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Turning to international litigation to protect the Amazon?

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Safeguarding the Amazon biome remains a critical priority, not only for the eight Amazon River basin States but also for the world at large given the ecosystem's planetary importance. There is now a new sense of urgency surrounding Amazon protection given the substantial increase in rates of deforestation and fires in the region. Accordingly, new options to advance Amazon protection are beginning to be explored, including proceedings in international courts and tribunals. This article provides a critical assessment of the potential for such litigation, examining the possible claims that could be advanced, the risks associated with each of these and which are more likely to be successful. It argues that the litigation landscape is complex, and there are jurisdictional, normative and evidentiary hurdles in the way of a clear-cut judgment requiring Amazon States to take the urgent and direct measures needed to bring the ecosystem back from the brink.

1 INTRODUCTION

For over half a century, the loss of tropical forest in the Amazon has been recognized as a globally significant environmental challenge.[1] Safeguarding the Amazon biome remains a critical priority, not only for the eight Amazon River basin States,[2] but also for the world at large given the planetary importance of the ecosystem. While the level of deforestation had been relatively stable in the early 2000s,[3] recent land-use changes in the Brazilian Amazon and a record number of fires has brought renewed attention to the need for enhanced governance of the region,[4] including the role that international law may perform in achieving this objective. There is now a new sense of urgency surrounding Amazon protection, with recent research indicating that the region could become a source rather than sink for atmospheric carbon within a decade due to damage caused by agricultural expansion and logging.[5] Whereas biodiversity was the key focus of conservation attention in the 1980s and 1990s, the protection of the Amazon is now seen increasingly as a priority for global climate policy.[6]

A number of global legal frameworks have been invoked to advance Amazon conservation.[7] These range from the Convention on Biological Diversity (CBD)[8] to the more

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[1] PM Fearnside, 'Deforestation of the Brazilian Amazon' in H Shugart (ed), *Oxford Research Encyclopedia of Environmental Science* (Oxford University Press 2017) <https://doi.org/10.1093/acrefore/9780199389414.013.102>. Data on the extent of forest losses since the 2000s can be found at <https://www.globalforestwatch.org/map/>.

[2] Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela.

[3] D Boucher, S Roquemore and E Fitzhugh, 'Brazil's Success in Reducing Deforestation' (2013) 6 Tropical Conservation Science 426.

[4] L Ferrante and PM Fearnside, 'Brazil's New President and "Ruralists" Threaten Amazonia's Environment, Traditional Peoples and the Global Climate' (2019) 46 Environmental Conservation 261.

[5] W Hubau et al, 'Asynchronous Carbon Sink Saturation in African and Amazonian Tropical Forests' (2020) 579 Nature 80.

[6] W Boyd, 'Ways of Seeing in Environmental Law: How Deforestation Became an Object of Climate Governance' (2010) 37 Ecology Law Quarterly 843.

[7] See generally Beatriz Garcia, *The Amazon from an International Law Perspective* (Cambridge University Press 2011).

recent Reducing Emissions from Deforestation and Forest Degradation (REDD+) mechanism adopted under the international climate regime.[9] The implementation of these international norms in the Amazon has enjoyed limited success, and gains are now being lost. Accordingly, new options to advance Amazon protection are beginning to be explored, including the possibility of proceedings in international courts and tribunals. This article provides a critical assessment of the potential for such litigation, examining the possible claims that could be advanced, the risks associated with each of these and which are more likely to be successful. It analyses how the various applicable international legal obligations might be pursued in court, identifying which causes of action might lead to impactful outcomes.

2 THE AMAZON AS AN OBJECT OF INTERNATIONAL LEGAL CONCERN

The protection of the Amazon poses particular challenges for international law. This is because, as with other environmental assets of global significance found within the territorial jurisdiction of states, international norms of protection exist alongside and in tension with the well-established 'permanent sovereignty over natural resources' concept. The permanent sovereignty norm was first endorsed at a global level in United Nations General Assembly Resolution 1803,[10] has subsequently been carried into multiple subsequent instruments, and was recognized as a rule of customary international law by the International Court of Justice (ICJ) in the *Armed Activities on the Territory of the Congo* case.[11]

Nonetheless, both in relation to the Amazon, and other environmental assets of global significance, there has also been a clear trend towards their internationalization as objects of global concern. This has found expression in the notion of the Amazon as a 'common concern of humankind'. In her exhaustive study of the Amazon and international law, Beatriz Garcia concluded:

> *The protection of the Amazon should be considered a common concern of humankind. This means that the Amazon countries in particular have an obligation owed to the international community to preserve the Amazon, while maintaining exclusive sovereign rights over their respective Amazonian territories. The international community, on the other hand, has a legitimate interest in the protection of this region, from which derives a right of surveillance, and, at the same time, a duty to provide financial and technical assistance to the Amazon States.*[12]

The Amazon is not now, and cannot ever be expected to be, part of the common heritage of humankind. That status is presently accorded only to the mineral resources of the deep seabed beyond national jurisdiction under the 1982 United Nations Convention on the

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[8] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

[9] S Butt et al, 'Brazil and Indonesia: REaDD+y or Not?' in R Lyster, C MacKenzie and C McDermott (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press 2010) 251. See further <https://redd.unfccc.int/>

[10] UNGA 'Permanent Sovereignty Over Natural Resources' UN Doc A/RES/1803/XVII (14 December 1962). See further S Schwebel, 'The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources' in S Schwebel, *Justice in International Law: Selected Writings* (Cambridge University Press 1994), 401.

[11] *Armed Activities on the Territory of the Congo (Congo v Uganda)* [2005] ICJ Rep 168, 244.

[12] Garcia (n 7) 304.

Law of the Sea (UNCLOS),[13] and the moon and its resources under the 1979 Moon Treaty.[14] However, Garcia argues that the Amazon can legitimately be considered as a common concern of humankind. She cites the origins of the common concern concept, its endorsement in the CBD[15] and United Nations Framework Convention on Climate Change (UNFCCC),[16] and the international recognition of the importance of forest conservation,[17] to support the argument that 'the protection of certain natural resources and ecosystems essential for maintaining the life-sustaining systems of the biosphere, even if under national jurisdiction, can be considered a common concern of humankind'.[18] The Amazon fits this category 'for its role in maintaining global ecological conditions'.[19]

This status brings with it a range of international obligations, both treaty-based and customary, that have some application to the region. We examine several of these below for their potential to support causes of action in international forums. However, before doing so it is necessary to say something about the role of international courts and tribunals in addressing environmental disputes.

