” “cases,” “courts,” and “litigation.” These searches helped identify cases through media reports, press releases, or organization websites across Latin America generally and in the four aforementioned countries specifically.

As a limitation to the research methodology, all cases identified here as just transition litigation relate to the energy transition process, e.g., concern decarbonization laws and policies or activities in support of a general goal to reduce emissions (for example, litigation challenging laws, policies, or activities related to mining of cobalt or lithium, or renewable energy projects). A clear reference to the energy transition objectives thus determines the research methodology’s boundaries. Any policies or activities relating to the following are eligible for inclusion into the present study: (i) pursuit of the long-term temperature goal of the Paris Agreement, (ii) a commitment made by the state at the international level through NDCs, and/or (iii) the design or implementation of any broader decarbonization policy or project at the national level.

Finally, and importantly, the cases identified as possible examples of just transition litigation must also refer to social justice, equity, or general (re)distribution of burdens and benefits from specific decarbonization policies or activities. In short, they must have a strong justice component – with the remit of issues related to workers, a cleaner environment, indigenous issues, or human rights. This aspect is essential since a substantial amount of litigation related to lithium mining or renewable energy projects exists, but not all such litigation may fit these criteria. For example, any litigation that would purely concern payment raises or safe working conditions for mine workers would not qualify, nor would cases on indigenous people’s rights related to displacement due to the construction of hydroelectric dams. Similarly, cases that are only based on environmental arguments are not included.

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<sup>61</sup> SABIN CENTER, GLOBAL CLIMATE CHANGE LITIGATION DATABASE, *About*, <http://climatecasechart.com/about/> (last visited Dec. 29, 2022)

<sup>62</sup> SABIN CENTER, GLOBAL CLIMATE CHANGE LITIGATION DATABASE: JUST TRANSITION <http://climatecasechart.com/non-us-case-category/just-transition/> (last visited Dec. 29, 2022)

### 3. CATEGORIZING JUST TRANSITION LITIGATION: AN INITIAL PROPOSAL & FINDINGS

As explained in the methodology, we set out to identify just transition litigation cases as identified in this report regionally focused on Latin America. The Latin American focus represented the first step in understanding just transition litigation, given that the most paradigmatic cases so far came from the region. As noted by others, just transition litigation cases offer a higher degree of complexity that differentiates them from other types of climate litigation cases.<sup>63</sup> They are classified as “non-climate aligned” since the plaintiffs question the effects of specific climate policies on vulnerable communities (i.e., decarbonization plans, renewable energy, or mining projects). However, they do not necessarily object to climate action in the long term.<sup>64</sup> The Latin American context is also particularly interesting as the communities affected – whose human rights are being vindicated in these cases – are often already marginalized. For this initial report on just transition litigation, we identified and mapped 20 just transition litigation cases in four countries in Latin America according to a few categories that allowed us to draw early conclusions about this new subtype of climate litigation.<sup>65</sup> We aim for these early findings to be further discussed, used, and reworked by scholars as a starting point for future research.

This report proposes initial categorizations of just transition litigation cases in Latin America. The first set of categories that we identified were of a factual and practical nature, giving a sense of (i) *time* (i.e., in which year was a case filed or concluded) and (ii) *place* (i.e., in which jurisdictions was the case filed). In addition, to understand the key players in just transition litigation, we analyzed the (iii) *types of actors* involved in litigation.

The additional set of categories delves deeper into the circumstances of the case and the legal arguments presented in a way that would allow for categorization and analysis along the lines of the definition set out, e.g., which dimensions of just energy transition are present, which types of rights are invoked, or the overall objectives of the plaintiffs in bringing the case. The cases were coded based on the claim as it originated in the court of that jurisdiction. As noted before, the objectives of the case as these were filed are often not clear. It may very well be that the short-term and long-term goals of the challenge brought may not necessarily align (i.e., in terms of ensuring that the decarbonization projects or plans are inclusive, which at first glance may seem anti-climate, but in the long-term are not).

Second, cases were coded and categorized according to the type of project or industry they related to (including as specific laws addressed such an activity). After an initial analysis, we identified that all cases fall into one of the following categories. This list may not represent all types of issues that may arise in just transition litigation, as it was based on the cases studied. It may well be that other issues could be identified in further studies in the future. Nevertheless, we consider this a first important delineation of the types of projects or activities that may generally attract just transition litigation: (i) the decommissioning of existing fossil fuel projects; (ii) mining activities or development of infrastructure to support the production of new technologies (for example, lithium mining); (iii) the deployment of renewable energy technologies and/or the implementation

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<sup>63</sup> *Supra* note 54 at 3.

<sup>64</sup> *Id.* at 23.

<sup>65</sup> Based on the Sabin Center’s database.

of renewable energy projects (for example, wind, hydro, and geothermal); and (iv) subsidies for fossil fuel projects.

Third, cases were categorized according to the legal bases raised by the plaintiffs, with a particular focus on human rights. The categorization proposed here includes the types of rights involved in the litigation, notably: (i) labor rights, (ii) indigenous rights, (iii) the right to a healthy environment or other substantive environmental rights, or (iv) other human rights (i.e., the right to life). Cases often refer to multiple rights concomitantly.

A fourth category relates to the justice angle brought by the plaintiffs. The categorization here broadly refers to the justice aspects identified in just transitional justice, mainly distributive, procedural, and remedial justice. These often, but not always, relate to the rights invoked. We, therefore, coded the cases according to reference to intra- and inter-generational equity, the right to information and participation, and the right to FPIC.

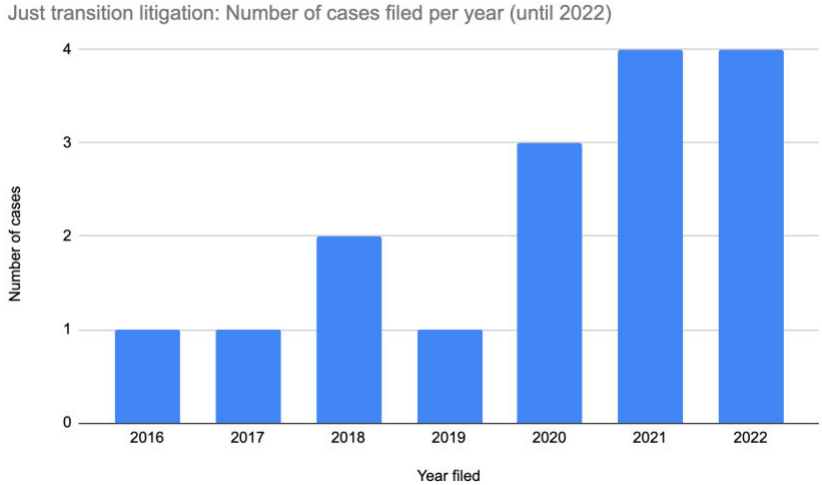
Fifth, we assessed how these cases refer to the climate angle. The categorization used here included whether they refer to or relate to (i) the long-term temperature goals of the Paris Agreement, (ii) NDCs, or (iii) broad decarbonization laws or policies adopted at the national level. It should be noted that the climate angle in the cases in the last category is often not apparent. At first glance, these cases might appear similar to traditional labor rights or environmental law cases. However, because the project is pushed forward due to a decarbonization policy or law (which, in turn, is adopted in compliance with the Paris Agreement or an NDC), we consider these cases as just transition cases for the purposes of this research.

Sixth, we analyzed whether cases are pro or anti-energy transition. As noted before, this distinction is not obvious. While some just transition litigation cases are “anti-” energy transition (or “anti-climate,” as the existing scholarship has characterized them), we also found cases that oppose fossil fuel subsidies, policies, or projects on the grounds of the climate commitments and the need to promote a just energy transition. Thus, the report brings forward a new type of just transition litigation by including cases that promote a just energy transition (and use the just transition framing to promote climate policies).

### **3.1. The when, where, and who of just transition litigation in Latin America**

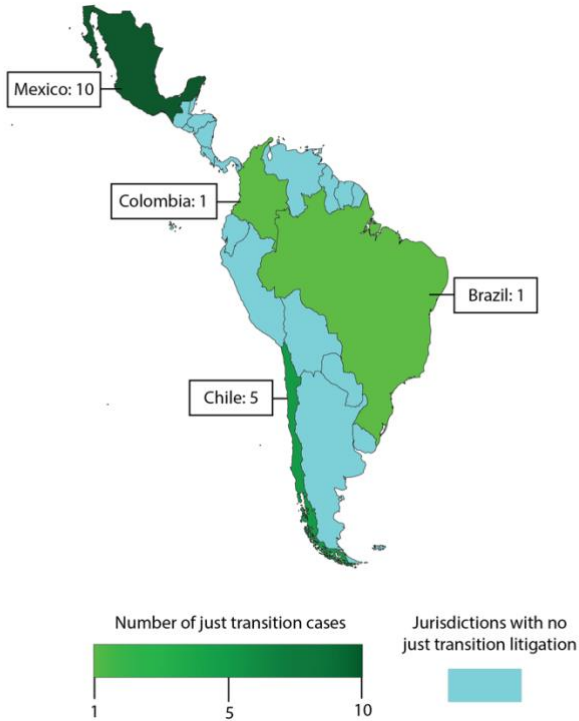
Our sample of cases reinforced our initial assumption that just transition litigation is a phenomenon that has developed in recent years. As shown in Figure 4, below, all cases identified were filed since 2016. However, while 5 cases were filed in the 2017-2019 period, 14 have been filed since 2020. This uptick in cases indicates how just transition litigation cases are growing as countries respond to the global long-term goal of emissions reductions agreed upon in the Paris Agreement. Since these cases are responding to how communities are affected by the developments in decarbonization policies, which are in itself more recent, this finding is not surprising. Despite the small sample of cases, the increase in just transition litigation cases, which has more than doubled in the past three years, shows a rising trend in the region.

**Figure 4: Number of just transition litigation cases filed per year (updated until Dec. 2022)**



In terms of geographical distribution, cases were identified in four Latin American jurisdictions: Mexico (10), Chile (5), Brazil (1), and Colombia (1). In addition, two cases were identified in France, but in relation to decarbonization policies happening in Mexico that were similarly brought in that jurisdiction. These two cases highlight the transnational aspects of just transition and were included in the dataset because of their effect on Latin America. Figure 5, below, maps the just transition cases in Latin America.

**Figure 5: Number of just transition litigation cases per jurisdiction (updated until Dec. 2022)**



The higher number of cases in Mexico and Chile is significant and can be explained by the geopolitical context of both countries. Mexico is particularly rich when it comes to just transition litigation. Mexico's energy industry has gone through several controversial changes in recent years. In 2013, several reforms opened the Mexican energy sector to foreign investment, bringing a new wave of investment from abroad. For example, public auctions led in 2017 targeted new renewable-energy investments. These were so successful that they doubled the country's renewable energy capacity and set world records for low-priced renewable energy, making Mexican wind and solar energy among the world's cheapest energy sources.<sup>66</sup> However, a change in administration in 2018 redirected the industry's course by restoring state entities' dominance in the energy sector through nationalization and resource nationalism.<sup>67</sup> The uncertainty created by these changes has accelerated litigation, including just transition litigation. In particular, the government's 2021 reforms to the Electric Industry Law and Energy Sector Programs<sup>68</sup> have been challenged in at least nine cases as of 2022.<sup>69</sup>

In all the Mexican just transition litigation cases, the right to a healthy environment takes center stage. As a standalone violation claim or alongside other human and fundamental rights violations (i.e., the right to health or the right to access electricity based on renewable resources), the right to a healthy environment is being used to challenge laws and policies that have reversed Mexico's decarbonization track (including through renewable energy projects and lithium mining) and the compliance with international commitments, including the Paris Agreements and Mexico's own NDC. It should be noted that Mexico's revised NDC, which includes a less ambitious emissions reduction target due to a revision of the baseline used, is also the target of further litigation that questions the backsliding specifically (*Greenpeace v. Instituto Nacional de Ecología y Cambio Climático and Others*).<sup>70</sup>

Chile's number of cases is also justified by its geopolitical context. Chile has recently developed an ambitious energy transition and decarbonization policy.<sup>71</sup> Among the reasons for this are the country's geographic characteristics, which make wind and solar projects particularly attractive, and the rich mineral resources central to the development of batteries, such as lithium. So far, decarbonization policies have not been adopted with the participation of the affected communities, and there is no clear distribution of the benefits of the energy transition. These factors may partly explain the increase in just transition litigation during the country's energy transition. In these cases, affected communities have brought claims based on human rights to question how they are included in political processes and negotiations, as well as how the benefits of the energy transition

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<sup>66</sup> The Wall Street Journal, Mexico Takes Aim at Private Companies, Threatening Decades of Economic Growth (Jun. 12, 2022)

<sup>67</sup> Rafael Llano *et al.*, Energy Investors Face Mexico Risks in the Electricity and Lithium Sectors, WHITE & CASE (Jul. 19, 2022) <https://www.whitecase.com/insight-alert/energy-investors-face-mexico-risks-electricity-and-lithium-sectors> (last visited Dec. 29, 2022)

<sup>68</sup> Electric Industry Law and Energy Sector Programs, Congreso General de los Estados Unidos Mexicanos, 2021 (Mar. 9) [https://www.diputados.gob.mx/LeyesBiblio/ref/lielec/LIElec\\_ref02\\_09mar21.pdf](https://www.diputados.gob.mx/LeyesBiblio/ref/lielec/LIElec_ref02_09mar21.pdf) (last visited Dec. 29, 2022)