3 THE ROLE OF INTERNATIONAL COURTS IN ADDRESSING INTERNATIONAL ENVIRONMENTAL DISPUTES

The twentieth century witnessed a marked proliferation of international courts,[20] many of which have been called upon to address environmental disputes of varying types.[21] International adjudication, through permanent courts or via ad hoc arbitration, has historically served a primarily dispute settlement function to diffuse tensions and resolve conflicts between States. International courts and tribunals have also acquired a significant normative role in interpreting and developing rules of international law, including international environmental law. Moreover, under some treaties, such as UNCLOS, dispute settlement mechanisms have a compliance and enforcement function and can be utilized to uphold obligations. Environmental disputes are now relatively frequently the subject of international litigation, with the dockets of the ICJ, the International Tribunal for the Law of the Sea (ITLOS), the Permanent Court of Arbitration, human rights courts and complaints procedures, and the World Trade Organization's dispute settlement mechanism all including a sizeable number of cases with environmental dimensions.

3.1 Relaxed standing rules

[13] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

[14] Agreement governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1362 UNTS 3. See further J Brunnée, 'Common Areas. Common Heritage, and Common Concern' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 551.

[15] CBD (n 8) preamble, recital 3('*[a]ffirming* that the common concern of biological diversity is a common concern of humankind').

[16] United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) preamble, recital 1 ('*[a]cknowledging* that change in the Earth's climate and its adverse effects are a common concern of humankind').

[17] See, e.g., UNGA 'Non-Legally Binding Instrument on All Types of Forests' UN Doc A/RES/62/98 (31 January 2008) art 2(a) (setting out 'shared global objectives' for forest protection).

[18] Garcia (n 7) 284.

[19] ibid.

[20] V Lowe, 'The Function of Litigation in International Society' (2012) 61 International and Comparative Law Quarterly 209.

[21] See further T Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 21–62.

One of the most important developments in international environmental dispute settlement has been the relaxation in rights of standing to enforce obligations under multilateral environmental agreements. Standing refers to the requirement that the litigating State has a defined interest in invoking the breach of an international legal obligation.[22] In the *Barcelona Traction* case,[23] the ICJ recognized the existence of certain collective obligations owed to all parties to a treaty (*erga omnes partes*), or to all States (*erga omnes*). Although international environmental agreements seeking to protect global commons such as the oceans, the atmosphere and biodiversity are examples of treaties creating such obligations *erga omnes,* it is only relatively recently that there has been clear recognition under the law of State responsibility,[24] and in the jurisprudence of the ICJ and ITLOS, that these types of obligations may be enforced by any State.[25]

In the *Whaling in the Antarctic* case,[26] for instance, Australia's standing to contest Japan's compliance with the 1946 International Convention for the Regulation of Whaling[27] was accepted by the ICJ without question, despite Australia establishing no greater interest in the matter than any other party to the Convention. Similarly, in the Advisory Opinion of the ITLOS Seabed Disputes Chamber in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,[28] which related to the obligations of states under UNCLOS to protect the marine environment when undertaking mining on the deep seabed beyond national jurisdiction (the 'Area'), it was held that environmental damage may give rise to the right of any party to claim compensation 'in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area'.[29]

3.2 Jurisdictional issues

These developments open up greater possibilities for litigation on globally significant environmental questions, including the protection of the Amazon as an object of common concern. However, before questions of invocation or breach can even arise in an international forum there is the anterior issue of jurisdiction.

The jurisdiction of international courts and tribunals is based upon consent, and relatively few are conferred compulsory jurisdiction. The jurisdiction of the ICJ for instance

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[22] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 26.
[23] *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 32, 33–34.
[24] Article 48 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002).
[25] Such obligations may arise in other contexts also. See in particular *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 (in which the ICJ concluded that the 1984 Convention Against Torture established certain prosecutorial obligations *erga omnes partes* that any party could enforce) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) (23 January 2020) (in which the ICJ found that any party to the 1949 Genocide Convention, and not only a specially affected party, may invoke the responsibility of another party in respect of breach).
[26] *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014] ICJ Rep 226. See further CJ Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment' in M Fitzmaurice and D Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill 2016) 193.
[27] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.
[28] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10.
[29] ibid 179.

is assumed primarily on three bases: (i) declarations under Article 36(2) of the Statute of the ICJ[30] accepting the compulsory jurisdiction of the Court, (ii) where the parties to a dispute specifically consent via special agreement, or (iii) where there is an existing treaty conferring jurisdiction on the Court. In relation to Article 36(2) compulsory jurisdiction, 74 States have accepted the competence of the ICJ (often subject to various subject-matter reservations).[31] Among the eight South American countries of the Amazon River basin, only Peru and Suriname have made Article 36(2) declarations.

In relation to treaty-based jurisdiction, there are several treaties conferring competence on the ICJ, including the 1948 American Treaty on Pacific Settlement (Pact of Bogotá)[32] which counts among its 12 parties four Amazon States (Bolivia, Brazil, Ecuador and Peru). Article XXXI provides that 'the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement'.[33] Accordingly, while there may be more limited opportunities for litigation by States outside South America, the Pact of Bogotá establishes a regional framework for possible ICJ proceedings concerning Amazonian conservation.

The multiplicity of dispute settlement bodies that could potentially be activated to address one or several legal issues connected with Amazon deforestation could possibly lead to issues of jurisdictional coordination.[34] Additionally, even if an international court possesses jurisdiction, and that jurisdiction is activated, it is not necessarily the case that the court will produce a clear outcome strongly vindicating the asserted rights.[35] International adjudication takes place within an inherently political context such that there is a strong tendency to adopt an outcome that avoids a binary judgment that uphold the interests of one party over another.[36]

With these general standing and jurisdictional considerations in mind, we now turn to consider potential causes of action in relation to Amazon deforestation.

4 CLAIMS BASED ON BIODIVERSITY AND CLIMATE CHANGE OBLIGATIONS

The failure to curb deforestation in the Amazon gives rise to potential breaches of several multilateral environmental agreements, including the CBD and the several treaties that comprise the climate regime (the 1992 UNFCCC, the 1997 Kyoto Protocol[37] and the 2015 Paris Agreement[38]).

4.1 Convention on Biological Diversity

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[30] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute).

[31] See <https://www.icj-cij.org/en/declarations>.

[32] American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 55.

[33] ibid art XXXI.