<sup>69</sup> See SABIN CENTER, GLOBAL CLIMATE CHANGE LITIGATION DATABASE: MEXICO <http://climatecasechart.com/non-us-jurisdiction/mexico/> (last visited Dec. 29, 2022)

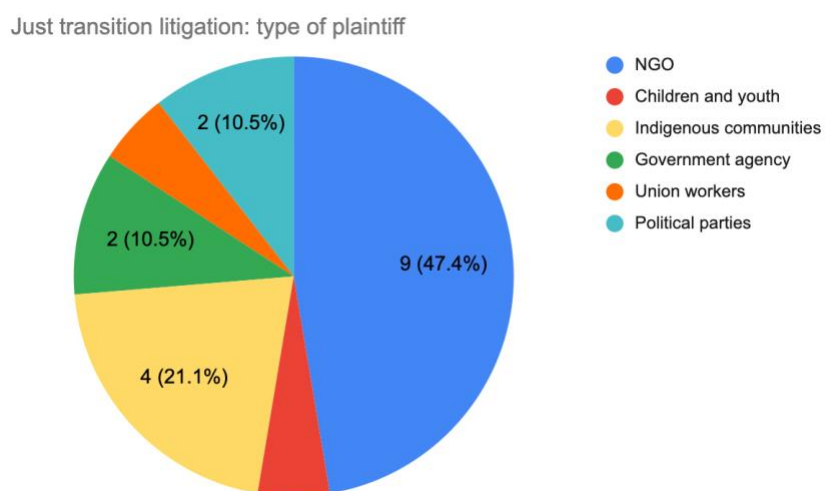
<sup>70</sup> *Greenpeace v. Instituto Nacional de Ecología y Cambio Climático and Others*, R.A.(I) 81/2021 (11th Collegiate Court of the 1<sup>st</sup> Circuit in Administrative Matters Sep. 2, 2021) <http://climatecasechart.com/non-us-case/greenpeace-v-instituto-nacional-de-ecologia-y-cambio-climatico-and-others/>

<sup>71</sup> TRANSICIÓN ENERGÉTICA DE CHILE: POLÍTICA ENERGÉTICA NACIONAL (MINISTERIO DE ENERGÍA, 2021) [https://energia.gob.cl/sites/default/files/documentos/actualizacion\\_anteproyecto\\_pen\\_2021\\_lr.pdf](https://energia.gob.cl/sites/default/files/documentos/actualizacion_anteproyecto_pen_2021_lr.pdf) (last visited Dec. 29, 2022)

are shared between affected parties. Since not all just transition cases are necessarily framed using climate terms, more cases are likely to exist.

To understand the dynamic of just transition litigation, it was also essential to ask who the key players are. Therefore, we analyzed who the plaintiffs (or claimants) are bringing these claims and who the defendants are. As noted in Figure 3 above, the actors pushing for a just transition are varied. In litigation, we have so far observed that while the majority of cases were filed by (i) NGOs (9) and (ii) indigenous communities (4), other stakeholders have also been responsible for bringing just transition litigation cases. Cases were likewise filed by (iii) government agencies (2), (iv) political parties (2), (v) children and youth (1), and (vi) union workers (1). Figure 6 shows a visual representation of how these actors are represented in cases so far.

**Figure 6: Plaintiffs in Just Transition Cases**



With a more extensive representation as plaintiffs in these cases, NGOs are at the forefront of just transition litigation, especially in Mexico and Chile. The vast majority of NGOs bringing these cases are environmental organizations. For example, Greenpeace is a prominent actor and plaintiff in four of seven NGO-filed cases. Most of the NGOs are domestic, although Greenpeace has an international reach. The Mexican Center for Environmental Law (*Centro Mexicano de Derecho Ambiental* – CEMDA) has brought two just transition cases. Moreover, five civil society organizations, including Nuestros Derechos al Futuro y Medio Ambiente Sano, Alianza Juvenil por la Sostenibilidad, Naj Hub, Consejo Interuniversitario Nacional de Estudiantes de Derecho, Ágora Ciudadanos Cambiando México and a youth collective (#JóvenesPorNuestroFuturo collective, made up of more than 20 youth groups) challenged legal norms that potentially prevent an energy transition in Mexico (*Nuestros Derechos al Futuro y Medio Ambiente Sano et. al., v. Mexico (Unconstitutionality of the reform to the Electric Industry Law)*).<sup>72</sup> The arguments, in this case, resemble those in *Julia Habana et al. v. Mexico*<sup>73</sup>, filed by young individuals. Finally, Chile has one lawsuit filed by Corporación Privada para el Desarrollo de Aysén, Corporación Pro Defensa de la Flora y Fauna, and the individual Hugo Díaz Manque to challenge the approval of a

<sup>72</sup> *Supra* note 70.

<sup>73</sup> Petition *Julia Habana et al. v. Mexico*, 210/2021 (Mexico District Court, Mar. 24 2021) <http://climatecasechart.com/non-us-case/julia-habana-et-al-v-mexico-unconstitutionality-of-the-reform-to-the-electricity-industry-law/>.

hydroelectric project based on a lack of sufficient compensation for the disruption of environmental and natural resources.

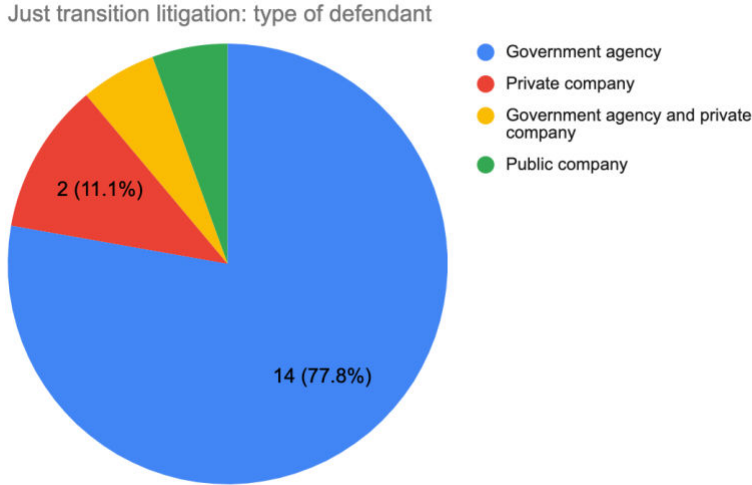
Indigenous groups are the second group that is the most prevalent among plaintiffs. Amid the energy transition, indigenous communities are demanding the protection of their rights, as well as the right to a healthy environment in general. Concerns relate to the lack of meaningful participation in the decision-making process regarding new technologies or the benefit distribution of renewable energy projects. Indigenous groups are plaintiffs in cases in Chile, Colombia, and Mexico.

We also observed a few examples of government agencies bringing just transition litigation cases. These are municipalities or regional governments. The two examples in Chile relate to concerns regarding new technologies projects that allegedly violate environmental laws and indigenous and human rights. Political parties have also brought just transition cases before Brazilian and Mexican courts. These two cases invoke a potential violation of the right to a healthy environment due to the promotion of fossil fuel projects at the expense of renewables. In Mexico, the plaintiffs are a portion of the Senate, while in Brazil, the lawsuit was filed by organizations active in political participation.

While our research began with the assumption that just transition litigation would involve a significant number of cases brought by union workers, this has not proven to be the case so far. The only claim investigated was brought in Chile against an administrative decision that ordered the decommissioning of an existing fossil fuel project. In this case, union workers are invoking the protection of their labor rights, especially when it comes to ensuring their participation in just transition decision-making.

As shown in Figure 7, below, concerning the defendants, the vast majority of cases were primarily filed against government agencies (15), either as sole defendants (14) or in tandem with private companies (1). Three cases were filed against private companies, and one against a public company.

**Figure 7: Defendants in Just Transition Cases**





Looking closely at who these government agents are, we found that national-level government agencies, such as ministries, are among the most prevalent defendants. Ministries of Energy, Mining and Environment in several Latin American countries are often the target of just transition litigation due to their role in administrative decision-making in environmental permits and energy-related approval processes. Congress and the Office of the President (of Mexico) are also found among defendants due to the adoption of national laws that concern and/or address energy transition. Finally, other government agencies, such as agencies specialized in energy matters (i.e., National Center of Energy Control, Energy Secretariat, and Environmental Evaluation Service), are also facing lawsuits against their decisions or acts.

The three cases filed against private companies as defendants are all against *Electricité de France* (EDF), a French energy company, for the alleged violation of indigenous communities' rights in Mexico. EDF operates three wind farms in Mexico and began planning a new one in the lands of indigenous communities without prior consultation. One of the complaints, at the UN Special Procedures, was concluded with a range of clarifications regarding the applicable rights and relevant issues.<sup>74</sup> Another, at the Paris District Court, is still pending, although an injunction for interim relief was denied.<sup>75</sup> A third complaint to the French national contact point (NCP) for the Organization for Economic Cooperation and Development (OECD) was concluded in 2020 with findings and recommendations, despite the community members and the NGO PRODESC withdrawing from the process in 2019 due to slow progress in the mediation.<sup>76</sup>

Amongst other findings, the French NCP affirmed the unique relationship with and dependence on the indigenous lands, stating that EDF “could have carried out extended due diligence measures on social, cultural and customary dimensions in relation with Unión Hidalgo indigenous community,” i.e., “beyond administrative and legal checks.” This may have included additional consultations with “institutions or organizations specialized in socio-cultural and customary issues related to land tenure issues of indigenous peoples.” That would have enabled EDF “to better identify and prevent the societal risks linked to the project,” as its decisions led to major tension and (violent) conflict on land rights issues that were present in the community before. The contact point also reaffirmed that “engagement with stakeholders is one of the key elements of the due diligence” required by General Guideline 14 of the OECD Guidelines, especially when vulnerable populations, communities, or indigenous peoples are present.<sup>77</sup>

One case involves a public company, Comisión Federal de Electricidad (CFE), Mexico's state-owned electric utility company. As such, CFE issues acts that concern electricity fees for all kinds

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<sup>74</sup> OECD WATCH, *Union Hidalgo vs. EDF Group* (Feb. 8, 2018), <https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group/>.

<sup>75</sup> *Indigenous community of Unión Hidalgo, ProDESC and ECCHR v. EDF*, (Paris District Court, filed Oct. 13, 2020), <https://www.business-humanrights.org/en/latest-news/edf-lawsuit-re-indigenous-rights-in-mexico-filed-in-france/>. (Anonymous v. S.A. Electricite de France, Ordonnance du Juge de la Mise en Etat, Tribunal Judiciaire de Paris, 4ème chambre 1ère section (Nov. 30, 2021)). See Christopher Ewell, *Reimagining the Renewable Energy Transition: The Potential for Mandatory Corporate Due Diligence to Ensure Respect for the Right to Free, Prior, and Informed Consent*, 47 THE YALE J. OF INT. L. 309 (2022).

<sup>76</sup> OECD NATIONAL CONTACT POINT FRANCE, *Union Hidalgo vs. EDF Group* <https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group/> and <https://www.tresor.economie.gouv.fr/tresor-international/pcn-france/circonstance-specifique-edf-et-edf-en-au-mexique>.

<sup>77</sup> OECD NATIONAL CONTACT POINT FRANCE, FINAL STATEMENT OF THE NCP ON SPECIFIC INSTANCE: EDF AND EDF RENEWABLES IN MEXICO (*Union Hidalgo vs. EDF Group*) (Mar. 10, 2020) 14 <https://www.oecdwatch.org/download/29069/?tmstv=1672736250>. (last visited Dec. 29, 2022).

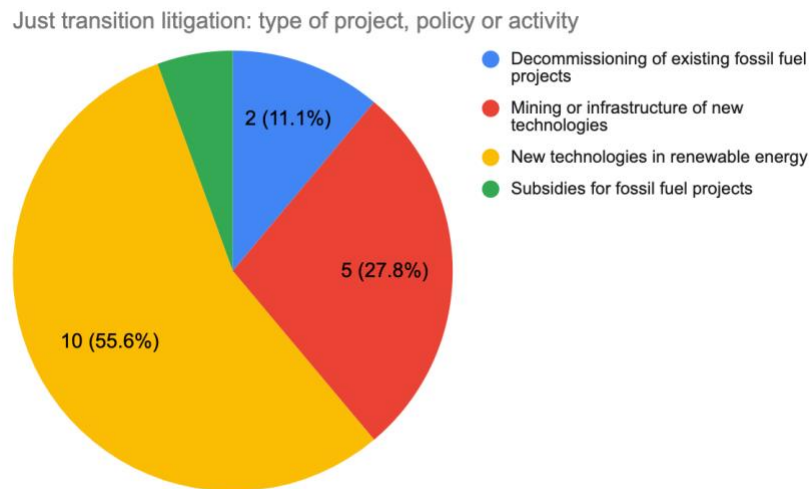


of projects, including renewable sources. The one case involving government agencies and private companies as defendants relates to an environmental license issued by the Colombian government to a private company. In this case, the Ministry of Environment, the National Agency of Environmental Licences, the National Mining Agency, and the regional environmental authority are the government agencies against whom the lawsuit was brought. As for the private company, Carbones del Cerrejón is a mining company that exploits coal in the Guajira region and is the permit-holder in this case that is being challenged as going against energy transition (among other arguments).

### 3.2. Categorization of cases by the industry involved

Just transition litigation has so far addressed different aspects of decarbonization policies, leading to four types of cases. As depicted in Figure 8, below, cases identified fall into one of these categories: (i) decommissioning of existing fossil fuel projects (2), (ii) mining or infrastructure of new technologies (4), (iii) new technologies in renewable energy (10), and (iv) subsidies for fossil fuel projects (1). Although many of these cases would traditionally be considered environmental litigation – as these refer to the socio-environmental impacts of mining and energy projects – they peripherally relate to climate change with a broad decarbonization strategy for an energy transition at its core.

**Figure 8: Categorization of just transition cases by type of project**



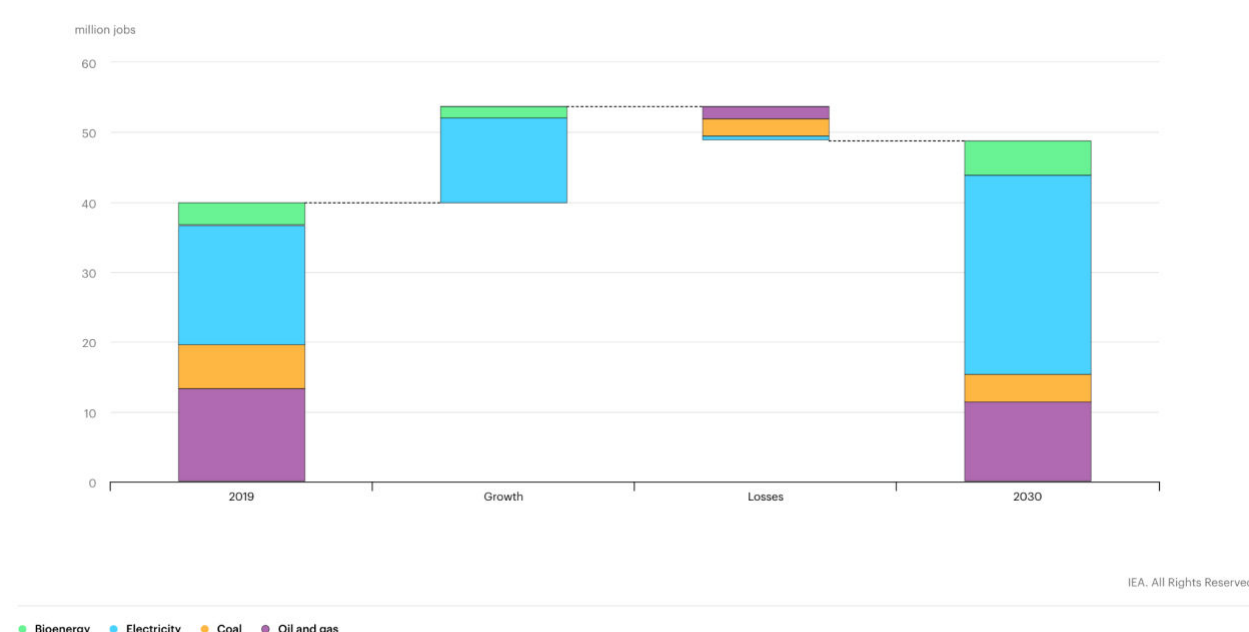
#### 3.2.1. Just transition litigation related to decommissioning fossil fuel projects

As noted previously, the energy transition will lead to the closure of fossil fuel production sites and thus affect workers in the sector. While transitioning from fossil fuels to more sustainable resources is imperative, workers must be protected in the process and assisted through retraining and reintegration plans. One of the most direct types of just transition litigation relates to how workers in the fossil fuel industry are affected by the decommissioning of fossil fuel projects. The International Energy Agency (IEA) has estimated that fossil fuel production could lose 5 million

job positions by 2030.<sup>78</sup> Job losses can be prominent in communities heavily dependent on the fossil fuel industry. For instance, the World Bank has reported that over the last half-century, as many as 4 million coal workers have lost their jobs, mainly in Europe, as well as in the United States and China.<sup>79</sup>

On the other hand, the transition toward net-zero emissions will increase jobs in the energy sector. The IEA estimated that more than 14 million new jobs will be created in the energy production sector by 2030 (Figure 9).<sup>80</sup> Yet, these new jobs will not be in the same industries or places where employment is lost. It is thus vital to foster a just transition, putting people at the core of the process. Among other initiatives, the ILO adopted the “Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All” in 2015.<sup>81</sup> The guidelines provide practical orientation to governments and social partners on worker rights and labor market policies for a just transition.

**Figure 9: Global employment in energy supply in the NZE Scenario, 2019-2030 (IEA)**



We identified two cases related to decommissioning fossil fuel projects. In *Company Workers Union of Maritima & Commercial Somarco Limited and Others v Ministry of Energy*,<sup>82</sup> the Supreme Court of Chile considered the claims of workers affected by decarbonization policies. In 2021, union workers affected by the closure of a coal mine in Antofagasta brought a case against the Ministry of Energy. The workers questioned an agreement signed in 2019 between the Chilean

<sup>78</sup> IEA, ROADMAP TO NET ZERO BY 2050 (IEA, 2021) <https://www.iea.org/reports/net-zero-by-2050> (last visited Dec. 29, 2022)

<sup>79</sup> WORLD BANK GROUP, MANAGING COAL MINE CLOSURE: ACHIEVING A JUST TRANSITION FOR ALL (World Bank, 2018), <https://openknowledge.worldbank.org/handle/10986/31020>. (last visited Dec. 29, 2022)

<sup>80</sup> IEA *supra* note 78.

<sup>81</sup> *Supra* note 18.

<sup>82</sup> *Company Workers Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy* - Climate Change Litigation, 318-2021 (Court of Appeal of Antofagasta Mar. 26, 2021); 25.530-2021 (Supreme Court of Chile Aug. 9, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/company-workers-union-of-maritima-commercial-somarco-limited-and-others-with-ministry-of-energy/>.

government and energy sector companies to organize the closure of two units of coal plants and begin the energy transition process. The workers claimed they had not been involved in this agreement, so no measures had been taken to protect their rights.

In 2021, the Supreme Court of Chile ruled in favor of the plaintiffs and ordered government authorities to implement a plan to reinsert affected workers into the labor market and ensure a just energy transition. The court acknowledged that the closure of coal-fired plants was part of Chile's Energy Sector Decarbonization Plan to achieve carbon neutrality by 2050. However, it emphasized how essential a just transition strategy is for the workers affected by the loss of employment and the communities affected by the loss of services linked to the declining thermoelectric activity. The court ordered the government authorities to adopt measures providing for the reinsertion or reconversion of affected workers into the labor market. In addition, it called for mechanisms to control the efficiency of such efforts, ensuring the transition to an environmentally sustainable economy, and safeguarding workers' rights. While recognizing the importance of decarbonization strategies, Chile's ruling specifically considers just transition as a legal parameter for the legality of administrative climate action. In 2022, the appellants asked the court to issue an order to the defendant to report on its compliance with the judgment. To date, there is no record of compliance with the decision.<sup>83</sup>

While expressly referring to mitigation targets, the decision requires protecting the most vulnerable groups. Furthermore, the ruling stresses that the transition must be just and equitable and encompass environmental, social, and economic aspects. Chile's decision is a paradigmatic just transition case and incorporates the values of climate justice. Notably, the plaintiffs did not challenge the project itself but rather the procedural requirement of participation and the alternatives for the indirect effects of decommissioning on their jobs. While the plaintiffs were successful in their claims, the remedies provided by the court are procedural. As such, the court noted the importance of ensuring the affected workers' participation in the just transition strategy and implementing plans to reinsert them into the market in new positions. In alignment with this decision, the cases we have observed so far do not specifically challenge climate measures as such, only the way these are implemented. Similar cases will likely be brought in the near future, addressing the lack of substantial and procedural safeguards for workers or other affected communities. For example, *Wayúu Indigenous community v. Ministry of Environment et al.* refers to the impacts of decommissioning fossil fuel projects on the rights of indigenous communities. The case, detailed below, further brings light to pre-existing environmental justice issues and indigenous peoples' rights in a just transition process.

### **3.2.2. Just transition litigation related to mining or infrastructure in support of the deployment of new renewable energy technologies**

The second category relates to new technologies in renewable energy, specifically mining and infrastructure. Just transition litigation may appear in the extraction of minerals, such as lithium and others, necessary for electric batteries in renewable energy. The increasing demand for electric cars and electrification has created a strong need for lithium, deeming this period the "*Lithium*

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<sup>83</sup> PODER JUDICIAL REPÚBLICA DE CHILE, OFICINA JUDICIAL VIRTUAL, <https://oficinajudicialvirtual.pjud.cl/indexN.php#modalDetalleSuprema> (last visited Dec. 29, 2022).

*Boom*<sup>84</sup> as demand exceeds production. However, the extraction of mineral deposits carries the risk of considerable social conflict and environmental damage, significantly impacting indigenous or traditional communities.<sup>85</sup> Lithium is abundant in Latin America, specifically in the Andes mountains, Bolivia, Chile, and Argentina (the “Lithium Triangle”). In particular, it is a crucial mineral for energy storage in countries such as Australia, China, Japan, and the United States.<sup>86</sup> The high supply in the Global South and high demand in the Global North further recreates and replicates the pattern of North-South disparities, bringing a series of equity issues.<sup>87</sup>

In Chile, lithium extraction has been subject to complaints<sup>88</sup> by indigenous communities in the Atacama area and civil society groups.<sup>89</sup> These communities claim there is an absence of indigenous consultation and citizen participation. In particular, they argue that the projects are destroying biodiversity, causing pollution, obliterating indigenous cultural heritage, and augmenting the water crisis. In 2022, the Chilean Supreme Court granted constitutional relief to the plaintiffs and invalidated contracts for the exploration and exploitation of lithium awarded to two foreign companies.<sup>90</sup> The decision was based on the lack of a consultation process with the indigenous communities in compliance with ILO Convention No. 169.<sup>91</sup>

Finally, the distribution of energy often fails to consider the issue of benefit-sharing with the affected communities. The energy produced by the new projects is often used by private companies involved in other extractive and infrastructure projects or exported to other areas, excluding local communities. Conflicts, therefore, arise between communities that are affected by renewable energy production but fail to share its benefits. For example, some local communities living next to solar, wind, and hydroelectric projects still lack access to energy or have to pay high energy bills.<sup>92</sup> This can be seen in Chiloe, an island in southern Chile experiencing a boom in renewable energy projects. Chiloe residents still face high electricity bills, poor connectivity, and high dependency on oil.<sup>93</sup> The local energy poverty controversy has not yet reached the courts, but Chiloe’s social organizations are publicly raising awareness of this issue.<sup>94</sup> Energy poverty,

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<sup>84</sup> “GREEN” EXTRACTIVISM AND THE LIMITS OF ENERGY TRANSITIONS: LITHIUM, SACRIFICE, AND MALDEVELOPMENT IN THE AMERICAS GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS, <https://gjia.georgetown.edu/2021/07/20/green-extractivism-and-the-limits-of-energy-transitions-lithium-sacrifice-and-maldevelopment-in-the-americas/> (last visited Dec 6, 2022)

<sup>85</sup> (IN)JUSTICIA ENERGÉTICA EN AMÉRICA LATINA - BUSINESS & HUMAN RIGHTS RESOURCE CENTRE BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/es/de-nosotros/informes/injusticia-energ%C3%A9tica-en-am%C3%A9rica-latina/> (last visited Dec 6, 2022).

<sup>86</sup> Oliver Hailes, *Lithium in International Law: Trade, Investment, and the Pursuit of Supply Chain Justice*, 25 JOURNAL OF INTERNATIONAL ECONOMIC LAW 148–170 (2022), <https://academic.oup.com/jiel/article-abstract/25/1/148/6529346> (last visited Dec 28, 2022).

<sup>87</sup> *Supra* note 84.

<sup>88</sup> Ghaleigh labelled this category as “defensive” climate litigation, as “it defends the status quo of a regulatory vacuum.” See Ghaleigh *supra* note 52.

<sup>89</sup> Regional Government of Atacama v. Ministry of Mining and Other, 9-2022 (Court of Appeal of Copiapo Jan. 10, 2022). <http://climatecasechart.com/non-us-case/regional-government-of-atacama-v-ministry-of-mining-and-other/>

<sup>90</sup> Atacama Community of Coya v. Ministry of Energy and Others, 8.507-2022 (Supreme Court of Chile June 1, 2022), 8.507-2022

<sup>91</sup> Convenio Núm. 169 de la OIT sobre pueblos indígenas y tribales en países independientes: Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas, Organización Internacional del Trabajo, 2009.

<sup>92</sup> *Supra* note 85.