[34] As has been the case with some environmental disputes. See, e.g. the *Southern Bluefin Tuna (Jurisdiction)* (Award) (2000) 39 ILM 1359. See Stephens (n 21) 271–303.

[35] See generally N Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014).

[36] T Ginsburg, 'Political Constraints on International Courts' in C Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 483.

[37] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 22 (Kyoto Protocol).

[38] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740.

The CBD, to which all Amazonian States are parties, seeks to establish a comprehensive international framework for the preservation of biological diversity. In its preamble, the CBD characterizes the conservation of biological diversity as 'a common concern of humankind' but also acknowledges that parties possess 'sovereign rights over their own biological resources' and are 'responsible for conserving their biological diversity and for using their biological resources in a sustainable manner'.[39]

In service of the CBD's conservation and sustainable use objectives contained in Article 1, the treaty sets out several obligations, including the responsibility not to cause damage to the environment of other States (Article 3), and the duties to cooperate for the conservation and sustainable use of biological diversity (Article 5), to develop national plans for biodiversity conservation (Article 6), to identify and monitor components of biodiversity (Article 7), to adopt measures such as protected areas to conserve biodiversity *in situ* (Article 8) to utilize environmental impact assessment for projects likely to have significant adverse effects on biodiversity (Article 14) and to provide access to and share the benefits of genetic resources (Articles 15 and 19). Complementing these obligations, there is a body of decisions made by the CBD's supreme treaty body, the Conference of the Parties, which specifically address actions to be taken to conserve forests.[40]

Any claim that the failure to protect the Amazon amounts to a breach of the CBD may focus on the Article 8 *in situ* conservation obligations. However, this provision is introduced by language that leaves parties with considerable discretion ('[e]ach Contracting Party shall, as far as possible and as appropriate …').[41] A case built on Article 3, which includes the obligation to prevent transboundary harm, would also be challenging to sustain, for the reasons given below in relation to the customary law obligation of prevention. Arguments based on more procedurally focused CBD obligations, such as the Article 5 obligation to cooperate, or the Article 14 duty to undertake environmental impact assessment, may have more likelihood of success.

In terms of available judicial or other dispute settlement forums, the CBD's dispute settlement provision (Article 27), provides for negotiation, good offices and mediation as the primary means for dispute settlement, with compulsory conciliation a fall-back option unless the parties have declared, on joining the treaty, that they recognize arbitration and/or adjudication by the ICJ as compulsory. Only four States have made such declarations,[42] and none of these are Amazonian States. This means that a claim before an international court based on the CBD would need to be pursued under a separate instrument conferring jurisdiction, such as the Pact of Bogotá. It may be noted that the CBD has not previously been litigated to any great extent in the ICJ, or in any other international court or tribunal. By way of example, in the *Whaling in the Antarctic* case Australia referred to Article 3 of the

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[39] CBD (n 8) preamble.

[40] Decision II/9, Forests and Biological Diversity (1995), UNEP/CBD/COP/DEC/2/9; Decision III/12, Programme of work for terrestrial biological diversity: forest biological diversity (1996), UNEP/CBD/COP/3/38; Decision IV/7, Draft Programme of Work for Forest Biological Diversity (1998), UNEP/CBD/COP/4/7; Decision V/4, Progress report on the implementation of the programme of work for forest biological diversity (2000), UNEP/CBD/COP/DEC/V/4; Decision VI/22, Forest biological diversity (2002), UNEP/CBD/COP/6/20; Decision VII/1, Forest Biological Diversity (2004), UNEP/CBD/COP/DEC/VII/1; Decision VIII/19, Forest biological diversity: implementation of the programme of work (2006), UNEP/CBD/COP/DEC/VIII/19; Decision IX/5, Forest Biodiversity (2008) UNEP/CBD/COP/DEC/IX/5; Decision X/36, Forest Biodiversity (2010) UNEP/CBD/COP/DEC/10/36.

[41] CBD (n 8) art 8.

[42] Austria (arbitration and ICJ), Cuba (arbitration), Georgia (arbitration and ICJ), Latvia (arbitration and ICJ) and the Netherlands (arbitration and ICJ). See <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27#top>.

CBD in its initial application,[43] but this argument was withdrawn at the hearings and the case instead turned only on the International Convention for the Regulation of Whaling.[44]

In lieu of judicial proceedings, CBD parties could utilize its compulsory conciliation process. Although it has yet to be used in any dispute,[45] with the recent conciliation between Australia and Timor Leste under UNCLOS[46] there is now a precedent for the successful use of a conciliation procedure to address natural resource disputes.[47]

4.2 The climate regime

Given the importance of the Amazon for the global climate system, the climate regime also offers potential avenues for pursuing a claim before an international court or tribunal, or through the regime's own compliance system.

The climate regime comprises the UNFCCC, the Kyoto Protocol and the Paris Agreement, and decisions adopted by the parties to these treaties. These treaties are widely ratified, and the eight Amazon States are parties to all three of them.[48] The overarching objective of the climate regime is to 'prevent dangerous anthropogenic interference with the climate system'.[49] To this end, the UNFCCC, the Kyoto Protocol and the Paris Agreement establish several obligations for parties to reduce greenhouse gas emissions and to enhance carbon sinks and reservoirs.

Forests are specifically mentioned in multiple provisions across all three agreements. In the UNFCCC, Article 4(1)(d) requires parties to promote the sustainable management, conservation, and enhancement of carbon sinks and reservoirs including 'biomass, forests and oceans'.[50] In the implementation of this and other commitments, parties are to give 'full consideration to what actions are necessary … including actions related to funding' to meet the specific needs of countries with 'forested areas and areas liable to forest decay'.[51] In the Kyoto Protocol, emissions from land use change, including forestry activities, receives detailed treatment, enabling Annex I parties to use enhancements in forest sinks to meet emissions commitments.[52] Moreover, the Kyoto Protocol establishes the basis for afforestation and reforestation projects under the Clean Development Mechanism (CDM). Deforestation was addressed specifically through the REDD+ mechanism launched in 2007[53] under which payments may be channelled to tropical forest states for preventing forest removal.[54]

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[43] Australia, 'Application Instituting Proceedings' (31 May 2010) 18.
[44] See also *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* [2015] ICJ Rep 665, 163–164.
[45] Stephens (n 21) 75.
[46] *Timor Sea Conciliation (Timor-Leste v Australia)* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea) (9 May 2018) PCA Case No. 2016-10.
[47] R Brown, 'Dispute Settlement in the Seas: International Law Influences on the Australia-Timor-Leste Conciliation' (2020) 34 Ocean Yearbook 89.
[48] See <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states?field_partys_partyto_target_id%5B512%5D=512&field_partys_partyto_target_id%5B511%5D=511>.
[49] UNFCCC (n 16) art 2.
[50] ibid art 4(1)(d).
[51] ibid art 4(8)(c).
[52] Kyoto Protocol (n 37) art 3(3).
[53] UNFCCC Decision 2/CP.13 ('Bali Action Plan'), FCCC/CP/2007/6/Add.1 (2008), 3.
[54] See generally S Butt, R Lyster and T Stephens, *Climate Change and Forest Governance: Lessons from Indonesia* (Routledge 2015) 17-44.

Article 5 of the Paris Agreement states that 'Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1(d), of the Convention, including forests'.[55] It further provides that 'Parties are encouraged to take action to implement and support [REDD+]'.[56] These provisions recommend and encourage behaviour, without establishing obviously enforceable obligations. However, these provisions when considered alongside the Agreement's clear temperature goal of keeping global warming below 2°C (and pursuing efforts to stay below 1.5°C),[57] and national obligations to 'pursue domestic mitigation measures'[58] that 'reflects its highest possible ambition'[59] do establish a legally binding framework that could be tested in proceedings in an international court or tribunal.[60]

It must be noted that the language of key provisions of the Paris Agreement is carefully circumscribed and this lessens their mandatory force. Parties are to 'aim' to peak greenhouse gas emissions as soon as possible,[61] they 'shall' prepare nationally determined contributions (NDCs) that they 'intend' to achieve and propose domestic mitigation measures with the 'aim' of achieving their NDCs.[62] Successive NDCs are to be progressively stricter over time, and 'reflect its highest possible ambition' in light of common but differentiated responsibilities.[63] Developing country parties 'should continue' enhancing their mitigation efforts and 'are encouraged' to move to economy-wide reduction targets.[64] The duty to 'conserve and enhance' sinks and reservoirs of greenhouse gases, including forests, under Article 5 is more normatively demanding. Parties 'should' take action to achieve this objective.[65]

The submission of NDCs does not involve the assumption of obligations of result, and accordingly parties could fail to meet the pledges that they make without incurring international legal responsibility. However, the argument has been advanced, having regard to the terms of the Paris Agreement itself, and its *travaux préparatoires*, that the regime establishes 'strong normative expectations' and imposes 'certain obligations, albeit of conduct' under which all parties must maintain and enhance their successive NDCs.[66] Moreover, even if the failure of a party to live up to its promises under its NDC would not necessarily provide a basis for a claim in an international court or tribunal, it would entail that

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[55] Paris Agreement (n 38) art 5(1).
[56] ibid art 5(2).
[57] ibid art 2(1)(a).
[58] ibid art 4(2).
[59] ibid art 4(3).
[60] K Winter, 'The Paris Agreement: New Legal Avenues to Support a Transboundary Harm Claim on the Basis of Climate Change' in Christina Voigt (ed), *International Judicial Practice on The Environment: Questions of Legitimacy* (Cambridge University Press 2019) 188.
[61] Paris Agreement (n 38) art 4(1).
[62] ibid art 4(2). See further J Pickering et al, 'Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's "Crème Brûlée" Approach Enhance Ecological Reflexivity?' (2019) 31 Journal of Environmental Law 1.
[63] Paris Agreement (n 38) art 4(3).
[64] ibid art 4(4).
[65] ibid art 5(1).
[66] L Rajamani and J Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) 29 Journal of Environmental Law 537, 547. See also B Mayer, 'International Law Obligations Arising in Relation to Nationally Determined Contributions' (2018) 7 Transnational Environmental Law 251 (arguing that NDCs may constitute unilateral declarations creating legal obligations).

the party may be subject to the Paris Agreement's transparency, implementation and compliance mechanism[67] where it 'may need to explain its failure to achieve its NDC'.[68]

All eight Amazon basin States have submitted their NDC under the Paris Agreement,[69] and all address deforestation to some extent, including, in several NDCs, specifically in relation to the Amazon. For instance Brazil's NDC, which sets out an unconditional economy-wide mitigation target, observes that the deforestation rate in the Brazilian Amazon was reduced by 82 percent between 2004 and 2014.[70] Brazil's NDC includes commitments to strengthen and enforce the implementation of Brazil's Forest Code in the Brazilian Amazon 'with a view to achieve … zero illegal deforestation by 2030 and compensating for greenhouse gas emissions' from vegetation removal.[71] Given the substantial recent increase in deforestation in Brazil,[72] it is open to question whether the Brazilian government is discharging these commitments. As noted above, an NDC is not legally binding, and the failure to meet promises made within an NDC would not itself give rise to an internationally wrongful act attracting State responsibility. However, NDCs could conceivably provide evidence of non-performance of obligations under the Paris Agreement, or indeed of obligations under other agreements such as the CBD, and customary international law. At the very least, promised actions under NDCs could be raised by other parties at a diplomatic level.

5 CLAIMS BASED ON OBLIGATIONS TO PREVENT TRANSBOUNDARY HARM

Another possible cause of action in relation to Amazon conservation could derive from a regional or global obligation to prevent transboundary harm.

The customary international law obligation that one State may not permit activities within its jurisdiction or control to damage another State[73] has been accepted by the ICJ in several cases, including the *Pulp Mills* case[74] between Argentina and Uruguay, and the jointly decided *San Juan River* case between Costa Rica and Nicaragua.[75] In *Pulp Mills*, the Court observed that:

> *[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' …. A State is thus obliged to use all the means at its disposal in order to avoid activities*

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[67] The Paris Agreement Implementation and Compliance Committee held its first meeting in June 2020, and is currently developing draft rules of procedure. See <https://unfccc.int/news/key-paris-agreement-implementation-and-compliance-work-initiated>.

[68] Rajamani and Brunnée, (n 66) 542.

[69] In 2019, Suriname submitted its second NDC; all other Amazon States have submitted only a first Intended Nationally Determined Contribution.

[70] Brazil, 'Intended Nationally Determined Contribution' <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/BRAZIL%20iNDC%20english%20FINAL.pdf> 3.

[71] ibid.

[72] P Ramon, 'Amazon Deforestation Increases 25 per cent in Brazil', *Phys.Org,* 10 Jul 2020 < https://phys.org/news/2020-07-amazon-deforestation-percent-brazil.html>.