<sup>93</sup> Alarmante Aumento de Prouecto de Energía en Chiloé, RADIO JGM (Dec. 10, 2020), <https://radiojgm.uchile.cl/alarmante-aumento-de-proyectos-de-energia-en-chiloe/> (last visited Dec. 29, 2022)

<sup>94</sup> Marcelo Vera, Chiloé: Temen déficit de suministro eléctrico por falta de diésel, DIARIO CHILOÉ (Feb. 24, 2022) <https://www.diariochiloe.cl/noticia/actualidad/2022/02/chiloe-temen-deficit-de-suministro-electrico-por-falta-de-diesel> (last visited Dec. 29, 2022); Alcalde Vera pide que Chiloé sea incluido en el programa de Eficiencia Energética 2021, EL INSULAR (Nov. 3, 2021),

including in the context of the “right to (affordable) energy,” has been judicially addressed in other jurisdictions. With the imminent energy crisis, similar claims may be filed in Latin American jurisdictions.<sup>95</sup> These impacts, nevertheless, are not contemplated in the current legislation, and consequently, the environmental evaluations do not mention them. This absence led to a proposed bill – currently under debate in Chile’s Congress – to regulate wind farm projects and, mainly, reduce wind turbines’ adverse impacts.<sup>96</sup>

### 3.2.3. Just transition litigation related to renewable energy projects

The third type of project, more closely related to traditional environmental litigation, refers to the development of renewable energy, such as hydropower plants and solar or wind farms. In Latin America, litigation challenging energy project development is not new. For example, among the many mega-dams spread across the Brazilian Amazon, the *Belo Monte* dam in the State of Pará has been at the center of lawsuits challenging the project’s permits.<sup>97</sup> NGOs also brought a case before the Inter-American Commission on Human Rights in 2011.<sup>98</sup> Indeed, since funds for developing these energy projects often come from international sources, complaints have also been filed with international grievance mechanisms. In 2012, for instance, the Indian Law Resource Centre supported the indigenous and local communities in Oaxaca, Mexico, to file a complaint regarding the Mareña Renovables Wind Power Project with the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, which financed the project.<sup>99</sup> Similar cases have been brought in the following years. This type of litigation is set to increase as decarbonization needs to drive the development of renewable energy projects, with consequent impacts on the environment and human rights.

In terms of anti-regulatory or just transition litigation, the construction of hydroelectric facilities or other renewable energy projects, such as large-scale wind farms, have begun to attract rights-based litigation incorporating just transition arguments, for example, about the distributions of benefits. Litigants argue that marginalized local communities are not profiting from such projects. One illustrative situation concerns the previously mentioned construction of large-scale wind farms by the private French energy company EDF on the lands of the *Zapoteca* indigenous peoples of *Unión Hidalgo* in Oaxaca, Mexico. It led to rights-based legal action on multiple fronts, e.g., with OECD national contact points in France (NCPs),<sup>100</sup> in a Paris District Court,<sup>101</sup> and

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<https://elinsular.cl/noticias/chiloe/2021/11/03/alcalde-vera-pide-que-chiloe-sea-incluido-en-el-programa-de-eficiencia-energetica-2021/> (last visited Dec. 29, 2022)

<sup>95</sup> Marlies Hesselman, *Right to Energy*, in Binder, Nowak, Hofbauer and Janig (eds) ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS (Edward Elgar 2022); Government taken to court over inadequate climate strategies, FRIENDS OF THE EARTH (Jan. 12, 2022)

<https://friendsoftheearth.uk/climate/government-taken-court-over-inadequate-climate-strategies> (last visited Dec. 29, 2022)

<sup>96</sup> Proyecto de Ley Regula la construcción, instalación y operación, su impacto ambiental y la fiscalización de complejos de aerogeneradores de energía eléctrica, Cámara de Diputadas y Diputados de Chile (n.d.), <https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=14924&prmBOLETIN=14443-12> (last visited Dec. 29, 2022)

<sup>97</sup> Suspension of the Belo Monte dam license in view of breach of failure to comply to previous order, JUDICIAL PORTAL (Jan. 7, 2016), <https://leap.unep.org/countries/br/national-case-law/suspension-belo-monte-dam-license-view-breach-failure-comply> (last visited Dec. 29, 2022)

<sup>98</sup> Consórcio Norte Energia lawsuit (re Belo Monte dam in Brazil), BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Jan. 1, 2011) <https://www.business-humanrights.org/en/latest-news/consorcio-norte-energia-lawsuit-re-belo-monte-dam-in-brazil/> (last visited Dec. 29, 2022)

<sup>99</sup> Oaxaca Case, Indian Law Resource Center (n.d.) <https://indianlaw.org/mdb/oaxaca-case> (last visited Dec. 29, 2022)

<sup>100</sup> *Unión Hidalgo vs. EDF Group*, supra note 74

<sup>101</sup> *Indigenous community of Unión Hidalgo, ProDESC and ECCHR v. EDF*, supra note 75

communications of Special Procedures of the UN Human Rights Council.<sup>102</sup> These legal actions raised matters of just transition in several respects. In fact, the concerns are well expressed by the NGOs involved in the case when stating that:

[W]hile the climate emergency must prompt governments all over the world to take radical action, especially in the energy sector, the energy transition can only be legitimate and sustainable if it respects the rights to land, natural resources, and fundamental rights of local communities. [...] Even though the wind park addresses the critical topic of climate change, this should never happen at the expense of human rights.<sup>103</sup>

More specific arguments are visible across the different legal actions. The UN Special Procedure complaint is especially of interest, as it raises issues more widely beyond procedural ones of due diligence during decision-making processes and the right to FPIC, as for example those stressed in the OECD and Paris District Court cases. Thus, amongst the different just transition concerns, applicants have, for example, argued that while EDF wind farms produce clean, sustainable, high-quality electricity supplies for millions of people, the energy produced by the region is chiefly directed to the use of large private companies. It is not used to alleviate energy poverty amongst local populations in terms of securing more affordable energy prices and access to reliable and sustainable sources of electricity. Despite a majority of members already having grid access, access to electricity remains intermittent and unaffordable, including for the 11% of the community which lives in extreme poverty.<sup>104</sup>

Secondly, rather than improving livelihoods and energy access, the project aggravates people's access to energy sources and decent lives by placing pressure on indigenous livelihoods. In particular, the project encroaches on productive lands and hampers the community's traditional, historical economic activities around firewood collection and use: land enclosures aggravate scarcity and make fuel wood more expensive. Women are significantly affected because they are typically responsible for firewood collection and use, raising a gender equity dimension.

Lastly, the community raised several labor dimensions. Renewable energy developers typically insist that local renewable energy projects will be beneficial for local job creation. Still, the UN Special Procedures warn that jobs created by wind farm projects are often *temporary, low-paid*, and may not extend beyond the *initial construction phase*. Moreover, when the jobs created are insufficiently secure or long-term, local workers may be prevented from registering for social security or other labor benefits. In addition, the hires amongst *local women* are exceedingly scarce and often gender-stigmatizing, e.g., cleaning jobs. In addition, after the construction is completed, there is a risk that most (high-quality) job opportunities will be reserved for foreign workers, including through in-company transfers. Therefore, where diversity and inclusivity policies are available, they should not only apply to high-level technical and professional employment opportunities.

The complaints related to the Oaxaca community and EDF windfarms thus usefully show a wide variety of just transition questions, including decent work, access to services, and gender dimensions, which renewable energy projects raise. These are essential aspects that increase the

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<sup>102</sup> UN Special Rapporteurs Communication MEX 13/2021 and FRA 8/2021, *supra* note 76

<sup>103</sup> *Supra* note 56.

<sup>104</sup> OHCHR (2021). UN Special Rapporteurs Communication MEX 13/2021 and FRA 8/2021, *supra* note 76



acceptability of renewable energy projects beyond the more traditional issues of displacement, violence against local communities, and the loss of lands.

Finally, the installation of new energy projects can further impact the rights of indigenous groups and other traditional communities, leading to displacement or affecting their traditional ways of living. Implementing renewable energy projects has led to some legal actions. In *Private Corporation for the Development of Aysen, et al. v. Environmental Evaluation Service of Chile*,<sup>105</sup> claimants challenge the EIA of a proposed hydroelectric project, alleging, among other things, that the analysis failed to consider potential climate impacts. The environmental court of Valdivia rejected the climate claims but annulled the EIA on other grounds. In *The Municipality of San Felipe with the Environmental Assessment Service (SEA)*,<sup>106</sup> the plaintiff asked for the court to require an EIA for a Photovoltaic project based on a potential impact on a wetland. The Supreme Court rejected the petition on formal grounds. In another Chilean case, *Huayun Mapu Indigenous Community and Others with the Environmental Assessment Commission*, the plaintiffs asked the court to consider the indigenous character of the land use for a wind energy project.<sup>107</sup> The court dismissed the complaint because the administrative analysis thoroughly assessed the impact of the project.

#### **3.2.4. Just transition litigation related to subsidies for fossil fuel projects**

The fourth type of just transition litigation relates to subsidies granted to fossil fuel projects under the ruse of or despite just transition policies. One example is found in Brazil. The case directly deals with a just energy transition program proposed by the Brazilian government. However, it doesn't fall within the categories initially identified by the authors, as it questions the use (or misuse) of the just transition terminology through “greenwashing” arguments made by the government.<sup>108</sup> The case, *Rede Sustentabilidade and Others v. National Congress (ADI 7095; Complexo Termelétrico Jorge Lacerda)*,<sup>109</sup> challenges government subsidies extended to a coal energy complex under the guise of a just transition program. It relates to the thermoelectric complex built in the 1960s, which is the largest emitter of GHGs in the southern region of Brazil. In 2022, the federal administration adopted a law proposing a “Just Energy Transition Program” for coal-rich areas in the South of Brazil. The program – to be developed by January 2023 – was intended to prepare the region for a “probable” decommissioning of coal energy projects by 2040.<sup>110</sup> The law provided for the decommissioning of the thermoelectric complex in the following decades. However, in effect, it instituted economic subsidies from the federal government to small-scale energy distribution companies, extending the administrative and environmental

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<sup>105</sup> *Private Corporation for the Development of Aysen, et al. v. Environmental Evaluation Service of Chile*, Environmental Court verdict No R-42-2017, April 1, 2018.

<sup>106</sup> Case Number 36.277-2019, *The Municipality of San Felipe with the Environmental Assessment Service (SEA)*, Supreme Court of Chile, May 10, 2021

<sup>107</sup> Case Number R-3-2021 *Comunidad Indígena Huayun Mapu y Otros con Director Ejecutivo del Servicio de Evaluación Ambiental*. Environmental Court verdict No R-3-2021, May 19, 2022. <https://3ta.cl/wp-content/uploads/2022/05/Sentencia-R-3-2021-3TA.pdf>

<sup>108</sup> The Brazilian case is unique, and its consequences and ramifications are still being analyzed. During a workshop organized by Annalisa Savaresi and Joana Setzer on just transition litigation, one of the participants, Chris Hilson, suggested that this constituted a case of “just transition greenwashing.”

<sup>109</sup> *Rede Sustentabilidade (Rede), Partido Socialismo e Liberdade (PSOL) e Partido Socialista Brasileiro (PSB) v. Brazilian Congress (Complexo Termoeletrico Jorge Lacerda case)*, ADI 7095 (Federal Supreme Court, Mar. 10, 2022) <http://climatecasechart.com/non-us-case/adi-7095-complexo-termeletrico-jorge-lacerda/>

<sup>110</sup> Federal Law No. 14.299/2022, *Camara dos Deputados*, Jan. 5, 2022, <https://www2.camara.leg.br/legin/fed/lei/2022/lei-14299-5-janeiro-2022-792216-publicacaooriginal-164327-pl.html> (last visited Dec. 29, 2022)

authorizations granted to the complex until 2025. The subsidies allow the complex to sell energy above market prices and indirectly pay for additional energy from coal and fossil fuels.

The plaintiffs challenged the constitutionality of said law based on the violation of the right to a healthy environment and the Paris Agreement, among other human rights. They emphasize that using coal for energy generation is responsible for socio-environmental disasters in the region, exacerbation of climate change, and damage to public health, especially concerning populations already subject to socioeconomic disadvantages. Further, the law has not presented guidelines for the reduction of GHG by the complex. On the contrary, the Just Energy Transition Program stated that there would be no carbon dioxide abatement.

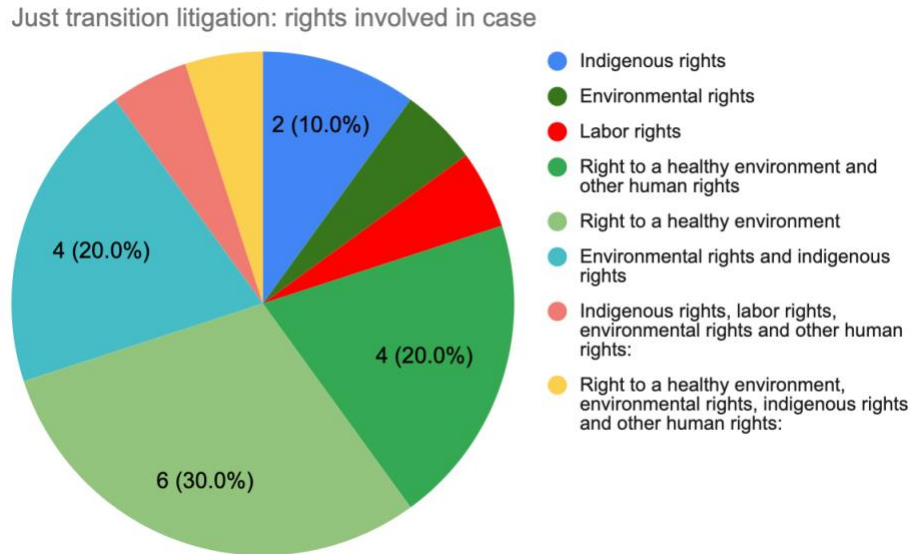
Finally, the applicants argue that the composition of the just energy transition council established in the law violates the principles of participatory democracy and equality, as there are no equal seats allocated to government and civil society organizations. Moreover, its composition does not reflect the participation of actors related to environmental and labor causes and the sustainable closure of mines. As a precautionary measure, the plaintiffs request that the law is declared unconstitutional. Further, they asked for the subsidy established by the law to be suspended and declared unconstitutional.