[73] See generally O McIntyre, 'The Current State of Development of the No Significant Harm Principle: How Far Have We Come?' (2020) 20 International Environmental Agreements: Politics, Law and Economics 601.

[74] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 (*Pulp Mills*).

[75] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665, 104.

which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.[76]

It is noteworthy that the parties in these two cases were South American States, which have been particularly active litigants in the ICJ in transboundary harm disputes (not all of which have progressed to the merits stage).[77] Furthermore, the proceedings between Costa Rica and Nicaragua were commenced under the Pact of Bogotá. There is therefore some precedent, and a clear jurisdictional basis, for proceedings by States within the Amazon region if the breach of an applicable regional or global legal obligation to prevent transboundary harm can be identified.

In terms of regionally based obligations, the 1978 Treaty for Amazonian Cooperation (ACT),[78] concluded by the eight Amazonian States might be thought to be a potential springboard for proceedings concerning the failure to safeguard the Amazon given the ACT's multiple references to the need to protect, conserve and preserve the Amazon environment. However, on close reading, it is clear that the ACT is unlikely to provide a basis for such litigation. It has no dispute settlement procedure, and in any event places as much (perhaps even more) emphasis on economic development and the exploitation of resources as it does on environmental protection,[79] and reinforces the exclusivity of the sovereign rights of parties to exploit natural resources within their territories.[80] Moreover, most of its provisions are aspirational and not prescriptive, and do little more than encourage cooperation between the parties. This cooperation is now advanced through the Amazon Cooperation Treaty Organization (ACTO) established in 2002 following amendments to the ACT.[81]

The ACT does not have the character of the 1975 Statutes of the River Uruguay,[82] at issue in the *Pulp Mills* case, which provided a basis for assessing the obligations of the parties with respect to transboundary harm in the context of an international watercourse. Moreover, there is a fundamental factual difference between the situation affecting the Amazon and classic transboundary harm disputes such as the *Trail Smelter* case.[83] The most serious harm is occurring within the territory of one State, Brazil, which is downstream of other Amazonian States, and this is having limited if any transboundary impacts on neighbouring States. Although Amazonian fires are significant in spatial extent and duration, their cross-border effects are minor compared with, for instance, the transboundary haze problem that has beset several Southeast Asian States.[84] However, if the conditions in the Brazilian Amazon continue to worsen to such an extent as to place the viability of the Amazon ecosystem as a whole in jeopardy this analysis may change, given the connected and interdependent character of the Amazon across its geographical entirety.

There has been increasing attention given to the possibility of a climate change-related transboundary harm case. While industrialized States are usually identified as

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[76] Pulp Mills (n 74) 101.

[77] See, e.g., the *Aerial Herbicide Spraying (Ecuador v Colombia)* case, which concerned alleged damage in Ecuador from the spraying of herbicides by Colombia near its border with Ecuador, which was settled and discontinued in 2013.

[78] Treaty for Amazonian Cooperation (adopted 3 July 1978, entered into force 12 August 1980) 1202 UNTS 51.

[79] See, e.g. ibid art VII.

[80] ibid art IV.

[81] Under the Protocol of Amendment to the Amazon Cooperation Treaty (adopted 14 December 1998, entered into force 2 August 2002) 2199 UNTS 163.

[82] Statutes of the River Uruguay (adopted 26 February 1975, entered into force 18 September 1976) 1295 UNTS 331.

[83] *Trail Smelter (Canada/United States of America)* (1938/1941) 3 RIAA 1905.

[84] P Listiningrum, 'Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle' (2019) 8 Transnational Environmental Law 119.

potential respondents in such proceedings given the primacy of their responsibility for the carbon emissions driving the warming of the planet, there is no reason in principle why developing States could not also be targets for such litigation. A possible pathway for a transboundary harm case in the Amazon context would be to focus on the global impacts of greenhouse gas emissions from deforestation and other land use. Globally, deforestation is the second-largest source of carbon emissions from human activities.[85] In the Amazon, Brazil and Bolivia account for the largest (79 percent) and second largest (12 percent) proportion of total forest loss,[86] and this contributes large quantities of greenhouse gases to the atmosphere, worsening climate change.

There are substantial evidentiary challenges in any such proceedings, most obviously the difficulty in ascribing responsibility for an identified harm (e.g. such as damage caused by rising sea levels) to the emissions from a particular State. However, there have been improvements in attribution science, such that a causal link can be identified as between extreme weather events and human-caused climate change ('event attribution'), and which can also provide a basis for quantifying the contribution to climate change made by particular states and non-state actors such as fossil fuel companies ('source attribution').[87] In the case of the Amazon, however, the picture is far more complex than jurisdictions in which fossil fuel emissions comprise the bulk of emissions. Emissions from deforestation are diffuse and are the result of the actions of multiple actors which are responding to a range of factors and influences, including government policy and economic demand (e.g. export markets in Europe and elsewhere for beef and soy). Furthermore, potentially confounding a clear claim against Amazon States in relation to deforestation emissions is the increasing incidence of droughts in the region. These dry periods are contributing to an increase in forest fires, and counteracting emissions reductions achieved through controls on forest clearing.[88]

6 HUMAN RIGHTS BASED CLAIMS

The Amazon is not only worth protecting from a purely ecological perspective, but also because it is 'home to 34 million people living in the Amazon, including over 350 indigenous groups, some living in voluntary isolation'.[89] The rights of those living in the Amazon and in particular of the indigenous communities are protected by, *inter alia*, the American Convention on Human Rights (ACHR).[90] Under the ACHR cases may be referred to the Inter-American Court of Human Rights (IACtHR) by the Inter-American Commission on Human Rights (IAComHR) or by a State party (individual complaints are not admissible). All eight Amazonian States, except Guyana and Peru, are parties to the ACHR.

A human-rights based case in relation to deforestation in the Amazon is likely to have stronger prospects than State-to-State litigation, as the transboundary element necessary in State-to-State litigation does not need to be present for a case to be upheld. In a human rights-based case, the cause of action is necessarily more confined, and relates to the impairment of

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[85] GR van der Werf et al, 'CO_2 Emissions from Forest Loss' (2009) 2 Nature Geoscience 737.
[86] For the period 2000 to 2010. See ibid.
[87] M Burger, J Wentz and R Horton, 'The Law and Science of Climate Change Attribution' (2020) 45 Columbia Journal of Environmental Law 57; M Allen, 'The Scientific Basis for Climate Change Liability' in R Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012) 8.
[88] LEOC Aragão et al, '21st Century Drought-Related Fires Counteract the Decline of Amazon Deforestation Carbon Emissions' (2018) 9 Nature Communications 536.
[89] S Charity et al, *Living Amazon Report 2016: A Regional Approach to Conservation in the Amazon* (WWF 2016).
[90] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

the rights of individuals within a State's territory. The IACtHR has developed a strong jurisprudence based on the human right to a healthy environment, derived from Article 26 of the ACHR among others, and on indigenous peoples' rights, in particular the right to property. However, this remains an indirect way of advancing the protection of the Amazon, as the Court is only able to adjudicate on deforestation issues to the extent that they coincide with the violation of the rights of either certain individuals or tribal and indigenous peoples.