### **3.3. Categorization of cases by rights involved**

As noted before, this report treats just transition as a three-fold concept that encompasses labor, human rights, and the environment (Figure 1, above). As such, the cases observed so far are grounded on different human rights that relate to these categories: (i) labor rights (1), (ii) environmental rights (1), (iii) environmental rights and indigenous rights (4), (iv) indigenous rights, labor rights, environmental rights and other human rights (1), (v) indigenous rights (2), (vi) right to a healthy environment, environmental rights, indigenous rights and other human rights (1), (vii) right to a healthy environment (6), (viii) right to a healthy environment and other human rights (4). Figure 10 illustrates the percentage of cases in each category, which are dealt with separately below. The table shows that plaintiffs have often used a combination of these rights to substantiate their claims, e.g., environmental rights and indigenous peoples' rights.



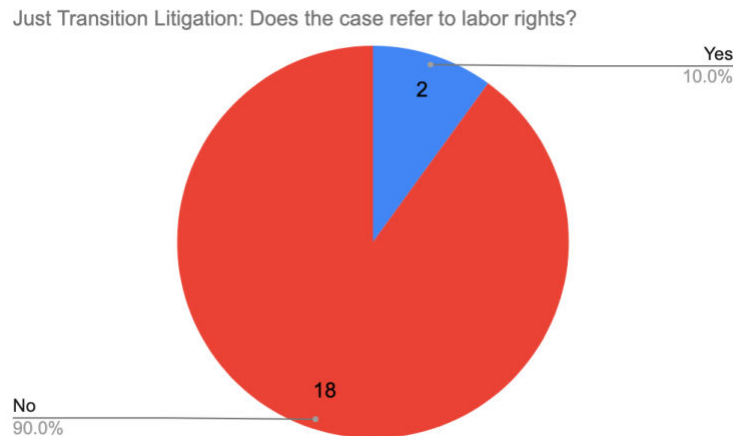
**Figure 10: Categorization of just transition litigation by rights involved**



### 3.3.1. Labor rights

A fundamental dimension of the energy transition relates to labor. Access to decent work must be ensured for the transition to be just. As reported above, workers in the fossil fuel industry will be deeply affected by the energy transition. However, in this report’s cases, labor rights are only used in two cases: in one case as the single argument and in another combined with indigenous rights, environmental rights and other human rights.

**Figure 11: Reference to labor rights**



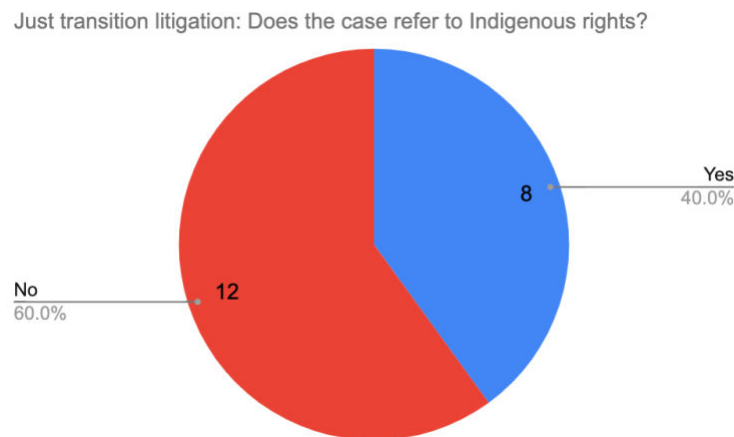
Aside from the UN Special Procedure communication related to the EDF wind farm in Oaxaca, Mexico, discussed in section 3.1.2, the trade union case of *Company Workers Union of Maritima & Commercial Somarco Limited and Others v Energy Ministry of Chile* is a leading – and successful – case in this context. As reported in section 3.2, three union workers brought the case against the Energy Ministry of Chile because it failed to include worker consultation in coal plants’

reintegration and reconversion plans. Consulting with affected workers is a distinctive procedural duty necessary to ensure adequate protection of the right to work in the energy transition. The case is based on the fundamental guarantees enshrined in the Chilean National Constitution, including, in particular, the right to equality before the law (Art. 19, 2), freedom of employment (Art. 19, 16), and trade union freedom (Art. 19, 19). Overruling the Court of Appeals’ decision,<sup>111</sup> the Chilean Supreme Court upheld the plaintiffs’ arguments and confirmed that the lack of consultation violated the government’s obligation to ensure a just transition.<sup>112</sup>

### 3.3.2. Indigenous peoples’ rights

Indigenous peoples’ rights are involved in eight cases, of which three concern the same situation of the construction of a major wind park in Oaxaca, Mexico. Indigenous communities are among the most affected by climate change impacts as well as by large GHG-emitting projects, especially in Latin America.<sup>113</sup> In many instances, the construction of renewable energy projects may also take place on or affect the use of their indigenous lands and resources. Within this context, indigenous communities are slowly becoming powerful actors in climate litigation.<sup>114</sup> They are also among the most active plaintiffs in the subset of just transition cases examined in this report.

**Figure 12: Reference to indigenous rights**



Among others, and albeit at an early stage, the *Wayúu Indigenous community v. Ministry of Environment and others* is particularly illustrative in this context. Filed by the Wayúu indigenous community of Northern Colombia, the case seeks the annulment of the environmental license of coal mining activities performed by private companies in the Guajira region.<sup>115</sup> Plaintiffs claim that the permitting process failed to comply with environmental provisions, violating the rights of

<sup>111</sup> Court of Appeal verdict No 318-2021, 26 March 2021 Company Workers Union of Maritima case, *supra* note 82.

<sup>112</sup> Supreme Court verdict No 25.530-2021, 9 August 2021 Company Workers Union of Maritima case, *supra* note 82.

<sup>113</sup> Fernando de la Cuadra, *Indigenous people, socio-environmental conflict and post-development in Latin America*, 18 *AMBIENTE & SOCIEDADE* 23–40 (2015), <https://www.scielo.br/j/asoc/a/bNdsVgqrYFbQcfzyrLDzPzq/abstract/?lang=en> (last visited Dec 28, 2022)

<sup>114</sup> Maria Antonia Tigre, *Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation*, 9 *E-PUBLICA* 214 (2022)

<sup>115</sup> Petition Wayúu Indigenous community v. Ministry of Environment and others, 11001-0324-000-2019-00107-00 (Colombian Council of State, Feb. 22 2019), <http://climatecasechart.com/non-us-case/wayuu-indigenous-community-and-others-v-ministry-of-environment-and-others/>

the Wayúu community, as well as that of other communities, including afro descendants, peasants, and the general population. Plaintiffs argue that the region is particularly vulnerable to the effects of climate change due to historical inequalities, one aspect that needs to be considered during environmental licensing processes. At the core of their arguments is their claim for environmental and climate justice. In particular, plaintiffs seek to highlight the lack of coherence between addressing climate change and fostering an economic model based on extractivism. For the Wayúus, an energy transition away from fossil fuels and coal mining is crucial in fighting the climate crisis. The transition towards clean energy is also their chance to pursue climate justice and protect the environment. As a result, plaintiffs advocate for the need to create a public policy that moves towards the energy transition in a way that is coherent with protecting their rights.

This case is significant to the study of just transition litigation for several reasons. First, the case highlights the existing conflict between advancing environmental protection and marginalized communities from the devastating effects of climate change and Colombia's overreliance on extractivism as an economic model (which is similar to that of other countries in Latin America and the Global South generally). This could be applied to the Latin American region as a whole and could inform other cases in different jurisdictions beyond Latin America, where courts struggle with striking a balance between economic progress and environmental protection.<sup>116</sup> Second, the case sheds light on historical injustices that have placed the region's population in a vulnerable situation to address the climate and environmental crises. This approach invokes the need to apply a differentiated analysis to areas disproportionately suffering the effects of climate change. In doing so, mitigation and adaptation measures could also help overcome pre-existing inequalities.

Finally, the case provides interesting arguments and evidence that could be replicated in other cases and jurisdictions. For example, plaintiffs focus on the need to discourage coal mining globally due to its close relation to climate change and the environmental harms derived from this activity. Throughout the document, plaintiffs argue that the energy transition is imminent and that Colombia should move away from projects that depend on extractivism. Although this type of claim might fall within what is considered a traditional climate litigation case at first, plaintiffs do include a just transition component. While arguing for an energy transition towards cleaner sources, plaintiffs underscore the need to ensure meaningful participation as a way to achieve justice.<sup>117</sup> Plaintiffs claim that the overall public policies related to energy transition should consider the particular context where it happens to guarantee fairness and avoid perpetuating historical injustices. To support their claims, plaintiffs included evidence of environmental and human health harms, testing which type of evidence might be relevant in just transition cases. Yet, it will depend on the ultimate reasoning of the court, as the case is still pending.

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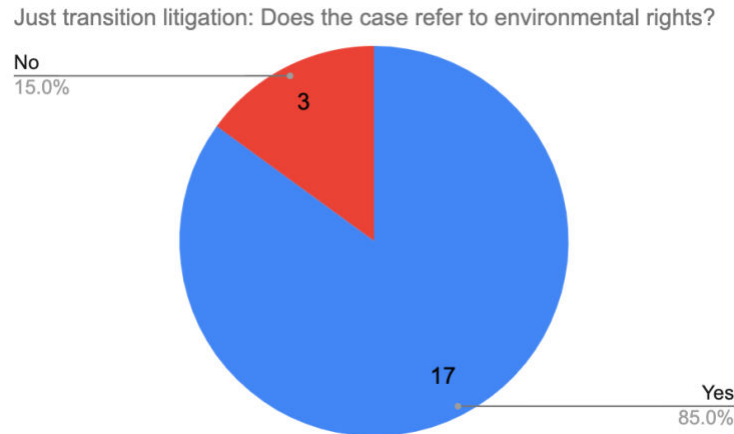
<sup>116</sup> J Auz, *Dos supuestos aliados: conciliar la justicia climática y los litigios en el Sur Global*, in C Rogríguez Garavito (ed) *LITIGAR LA EMERGENCIA CLIMÁTICA: LA MOVILIZACIÓN CIUDADANA ANTE LOS TRIBUNALES PARA ENFRENTAR LA CRISIS AMBIENTAL Y ASEGURAR DERECHOS BÁSICOS* 147–162

<sup>117</sup> Wayúu case *supra* note 115 at 292-293

### 3.3.3. The right to a healthy environment and other substantive “environmental rights”

The majority (17) of the examined cases rely in whole or in part on environmental rights. Plaintiffs have relied exclusively on the right to a healthy environment in six cases, and along with other human rights in five cases. Environmental rights arguments were also used in five cases in combination with indigenous rights and in one case by themselves.

**Figure 13: Reference to environmental rights**



The cases of *Julia Habana et al. v. Mexico*<sup>118</sup> and *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico*<sup>119</sup> challenge amendments to the 2021 Electric Industry Law, which, in the plaintiffs’ opinion, undermine the Mexican government’s duty to transition towards renewable energy. Both cases argue that the amendments violate the constitutional right to a healthy environment by prioritizing electricity generated by coal and fossil fuel plants over cleaner, renewable energy. Plaintiffs claim that a just energy transition guarantees the exercise of the right to a healthy environment and is a necessary condition to comply with international commitments to reduce GHG emissions. In another case (*Challenge to the constitutionality of amendments to the rules governing Clean Energy Certificates*), the Mexican Supreme Court decided that amendments to the Electric Industry Act related to the allocation of Clean Energy Certificates were unconstitutional. Seven Supreme Court Justices considered that the amendments violated the principle of sustainability and the right to a healthy environment.<sup>120</sup> Nevertheless, Mexican Law requires at least eight votes for the law to be declared invalid, a threshold that was not met in this case.

<sup>118</sup> Petition *Julia Habana et al. v. Mexico*, 210/2021 (Mexico District Court, Mar. 24 2021) <http://climatecasechart.com/non-us-case/julia-habana-et-al-v-mexico-unconstitutionality-of-the-reform-to-the-electricity-industry-law/>. This case was dismissed on procedural grounds (lack of standing) and is currently on appeal pending decision.

<sup>119</sup> Petition *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico*, 204/2021 (Mexico District Court, Mar. 24 2021), <http://climatecasechart.com/non-us-case/nuestros-derechos-al-futuro-y-medio-ambiente-sano-et-al-v-mexico-unconstitutionality-of-the-reform-to-the-electric-industry-law/>

<sup>120</sup> *Judgement Members of the Senate v. Mexico (Challenge to the constitutionality of amendments to the rules governing Clean Energy Certificates)* 64/2021 (Mexico Supreme Court, Apr. 7 2022), <http://climatecasechart.com/non-us-case/challenge-to-the-constitutionality-of-amendments-to-the-rules-governing-clean-energy-certificates/>

Grounded on similar arguments, *Greenpeace Mexico v. Ministry of Energy and Others* (on the Energy Sector Program)<sup>121</sup> and *Greenpeace (Mexico) v. Ministry of Energy and Others* (on the Energy Sector Program 2020 and Electric Industry Law)<sup>122</sup> seek the declaration of unconstitutionality of Mexico's Energy Sector Programs due to an alleged violation of the human rights to a healthy environment and access to electricity based on renewable resources. Plaintiffs in both cases argue that the programs are promoting fossil fuels at the expense of renewable energy projects, which could constitute an imminent danger to the invoked rights. The issue arises with the prioritization criteria included in those programs regarding energy dispatched and the modification of the certification market for renewable energy.

Finally, *CEMDA v. Comisión Federal de Electricidad (fees increase for generation of renewable energy)*<sup>123</sup> and *Idheas v. Centro Nacional de control de Energía and Secretaría de Energía*<sup>124</sup> challenge different provisions related to renewable energy production and transmission, including fee charges regulation and plant operation authorizations that prioritize fossil fuel over renewable energy sources. Both cases have had decisions in favor of plaintiffs.<sup>125</sup> The courts reasoned that the challenged provisions fostered the production and use of non-renewable energy sources, limiting renewable and clean energy, thus impeding the move towards decarbonization. The courts found that such provisions affected the environment and violated international commitments, especially those related to GHG emissions reduction.

In *ADI 7095 (Complejo Termeléctrico Jorge Lacerda)*,<sup>126</sup> the plaintiffs challenge a norm that provides further subsidies to fossil fuels grounded in the principles of the defense of consumers and sustainable development in the economic order (Brazilian constitution, art. 170(v), art. 170(vi), the fundamental right to health (art. 196), and the fundamental right to a healthy environment (art. 225). With respect to consumer rights, the plaintiffs argue that the subsidies provided by the purchase of coal reflect the competitiveness of thermoelectric companies, leading consumers to pay for more expensive energy. Mining and coal burning, in turn, cause severe harm to public health, including respiratory problems, cardiovascular problems, cancer, and the reduction of life expectancy. The contributions of the subsidies to coal on climate change, in turn, directly affect the right to a healthy environment, the right to life, the right to human dignity, the right to food, and the right to housing.

### 3.4. Categorization of cases according to the justice angle

Just transition is undoubtedly a matter of fairness. Different principles of justice are featured in the examined cases, as invoked by the plaintiffs or recognized by the courts. In this section, we discuss

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<sup>121</sup> Petition *Greenpeace Mexico v. Ministry of Energy and Others* (on the Energy Sector Program), 372/2020 (Mexico District Court, Aug. 20 2020) <http://climatecasechart.com/non-us-case/greenpeace-mexico-v-ministry-of-energy-and-others/>

<sup>122</sup> Judgement *Greenpeace v. Ministry of Energy and Others* (on the Energy Sector Program 2020 and Electric Industry Law), 135/2021 (Mexico District Court, Sep. 1 2022), <http://climatecasechart.com/non-us-case/greenpeace-v-ministry-of-energy-and-others-on-the-energy-sector-program-2020-and-electric-industry-law/> .

<sup>123</sup> *CEMDA v. Comisión Federal de Electricidad (Rise of Legacy Transmission Rates)*, 232/2021 (District Court, Oct. 27, 2020) <http://climatecasechart.com/non-us-case/cemda-v-rise-of-legacy-transmission-rates/>

<sup>124</sup> Judgment *Idheas v. Centro Nacional de control de Energía and Secretaría de Energía*, 186/2021 (Circuit Court, Apr. 19, 2021) <http://climatecasechart.com/non-us-case/idheas-litigio-estrategico-v-centro-nacional-de-control-de-energia-cenace-and-secretaria-de-energia-sener/>

<sup>125</sup> *CEMDA v. Comisión Federal de Electricidad* case is still pending but a definitive suspension was ordered for the remainder of the trial.

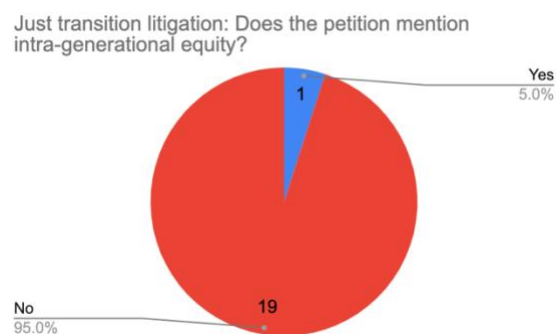
<sup>126</sup> *Complejo Termoeléctrico Jorge Lacerda* case *supra* note 109.

two main principles of justice, distributive and procedural justice, as defined at the beginning of the report.

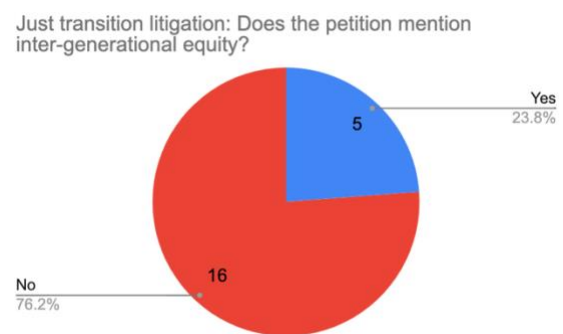
### 3.4.1. Distributive justice

The distributive justice principle incorporates two dimensions: intra- and inter-generational equity. The former refers to allocating burdens and resources within the present generations, and the latter focuses on alleviating future generations' burdens. Only one case refers to intra-generational equity, while five mention inter-generational equity in the plaintiff's reasoning.

**Figure 15: Reference to intra-generational equity**



**Figure 16: Reference to inter-generational equity**



The intra-generational dimension is often not explicitly addressed in the selected complaints. However, *Wayúu Indigenous community v. Ministry of Environment et al.*<sup>127</sup> is a very illustrative example of a claim by a marginalized and affected community addressing the unfair allocation of burden that the authorization to a climate-altering project would create.

The inter-generational dimension is more often invoked in the selected cases, particularly those based on the right to a healthy environment. For instance, in *Julia Habana et al. v Mexico*,<sup>128</sup> the plaintiffs claim that future generations will suffer the most adverse effects of climate change produced by the constitutional amendments that further push for fossil fuels.<sup>129</sup> Similarly to *Neubauer et al. v. Germany*,<sup>130</sup> in this case, claimants produced intergenerational arguments based on complying with the Paris Agreement and the commitments made by Mexico. Finally, in *Nuestros Derechos al Futuro y Medio Ambiente Sano et al., v. Mexico*,<sup>131</sup> the 20 young applicants stress the intergenerational dimension of the violation of the right to a healthy environment.<sup>132</sup> In

<sup>127</sup> Wayúu case *supra* note 115

<sup>128</sup> Julia Habana case *supra* note 118. This case was dismissed on procedural grounds (lack of standing) and is currently on appeal pending decision.

<sup>129</sup> *Id.* at para. 423 of the claim.

<sup>130</sup> Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, Mar. 24, 2021, [http://www.bverfg.de/e/rs20210324\\_1bvr265618en.html](http://www.bverfg.de/e/rs20210324_1bvr265618en.html) (hereinafter Neubauer). See Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), Constitutional Complaints Against the Federal Climate Change Act Partially Successful, Press Release No. 31/2021, (Apr. 29, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>

<sup>131</sup> Nuestros Derechos al Futuro y Medio Ambiente Sano case *supra* note 119.

<sup>132</sup> *Id.* at para. 328.

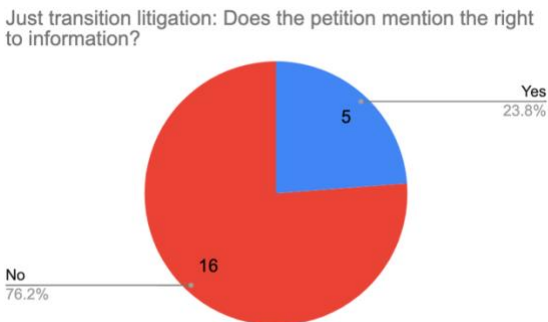
this sense, the applicants claim that allowing the increase in the use of fossil fuels today would result in the present generation consuming the carbon budget of future generations, making these amendments unconstitutional.

*Idheas Litigio Estrategico v. Centro Nacional de Control de Energía (CENACE) and Secretaría de Energía (SENER)* is another case invoking the intergenerational dimension of the right to a healthy environment.<sup>133</sup> The plaintiffs challenge a series of regulations by the Mexican government setting tariffs for renewable energy projects under legacy contracts. For the applicants, these regulations would increase the use of fossil fuels and hinder the energy transition. The argument put forward is that if more emissions are allowed today, fewer opportunities for a sustainable future would exist for future generations.

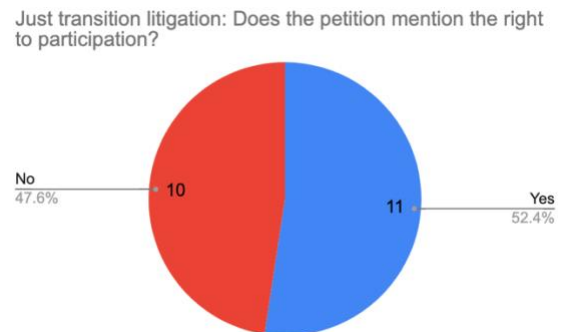
### 3.4.2. Procedural justice

The procedural justice principle is mainly displayed in claims that bring out arguments related to the right to information (5) and participation (11) of the most affected communities and groups in the decision-making process and the guarantee of free, prior and informed consent (FPIC) for indigenous peoples in relation to the adoption of legislative or administrative measures that may affect them (6).

**Figure 17: Reference to right to information**



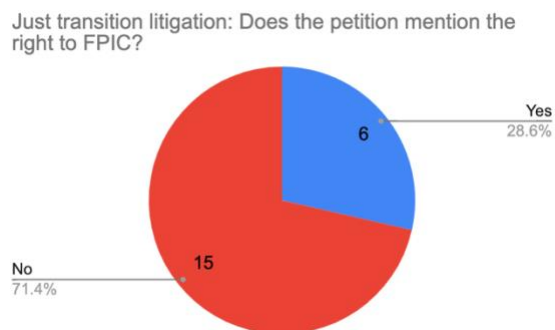
**Figure 18: Reference to other participation**



<sup>133</sup> *Idheas* case *supra* note 124.



**Figure 19: Reference to FPIC**



*ADI 7095 (Complejo Termeléctrico Jorge Lacerda)* is an illustrative example.<sup>134</sup> According to the plaintiffs, the composition of the Council of the Just Energy Transition Program violates the constitutional principle of participatory democracy and equality. As a public policy counsel, the program should allow for and encourage broad participation in elaborating and implementing public policies. However, on the contrary, the Council proposed by the law is not representative because there is no parity between the number of seats for government and civil society organizations. Workers' unions, other workers' organizations, and environmental non-profit organizations are not represented. The Council is mainly composed of agencies part of the subnational government of Santa Catarina – a state that heavily relies on coal – and civil society organizations that support and incentivize the use of coal.

Another case where procedural aspects are considered is *Unión Hidalgo v. EDF Group*,<sup>135</sup> where the Unión Hidalgo indigenous community, joined by ProDESC and ECCHR, sought to halt the construction of a wind farm project located on its land. The claim was based on the inappropriate participation of the community in the decision-making process related to the project, requiring EDF to comply with the human rights standards, especially regarding their procedural rights. As the wind farm was projected on communal land, according to Mexican law, the decisions regarding the uses of that communal property involved the entire community through their assemblies. Regrettably, those procedural rights were not respected.

Indigenous communities' rights to FPIC, participation and consultation are expressly laid down in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. Such rights stem from indigenous people's rights to control and protect their lands. According to the French OECD Contact Point and UN Special Procedures, the community's procedural rights, including FPIC, were not respected (see also section 3.1).<sup>136</sup> In addition, the EDF's Mexican subsidiary developed an EIA in 2018, confirming the potential negative impacts that the project could pose on the indigenous communities. Because the procedure at the French National Contact Point of the OECD did not result in a satisfactory outcome, the indigenous community, ProDESC and ECCHR filed a legal action in a French Civil Court under the 2017 Duty of Vigilance Law, which

<sup>134</sup> Complejo Termoeléctrico Jorge Lacerda case *supra* note 109.

<sup>135</sup> See section 3.1 and EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR). PRODESC AND TERRE SOLIDAIRE, *supra* note 75

<sup>136</sup> Joint Communication AL OTH 210/2021, *supra* note 74; and *Unión Hidalgo v. EDF*, *supra* notes 76-77



requires corporations to avoid human rights abuses or environmental damage. In this action, the plaintiffs again argue that EDF did not respect procedural rights and due diligence obligations towards the community by not assessing all risks adequately, by not consulting adequately in good faith, and by not engaging in FPIC. This also aggravated tensions, conflict and violence in the community. The Paris Civil Court dismissed the preliminary request to suspend the wind farm construction based, largely on procedural grounds, but recognized its judicial competence on the matter.<sup>137</sup>

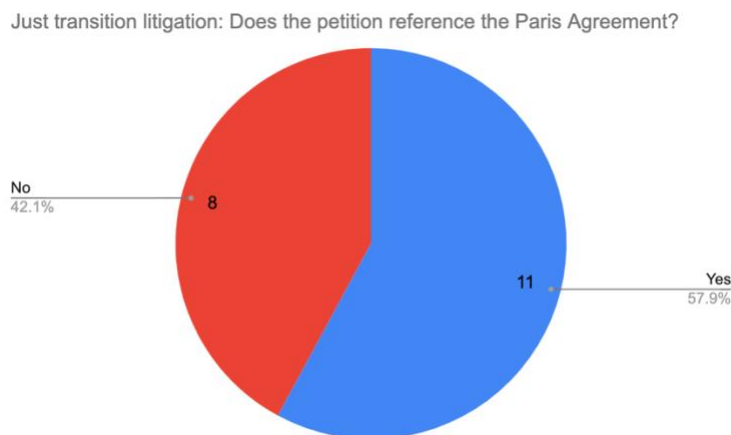
### 3.5. Categorization of cases according to the climate angle

We further assessed how these cases refer to the climate angle, asking whether they (i) refer to long-term temperature goals of the Paris Agreement (11), (ii) refer to NDCs (8), and/or (iii) relate to policies and activities that are necessary to achieve decarbonization to net zero emissions (including renewable energy projects, or mining of minerals for renewable energy technology) (12). It should be noted that the climate angle in the cases in the last category is often not obvious. At first glance, these cases might appear similar to traditional labor rights or environmental law cases. However, because the project is pushed forward due to a decarbonization policy or law (which, in turn, is adopted in compliance with the Paris Agreement or an NDC), we consider these cases as just transition cases for the purposes of this research.