6.1 Rights of tribal and indigenous communities

As part of an ongoing campaign for recognition of land rights, supported by the work of the International Labour Organization (ILO) and its supervisory bodies in the implementation of the ILO Indigenous and Tribal Peoples Convention,[91] indigenous communities in South America have pushed environmental issues to the forefront of a number of cases in the IACtHR. Indeed, in many cases it has been efforts by government and firms to gain access to natural resources located on indigenous lands that has given rise to rights violations. An example is the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*,[92] in which the Court found that Nicaragua had granted a forestry concession in violation of the property rights of the Awas Tingni Community in their ancestral lands, contrary to Article 21 of the ACHR.[93] As the IAComHR, in a summary of the norms and jurisprudence of the Inter-American Human Rights System, observed in 2009:

> *As with the right to territorial property in general, indigenous and tribal peoples' right to property over the natural resources may not be legally extinguished or altered by State authorities without the peoples' full and informed consultation and consent, or without complying with the general requirements established for cases of expropriation.*[94]

Moreover, the IAComHR reported in 2019 on the Pan-Amazon region and the specific threats to human rights of indigenous and tribal peoples in that region. Throughout the report the Commission makes clear connections between the status of the environment and the rights of indigenous peoples. Threats to their rights are examined and include extraction and use of various natural resources present in the region (mining, agri-industry, infrastructure projects, oil and gas, etc.).[95] Such violations have been found in numerous cases in the Amazon region,[96] recently in the case of the Xucuru peoples against Brazil,

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[91] Indigenous and Tribal Peoples Convention, 1989 (No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 28 ILM 1382.

[92] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) (31 August 2001) Inter-American Court of Human Rights Series C No 79 para 173(2).

[93] For an overview of the existing case law, see A Keenan, 'Sustainable Development Priorities in the Inter-American Human Rights System' in MC Cordonier Segger and CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012* (Routledge 2017) 496.

[94] IAComHR, *Indigenous and Tribal Peoples' Rights: Norms and Jurisprudence of the Inter-American Human Rights System*, Organization of American States, OEA/Ser.L/V/II (Doc. 56/09) (30 December 2009) para 185.

[95] IAComHR, *Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region*Organization of American States, OEA/Ser.L/V/II. (Doc. 176/19) (29 September 2019), chapter 2.

[96] The IACtHR also heard the Yanomanmi v Brazil, case 7615 (Brazil) OEA/Ser.L/VII.66 Doc.10 rev.1 (1985). In Ecuador the Court heard the Case of *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. In Suriname, the IACtHR heard several cases, including: IACtHR, Case of the *Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309; IACtHR, Case of the *Saramaka People. v. Suriname*.

where the IACtHR found that Brazil did not ensure that the rights of the Xucuru peoples to collective property are legally certain in the entire territory demarcated as theirs, and concluded that the administrative process of titling, demarcating and reorganizing the territory of the Xucuru peoples was partially ineffective.[97]

Recognizing the formal titles of indigenous communities, demarcating their territory and reorganizing it is a success in itself, but will that help prevent future actions from the state that purport to endanger further the environment? First, the case of the Xucuru peoples also shows how lengthy the administrative processes are (they started in 1992). And second, it has been shown how even after the final judgment, the protection of the indigenous lands was not always effective, as implementation of territorial claims often raise complex issues.[98]

Moreover, what types of actions would be sanctioned by the IACtHR? The protection indigenous communities receive from the ACHR would enhance environmental protection, as ownership of areas of land, such as the Amazonian territories, would allow those communities to have a say in the uses of those lands. However, De Moerloose and De Casas suggest that it is not clear whether indigenous communities have only a right to be consulted in the processes of the development of projects on their lands, or whether their formal consent must be acquired before specific projects can begin.[99] This is an important caveat, not only for upholding the rights of indigenous communities, but also in respect of preventing potential environmental harm. Indeed, the right to property has well-known limits, and expropriation can be justified under certain circumstances, arguably making the protection of indigenous peoples' rights more fragile, when protected mainly by a right to property.[100]

6.2 Right to a healthy environment

Regarding the particular right to a healthy environment, it was not designed per se explicitly in most human rights instruments (with the exception of the African Charter of Human and Peoples' Rights)[101], but a process of greening existing human rights has taken place in recent decades.[102] The Protocol of San Salvador[103] in its Article 11 shows such an evolution, but is not directly enforceable. As a result, the IACtHR had to be interpreted beyond the bare text of the Convention in order to recognize the existence of a human rights protection to a healthy

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Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172; IACtHR, Case of the *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124.

[97] IACtHR, Case of the *Xucuru Indigenous People and its members v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5, 2018. Series C No. 346. In particular, see paras. 150-162.

[98] GC Braga Navarro, 'The Struggle after the Victory: Non-compliance in the Inter-American Court of Human Rights' Jurisprudence on Indigenous Territorial Rights', Journal of International Dispute Settlement (2020), 1–27, doi: 10.1093/jnlids/idaa018.

[99] S de Moerloose and CI de Casas, 'The Lhaka Honhat Case Of The Inter-American Court Of Human Rights: The Long-Awaited Granting Of 400,000 Hectares Under Communal Property Rights' (EJILTalk!, 16 July 2020).

[100] See TM Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 University of Pennsylvania Journal of International Law 113.

[101] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 art 24

[102] United Nations Human Rights Council 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/73/188 (19 July 2018) 5–10.