#### 3.5.1. Reference to the Paris Agreement in the initial petition

The first aspect analyzed is whether the cases reference the Paris Agreement in the initial petition, which includes 11 cases. The mention of the Paris Agreement – similar to a vast majority of broadly defined climate litigation cases – is almost always used to support a just energy transition.<sup>138</sup> Since all Latin American countries ratified the Paris Agreement, goals to achieve carbon neutrality and reduce GHG emissions are part of each country’s overall decarbonization policies and actions.

**Figure 20: Reference to the Paris Agreement in the initial petition**



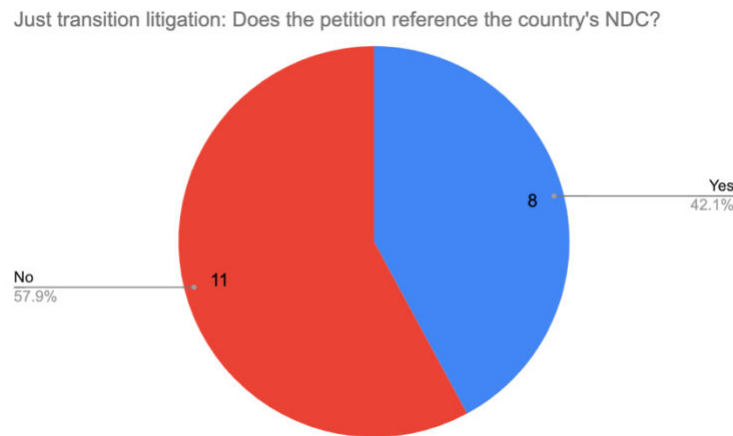
<sup>137</sup> EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR). PRODESC AND TERRE SOLIDAIRE, *supra* note 75

<sup>138</sup> See, e.g., Company Workers Union of Maritima case in Chile case *supra* note 82; Wayúu case *supra* note 115; Nuestros Derechos al Futuro y Medio Ambiente Sano case *supra* note 119; and CEMDA case *supra* note 123.

### 3.5.2. Reference to the NDC in the initial petition

The second aspect analyzed is whether the cases reference NDCs in the initial petition, which includes eight cases. Similar to the Paris Agreement, cases reference NDCs use these as supporting arguments for a just energy transition. In particular, the Chilean *Company Workers Union of Maritima* case explicitly invokes the text of the country's updated NDC (2020) referring to the concept of just transition.<sup>139</sup> Chile's NDC promotes an energy transition that encompasses a socially and environmentally sustainable economy that includes job creation, social justice, and poverty eradication.<sup>140</sup> The petitioners further argued that decarbonization and just transition are interdependent, considering that decarbonization processes affect the rights of communities, workers, and businesses. This reasoning reinforces the importance of including measures to ensure the protection of the rights of all actors.

**Figure 21: Reference to NDC in the initial petition**



### 3.5.3. Reference to decarbonization policies in the initial petition

The third climate-related aspect analyzed is whether the cases reference decarbonization policies directly in the initial petition, which include 12 cases. Most of these policies stem from the international commitments countries made in the Paris Agreement. That is the case of the *Company Workers Union of Maritima*, which challenged an act issued due to Chilean decarbonization policies.<sup>141</sup> Plaintiffs argue that the act gives prevalence to companies over workers in the energy transition process, recalled the need to comply with international commitments, and sought that their rights as workers are included in all efforts toward such decarbonization.<sup>142</sup>

Furthermore, several analyzed cases have challenged the Mexican Electric Industry Law and its amendments.<sup>143</sup> Although specific arguments may vary from case to case, a common claim is that these acts prioritize fossil fuel and carbon-based projects over renewable energy. Plaintiffs in these cases consider this to endanger the energy transition and impede the compliance of international,

<sup>139</sup> *Company Workers Union of Maritima* case in Chile case *supra* note 82.

<sup>140</sup> *Id.* at 8 of the appeal.

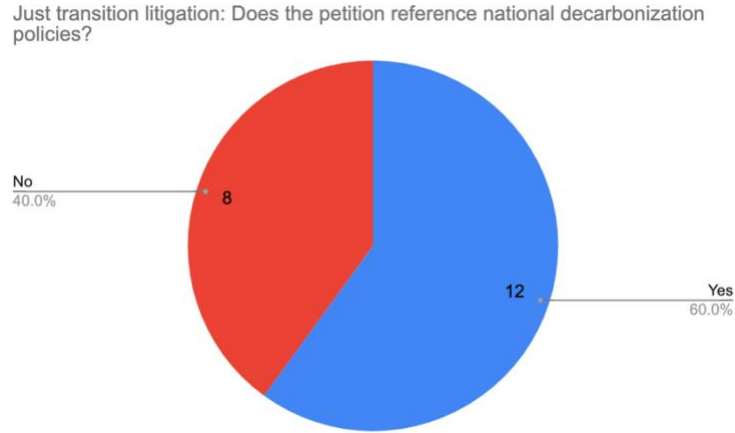
<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6, 7.

<sup>143</sup> Challenge to the constitutionality of amendments to the rules governing Clean Energy Certificates *supra* note 120; *Greenpeace v. Ministry of Energy and Others supra* note 122

regional, and national commitments regarding GHG reduction and the fight against climate change.

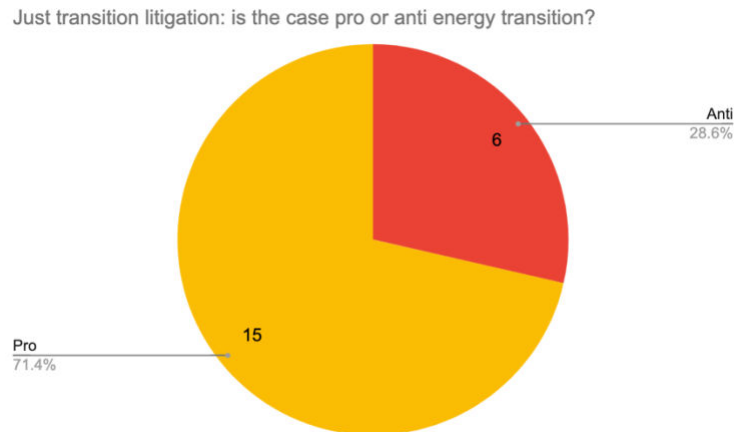
**Figure 22: Reference to decarbonization policies in the initial petition**



### 3.6. Objectives of Just Transition Litigation

In addition, we analyzed whether pro- or anti-energy transition sentiments inform cases. While just transition cases may be informed by “anti” energy-transition objectives (or “anti-climate,” as the existing scholarship has characterized them) (6), we also found cases that oppose fossil fuel subsidies, policies, or projects, without opposing the energy transition as such (15). Our report thereby sheds light on a new type of climate litigation that uses just transition framing to promote more just pro-climate policies. However, it should be noted that the overall objectives of plaintiffs are not always clear from the petitions. For example, short-term objectives may have anti-regulatory effects, which may not directly align with the litigation’s long-term goals and consequences.

**Figure 23: Are cases pro or anti-energy transition?**



Out of the cases analyzed in this report, fifteen can be categorized as informed by pro-energy transition claims in the terms indicated in the paragraph above. The indigenous communities and representative NGOs bringing the cases of Unión Hidalgo<sup>144</sup> and Wayúu<sup>145</sup> oppose fossil fuel projects by explicitly referring to the global need to move forward in the transition towards cleaner energy due to the devastating effects of the current energy activities. Plaintiffs in these cases urge the courts to find ways to ensure the energy transition happens while also bringing to the forefront claims of environmental and indigenous justice. For example, protecting the indigenous rights to land, natural resources, and other fundamental rights is a vital aspect of their claims in favor of an energy transition, which they claim is only legitimate and sustainable if their rights are also respected.

Similarly, cases that challenge existing energy acts can also be considered pro-energy transition, albeit it might look like they are against it at first sight. The Mexican case is a good example. Despite Mexico's claims of supporting the Paris Agreement, several recently-issued laws and resolutions seem to contradict this stand and affect their NDCs and climate change-related goals. Some of the Mexican cases challenge these provisions arguing that they are prioritizing non-renewable energy production, either by placing higher fees on renewable energy,<sup>146</sup> promoting fossil fuel projects at the expense of renewable energy projects,<sup>147</sup> or altering the rules of the national electric system in terms of energy dispatchment and market certification.<sup>148</sup> In 2022, Greenpeace Mexico and CEDMA filed two similar complaints in the District Court in Mexico City against Mexico's new Energy Sector Program for 2022-2036.<sup>149</sup> The complaint alleges that the Program violates human rights – including the right to a healthy environment. The argument is grounded on how the electricity policy reflected in the Program does not contemplate the development of a just energy transition strategy that generates well-being, reduces the sector's negative social and environmental impacts, and respects and guarantees human rights. In addition, it delays 13 years of fulfilling clean energy generation goals. It maintains the use of fuels with high social, environmental, and climate impacts, such as gas, fuel oil, and coal. Finally, it perpetuates negative externalities affecting populations living in highly marginalized conditions. It is also observed in the Program that the generation of electric energy with fossil fuels such as gas and fuel oil is favored and will continue to be favored; this will not allow Mexico to meet its clean energy goals.

Likewise, *ADI 7095 (Complexo Termelétrico Jorge Lacerda)* in Brazil challenges a federal law establishing an economic subsidy for contracting energy providers and allegedly creating the Just

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<sup>144</sup> See section 3.1 and EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR). *PRODESC AND TERRE SOLIDAIRE*, *supra* note 75.

<sup>145</sup> Wayúu case *supra* note 115.

<sup>146</sup> CEMDA case *supra* note 123

<sup>147</sup> Greenpeace Mexico case *supra* note 121; Nuestros Derechos al Futuro y Medio Ambiente Sano case *supra* note 119; Julia Habana case *supra* note 118; Challenge to the constitutionality of amendments to the rules governing Clean Energy Certificates *supra* note 120

<sup>148</sup> Greenpeace v. Ministry of Energy and Others *supra* note 122.

<sup>149</sup> Greenpeace v. Ministry of Energy and Others (on the Energy Sector Program 2022), 649/2022 (District Court in Administrative Matters, Jun. 22, 2022) <http://climatecasechart.com/non-us-case/greenpeace-v-ministry-of-energy-and-others-on-the-energy-sector-program-2022/> and Mexican center for Environmental Law (CEMDA) v. Ministry of Energy and Others (on the Energy Sector Program 2022), 650/2022 (District Court in Administrative Matters, Jun. 22, 2022) <http://climatecasechart.com/non-us-case/mexican-center-for-environmental-law-cemda-v-ministry-of-energy-and-others-on-the-energy-sector-program-2022/>

Energy Transition Program.<sup>150</sup> However, plaintiffs claim that the subsidies include purchasing energy from burning coal and fossil fuels in violation of their Constitution and the Paris Agreement.

The cases informed by pro-energy transition claims identified in this section provide a novel approach to just transition litigation. These cases are actively challenging acts that might initially seem to advance towards an energy transition but, in reality, still depend on and promote fossil fuel projects. Furthermore, they bring light to existing environmental and indigenous injustices issues and seize the energy transition efforts as the opportunity to end these injustices. Only in doing so can we envision a genuinely sustainable and just energy transition.

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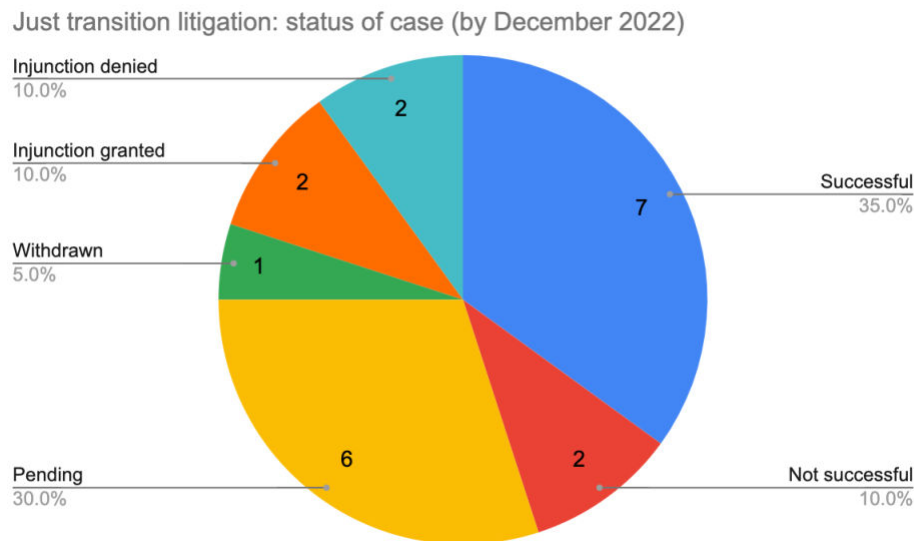
<sup>150</sup> *Complejo Termoeléctrico Jorge Lacerda* case *supra* note 109.