[103] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) <https://digitallibrary.un.org/record/520843?ln=en>.

environment.[104] It did so through Article 26 of the ACHR, which requires the Court to use a method of progressive development to interpret economic, social and cultural rights, and in particular and the rights to health, life, freedom of association, and to freedom of expression.[105]

However, it is at the procedural level that most of the advancements have been made. Indeed, procedural rights are at the forefront of the human rights and environment nexus, where the notions of public participation, right to information and access to justice are most prominent.[106] In such cases, the rules on standing become important, as they determine who can bring a complaint and therefore the breadth of litigation, potentially leading to an *actio popularis*. As Pavoni suggests, in the inter-American system, despite broad rules on standing (see Article 44 of the ACHR), the IACtHR has imposed requirements of nexus between the injury and the claimant, where cases show varying degrees of commitment to that rule.[107] That could reduce the impacts of an environmental case before the IACtHR based on procedural rights.

Moreover, it has now been established that indigenous peoples also enjoy the right to a healthy environment. In the case between Argentina and the Indigenous Communities Members of the Lhaka Honhat Association,[108] not only did the IACtHR grant the ownership of the disputed lands to the indigenous communities, through their communal right to property, it also recognized their right to a healthy environment, and their right to food and water, all based on an extensive interpretation of Article 26.[109] The recognition of the right to a healthy environment as 'autonomous' from other rights,[110] in particular property rights, has implications for the remedies that can be sought, as it opens up the possibility for reparations for environmental damage independently from ownership of the land.

6.3 Beyond the State: Application of human rights in the Amazon region

Another important development must be noted, with potential positive consequences for environmental litigation. The IACtHR has recently confirmed in an Advisory Opinion[111] that despite the fact that most human rights litigation will not contain an extraterritorial element, if environmental harm is transboundary, so is the right to initiate a procedure before the

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[104] Before the Commission: *Oscar González Anchurayco and members of the Community of San Mateo v Peru*, Report n. 69/04 –Petition 504/03 –Admissibility –Community of San Mateo de Huanchor and its Members – Peru, October 15, 2004; *Community of La Oroya v. Peru*, Report n. 76/09 –Petition 1473-06 –Admissibility – Community of La Oroya –Peru, August 5, 2009. Before the Court: Case of *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

[105] For a brief overview of the cases, see R Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights' in B Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 69, 72–76.

[106] As exemplified by the Escazú Agreement, due to enter into force in early 2021. See <https://www.cepal.org/en/escazuagreement>.

[107] Pavoni (n 105) 93–97.

[108] IACtHR, Case of the Indigenous Communities of the *Lhaka Honhat Association (Our Land) v. Argentina*. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400.

[109] See MA Tigre, 'Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment' (2020) 24 ASIL Insights <https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>.

[110] *Lhaka Honhat Association v Argentina* (n 108) para 203.

[111] IACtHR, *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)*, Opinion of November 15, 2017. Advisory Opinion OC-23/18, Series A No. 23.

Court.[112] That means that in cases of large projects such as the construction of substantial infrastructures (roads, canals, etc.) or energy-related projects (petroleum exploitation, etc.) with potential transboundary impacts, they may be open to challenge through human rights litigation. Such a transboundary element would also potentially allow claims based on climate change, which could become relevant in the case of the deforestation of the Amazon.

Such a collective approach to human rights protection has also been noted by the IAComHR concerning indigenous peoples' rights. In the report on the Pan-Amazon region, it specifically recommends States to create special agreements for the protection of indigenous peoples in the region – either bilateral or regional – based on the fact that indigenous peoples do not necessarily use political boundaries, but rather natural boundaries that can cross multiple States.[113]

In sum, there are multiple opportunities for human rights litigation to take on the issue of deforestation of the Amazon, and the strengthening of both indigenous rights and the right to a healthy environment make cases to combat deforestation more likely to succeed. Indeed, the case law on indigenous rights shows that the IACtHR takes these rights seriously, and the latest developments concerning the right to a healthy environment also show a commitment of the Court to consolidate the meaning of the right. One of the advantages of human rights litigation is its 'bottom-up' rather than 'top-down' character, allowing applicants to make claims that are geographically grounded in the region but which draw upon global norms. Moreover, the Inter-American system has several tools to promote compliance with the decisions taken, such as monitoring processes from the IACtHR, thematic reports from the IAComHR, and country visits.[114] Compliance with supranational decisions, however, is dependent to a large extent on political will, which may be lacking in the Amazonian region, in particular in Brazil.

7 TRADE AND INVESTMENT OBLIGATIONS: POTENTIAL FOR INDIRECT LTIGATION?

The primary purpose of international investment law, as set out in a sizeable number of bilateral investment treaties (BITs), is to provide protection for foreign investors in host jurisdictions, and to this end such agreements often enable investors to challenge actions affecting investment by host governments through a compulsory arbitration process. While there has been concern that such proceedings may undermine national and international environmental standards,[115] there is also some potential for these processes to be utilized to uphold environmental obligations indirectly. As Viñuales explains, environmental claims cannot be heard as standalone claims in an investment arbitration.[116] Instead, such claims can only be pursued as investment claims, when a State violates the rules protected in the investment treaty through the violation of another environmental norm.[117]

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[112] See M Feria-Tinta and SC Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights' (2016) 27 Yearbook of International Environmental Law 64.
[113] IAComHR (n 95) 193–194.
[114] For a critical review of the compliance mechanisms available, see JL Koorndijk, 'Judgments of the Inter-American Court of Human Rights Concerning Indigenous and Tribal Land Rights in Suriname: New Approaches to Stimulating Full Compliance' (2019) 23 International Journal of Human Rights 1615.
[115] See generally JE Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).
[116] ibid 89–92.
[117] ibid.

Amazonian States take several different approaches to treaty-based foreign investment protection. Peru, for instance, has ratified 27 BITs, containing strong dispute settlement clauses and has been involved in 19 investment arbitrations,[118] including a pending case with environmental dimensions – *The Renco Group, Inc. v The Republic of Peru*.[119] Brazil's investment treaty engagements reflect a different position on foreign investment policy. It is party to 14 BITs,[120] none of which include compulsory investor-State dispute settlement, and none of which are in force. However, as part of the 1990 Mercosur Agreement[121] other treaties with such clauses have been concluded, such as several free trade agreements among Latin American States, including the Amazonian States Bolivia, Ecuador and Peru, and with States and regional groupings beyond, such as Canada, the Southern African Customs Union and the EU.[122]

Moreover, since 2015, Brazil has sought to develop a different model of investment treaty, described as 'Investment Cooperation and Facilitation Agreements', to overcome what it regards as the 'negative experience' with conventional BITs which favour developed States and allow recourse to investor-State arbitration.[123] Thirteen of these have been concluded,[124] and while they eschew BIT-style arbitration they do include dispute settlement provisions which after bilateral dialogue and consultation in the first instance may culminate in inter-State arbitration. Their purpose is to create institutional cooperation through a joint committee where both governments make decisions, and where only inter-State dispute settlement exists.[125] Investors no longer have direct access to arbitration, as the overriding objective of the Investment Cooperation and Facilitation Agreements is to promote compliance rather than to provide compensation to the investors.[126] Nonetheless, it is noteworthy that these facilitation agreements do include environmental safeguards. For example, the 2019 Cooperation and Facilitation Agreement between Brazil and Morocco (not yet in force) emphasizes the importance of sustainable development as an investment strategy in its preamble and states in Article 4(6) that this treaty cannot be interpreted in a way that prevents either party to take necessary measures for, *inter alia*, the protection of the environment.[127]

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[118] Information from <https://investmentpolicy.unctad.org/international-investment-agreements/countries/165/peru> and <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/165/peru/investor>.