#### 4. REMEDIES IN JUST TRANSITION LITIGATION

Restorative justice aspires to return victims to the state in which they were before damages were caused.<sup>151</sup> It aims to repair the harm caused by the energy transition to individuals, groups, and communities.<sup>152</sup> Depending on the injustice experienced, restoration may take various forms, such as compensation for carbon emissions, restoring natural areas, creating reemployment plans, and compensating for job losses. There is no easy way to determine whether just transition litigation has been successful. The multiple dimensions of this type of litigation make it complex. The success of just transition litigation must embrace the analysis of all three dimensions of the decent work and livelihoods, a clean environment, and universal access to essential goods and services, which are the core of the just transition definition.

To provide an initial assessment of “success” in just transition litigation, we have investigated the status of the cases within our dataset. An analysis of the total number of lawsuits initiated reveals that 14 lawsuits have been decided. Decisions may not be final as some of these might be appealed. In 9 of these 14 cases, the courts ruled in favor of the plaintiffs, granting the requested remedies (either in a final or preliminary decision). In 4 out of 14 cases, the courts denied the motions and remedies requested (either in a final or preliminary decision). Five cases are still pending (i.e., no judgment has been granted yet), and one was withdrawn during the process. As such, in 45% of cases, the plaintiffs obtained the motions in their complaint. This dimension is illustrated in Figure 24 below.

**Figure 24: How just transition cases have been decided (updated until Dec. 2022)**



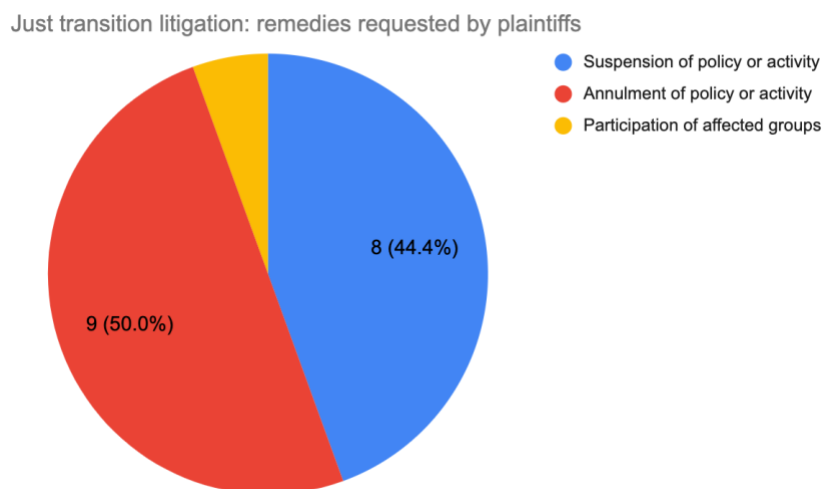
<sup>151</sup> Darren McCauley & Raphael Heffron, *Just transition: Integrating climate, energy and environmental justice*, 119 ENERGY POLICY 1–7 (2018), <https://www.sciencedirect.com/science/article/pii/S0301421518302301>

<sup>152</sup> M. Hazrati & R. J. Heffron, *Conceptualising restorative justice in the energy Transition: Changing the perspectives of fossil fuels*, 78 ENERGY RESEARCH & SOCIAL SCIENCE 102115 (2021), <https://www.sciencedirect.com/science/article/pii/S2214629621002085>

## 4.1. Remedies Requested

With respect to the remedies requested by plaintiffs, we identified three examples: (i) suspension of a policy or activity (8); (ii) annulment of a policy or activity (9); (iii) participation of affected groups (1). The plaintiffs typically demand annulment of project permits and suspension of public bidding, as well as a declaration of unconstitutionality and suspension of legal provisions. For instance, in *Company Workers Union of Maritima & Commercial Somarco Limited and Others v Ministry of Energy*, the plaintiffs demanded the suspension of a ministerial decree that did not envisage the consultation of workers affected by the decommissioning of coal power plants.<sup>153</sup>

**Figure 25: Remedies requested by plaintiffs**



Since several cases are still pending, there is not enough information to assess the remedies granted by courts. In one of the examples so far, the Chilean Supreme Court ordered the defendant to adopt measures to ensure that the energy transition incorporates a fair and equitable social and environmental component, with a specific plan to reincorporate workers into the job market.<sup>154</sup> This decision, as explained, can provide some benchmarks and standards for an equitable just transition. On the other hand, rejection decisions were mainly based on procedural grounds, such as lack of evidence on the violations allegedly committed or lack of legal standing of the applicants.

## 4.2. “Success” of Just Transition Litigation

However, a more in-depth analysis of the dataset is required to assess just transition litigation “success.” Indeed, it is also essential to distinguish the status of cases within the context of its objectives: just transition litigation labeled as pro- (71.4% of the cases) and anti-energy transition (28.6% of the cases). Only three decided cases, in which courts have granted remedies to plaintiffs, are anti-energy transitions. In turn, eleven decided cases with remedies granted are pro-energy transitions. To understand “success,” it is essential to determine the plaintiff’s goals in bringing

<sup>153</sup> *Company Workers Union of Maritima* case *supra* note 82.

<sup>154</sup> *Id.*

the case, since these can determine whether the plaintiffs' objectives are antithetical to the energy transition or, on the contrary, whether they align with the climate policies of each state. If we consider just transition litigation's multi-dimension, this distinction is crucial. Nonetheless, as noted before, understanding the motivations of a plaintiff in bringing a case is not always an obvious assessment.

One example of this multidimensional approach in just transition litigation is the case of *Company Workers Union of Marítima & Commercial Somarco Limited and Others v Ministry of Energy*.<sup>155</sup> This case is characterized as anti-energy-transition, where decarbonization and/or energy transition plans are directly challenged. The workers petitioned the court requesting to be included in the energy transition process. Importantly, they did not oppose the energy transition *per se* but rather how that transition was conducted. The workers' site had already been closed before the beginning of the legal actions because of the state decarbonization plans. The workers, in turn, claim that the state has not complied with its obligations to consult them in elaborating labor reinsertion policies. They allege that the government abandoned them after the closure of their workplace. The court ruled in favor of the plaintiffs and ordered the government to issue a just transition policy, including workers in that process. Therefore, the workers achieved their objective of being included in the participatory process. However, this did not affect Chile's decarbonization plans.

A different analysis can be made concerning the case *Huayún Mapu Indigenous Community*.<sup>156</sup> In this case, indigenous communities challenged contracts awarding lithium exploitation quotas to foreign companies. Due to non-compliance with legal norms requiring indigenous participation and consultation, the action sought to annul the contracts. The remedies requested were granted, and the contracts were dissolved. The court found that while there is no prohibition against awarding new contracts, consultation and citizen participation requirements must be met. Once again, this litigation is not against the energy transition since it doesn't directly challenge the measures but how these were conducted. However, it has the effect of slowing down the energy transition, since the steps taken by the government to fulfill it (contracts granted to the companies) were annulled and therefore had to be redone appropriately.

With the limited data we have, we can conclude that just transition litigation cases do not threaten the energy transition or broader decarbonization processes. However, they require fulfillment of certain procedural requirements, which may delay decarbonization policies in Latin America. These results show that ensuring adequate participation of all stakeholders affected in the energy transition – among other substantive and procedural requirements depending on the jurisdiction – is essential to avoiding litigation and further delays to national decarbonization.

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<sup>155</sup> Company Workers Union of Maritima case *supra* note 82.

<sup>156</sup> Comunidad Indígena Huayún Mapu case *supra* note 107.



## 5. CONCLUSIONS AND LOOKING AHEAD

In the context of an emerging just transition process in Latin America, the present report explores the challenges of just transition litigation in the region. The report began by proposing a definition of “just transition” and “just transition litigation,” which helps frame the subsequent categorization of cases. The definition of just transition litigation focuses on the distribution of the benefits and burdens of transition policies and activities, involving various procedural and substantive aspects, and with special attention to effects on local communities and (vulnerable) affected stakeholders.

The report evidences that just transition litigation is underway on this continent and that the cases that could be considered to fall within this newly identified climate litigation category are very diverse. Just transition concerns about decent jobs, livelihoods, and access to basic goods and services are being raised by different types of plaintiffs (e.g., NGOs, indigenous peoples, children/youth, union workers, political parties, and even some government agencies) against various types of defendants, but especially governments so far. Importantly, litigants address the distribution of burdens and benefits from different kinds of industries and activities related to the transition. In terms of the latter, this report shows that just transition litigation can both address (old) fossil fuel activities and projects – e.g., challenge the negative effects of the decommissioning of fossil fuel infrastructures or mining sites on workers in these sectors, or local communities or local environments – as well as new renewable energy-related activities, projects or policies that support the transition. In this sense, litigation may address burdens and benefits of the construction of new wind parks or the licensing or operation of rare minerals mines (e.g., lithium), both of which are necessary for scaling up the production of new renewable energy and relevant new renewable energy technologies (e.g., lithium).

A key insight identified is that just transition plaintiffs invoke different legal grounds to support their claims. However, at least in Latin America, they often bring rights-based arguments. Amongst the various human rights involved, environmental and human rights are most commonly claimed, including many references to procedural rights. Labor rights are the least invoked, which is remarkable since the just transition concept is generally associated with impacts on jobs. It is worthwhile to continue monitoring these trends to identify why and how some legal grounds are more frequently invoked in just transition disputes than others. If labor claims continue representing the smallest percentage of just transition litigation in Latin America, it would be helpful to understand whether these rights are not claimed because they are well protected in Latin America or simply because labor unions do not tend to engage in just transition processes, or do not view their struggles through a climate lens. Similarly, the role of procedural justice concerns, alongside the substantive dimensions of just transition, deserves close attention in this particular strand of climate litigation.

Another essential category in the report that can significantly influence future research is the *objective of just transition litigation*. It is vital to continue observing whether the purpose of just transition litigation is to encourage an energy and climate-resilient transition or, on the contrary, to obstruct it. We posit in this report that just transition litigation often cannot be neatly qualified as either anti-regulatory or pro-regulatory in nature, even though “successful” cases will typically affect (pro-)climate policies, activities, or projects – at least temporarily. As such, we consider that just transition litigation should be seen and understood as a third category of climate litigation, with its own (diverse) rationales. This exploratory paper shows that the claims and grievances

voiced by just transition litigants may be complex. Moreover, as discussed in our section on remedies, the “success” of a just transition case may have to be evaluated in light of all the different dimensions of just transition: i.e., decent work and livelihoods, a clean, healthy, safe, and sustainable environment, and universal access to basic goods and services. As cases further develop, the research into successes and failures and remedies granted by courts can be expanded.

Another gripping finding of the report is that most cases can be included in two or more categories, reflecting interconnections between each category. In this sense, the different interactions between categories and cases can become the aim of further research. For example, these interactions can help identify trends regarding the rights invoked concerning specific industries or the justice angle used by the plaintiffs for invoking a particular right. In addition, the lessons that just transition litigation can have on future legislative development in the region constitute another field of future research. Indeed, the judicial decisions and the areas involved can identify the crucial aspects legislation should tackle to address just transition.

As litigation is only one of the elements of the emerging just transition process in Latin America, this report aimed to clarify this process’s current stage. In addition, it sought to instrumentalize further research in the field, either in the proposed future research ambits or in other related projects. This research represents the first step in expanding the field of this novel subset of climate litigation. To properly understand global trends, future research will expand the dataset beyond Latin America and beyond the limited lens of energy-related decarbonization.

## ANNEX 1. JUST TRANSITION LITIGATION CASES IN LATIN AMERICA

**Table 1: List of Just Transition Litigation cases**

Case Name	Year filed	Country
Private Corporation for the Development of Aysen, et al.v. Environmental Evaluation Service of Chile	2016	Chile
The Municipality of San Felipe with the Environmental Assessment Service (SEA)	2017	Chile
Indigenous community of Unión Hidalgo v. EDF, France and Mexico	2018	Mexico, France
Indigenous community of Unión Hidalgo and ProDESC v. EDF	2018	France
Wayúu Indigenous community v. Ministry of Environment et al.	2019	Colombia
Indigenous Future HR v. EDF	2020	France
Greenpeace Mexico v. Ministry of Energy and Others (on the Energy Sector Program)	2020	Mexico
CEMDA v. Comisión Federal de Electricidad (fees increase for generation of renewable energy)	2020	Mexico
Challenge to the constitutionality of amendments to the rules governing Clean Energy Certificates	2021	Mexico
Huayun Mapu Indigenous Community and Others with the Environmental Assessment Commission	2021	Chile

Case Name	Year filed	Country
Atacama Community of Coya with Ministry of Mining	2021	Chile
Company Workers Union of Maritima & Commercial Somarco Limited and Others v Ministry of Energy	2021	Chile
Julia Habana et. al., v. Mexico	2021	Mexico
Nuestros Derechos al Futuro y Medio Ambiente Sano et. al., v. Mexico	2021	Mexico
Greenpeace v. Ministry of Energy and Others (on the Energy Sector Program 2020 and Electric Industry Law)	2021	Mexico
Idheas v. Centro Nacional de control de Energía and Secretaría de Energía	2021	Mexico
ADI 7095 (Complejo Termeléctrico Jorge Lacerda)	2022	Brazil
Greenpeace v. Ministry of Energy and Others (on the Energy Sector Program 2022)	2022	Mexico
Mexican Center for Environmental Law (CEMDA) v. Ministry of Energy and Others (on the Energy Sector Program 2022)	2022	Mexico
Regional Government of Atacama v Ministry of Mining and Other	2022	Chile