[119] *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46, < https://pca-cpa.org/en/cases/235/ >.

[120] A list can be found at <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties>.

[121] Of which Argentina, Brazil, Paraguay and Uruguay are full members. Treaty of Asunción Establishing a Common Market among Argentina, Brazil, Paraguay, Uruguay (adopted 26 March 1991, entered into force 29 November 1991) 2140 UNTS 257.

[122] All agreements negotiated by Mercosur can be found at <https://www.mre.gov.py/tratados/public_web/ConsultaMercosur.aspx>.

[123] Republic of Brazil, 'Investment Cooperation and Facilitation Agreements', <http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/218-negociacoes-internacionais-de-investimentos/1949-nii-acfi>.

[124] With Angola, Chile, Colombia, Ecuador, Ethiopia, Guyana, India, Malawi, Mexico,Morocco, Mozambique, Suriname, United Arab Emirates, . See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>.

[125] Information from the Brazilian Ministry of Finance found at <http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf>.

[126] G Vidigal and B Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19 Journal of World Investment and Trade 475, 485–487.

[127] Accord de Coopération et Facilitation en Matière d'Investissements entre le Royaume du Maroc et la République Fédérative du Brésil (adopted 13 June 2019, not yet in force).

These different types of investment treaties do not contain identical rules on the relationship between environmental protection and foreign investments, let alone boilerplate dispute settlement processes. The reality is that trade or investment rules may be used in some cases for advancing environmental purposes and in others to hinder them: they are in this sense a 'double-edged sword'.[128] While investment treaties seek to encourage foreign firms to invest in a host country, they also often contain clauses designed at ensuring that host countries retain their regulatory powers, including to protect environmental values.[129] Most cases that have been brought fall into the category of proceedings where investors have sought to challenge environmental regulations.[130] In this respect, one case appeared to hold promise that a different approach was possible, namely *Allard v Barbados* brought under a BIT between Canada and Barbados. In these proceedings, an investor challenged Barbados' alleged failure to implement its international environmental obligations under the Ramsar Convention[131] and the CBD. However, this claim was unsuccessful on the evidence, with the tribunal finding that Barbados had taken necessary steps, including preventing environmental damage, to protect the investment.[132]

Ultimately the efficacy of trade and investment treaties to provide environmental protection is highly dependent on the specific language of the negotiated text. In this regard, the agreement in principle between Mercosur and the EU on trade in June 2019 deserves special mention.[133] Final agreement has yet to be reached on the treaty terms; however, draft negotiating texts have been made available and these reveal a strong emphasis on environmental issues. The Trade and Sustainable Development chapter of the EU-Mercosur Association Agreement declares that the parties recognize the importance of addressing climate change, and of conserving biological diversity, consistent with the Paris Agreement and the CBD and other multilateral environmental agreements. The parties expressly commit to 'effectively implement' the UNFCCC and the Paris Agreement.[134] The chapter also includes a provision on 'Trade and Sustainable Management of Forests' under which the parties are obliged to:

(a) encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest;
(b) promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests.
(c) implement measures to combat illegal logging and related trade; [135]

However, the commitments made under this Agreement reflect the wording under the Paris Agreement, creating similar issues as to their practical implementation and

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[128] K Parlett and S Ewad, 'Protection of the Environment in Investment Arbitration – A Double-Edged Sword' (Kluwer Arbitration Blog, 22 August 2017).
[129] CL Beharry and ME Kuritzky, 'Going Green: Managing the Environment through International Investment Arbitration' (2015) 30 American University International Law Review 383, 388–396.
[130] ibid 396.
[131] Convention on Wetlands of International Importance, Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245.
[132] *Peter A Allard v The Government of Barbados* (Award) (27 June 2016) PCA Case No. 2012-06.
[133] 'EU-Mercosur Trade Agreement: Agreement in Principle and Its Texts' <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.
[134] ibid Trade and Sustainable Development chapter, art 6(1).
[135] ibid art 8.

enforcement. Moreover, the Trade and Sustainable Development chapter is excluded from the compulsory arbitration clause contained in the overall agreement. It has its own dispute settlement mechanism in the form of a consultation process. If the outcome is not satisfactory, the parties will create a panel of experts that can 'examine … the matter referred to in the request … and to issue a report … making recommendations for the resolution of the matter'.[136] These two elements significantly reduce the potential impacts of the Trade and Sustainable Development chapter under the Mercosur Agreement, despite the fact the EU is generally seeking to enhance the enforcement of sustainable trade commitments.[137]

8 CONCLUSION

The recent surge in deforestation and fires is pushing the Amazon towards a tipping point beyond which large parts of the forest may shift permanently to a savannah-like ecosystem.[138] With scientists warning unequivocally that the region is 'teetering on the edge of functional destruction',[139] it is understandable that a wide variety of litigation options are being explored to avoid this catastrophic outcome. These include proceedings brought within Amazonian states themselves, including Brazil and Colombia.[140] Domestic proceedings have several advantages over inter-State litigation, which is likely to be perceived as an unwarranted international intervention in a matter primarily of domestic concern. Nonetheless, given the urgency of the situation, it can be expected that States both within and beyond the Amazon region may consider inter-State litigation options. This article has sought to survey these options, weighing up the strengths and weaknesses of proceedings in various forums from the ICJ to human rights and trade jurisdictions. This litigation landscape is complex, and there are jurisdictional, normative and evidentiary hurdles in the way of a clear-cut judgment requiring Amazon States to take the urgent and direct measures needed to bring the ecosystem back from the brink. Given the uncertainty and unpredictability of international litigation, it can be no substitute at this point for close engagement by the international community with Brazil, and the other Amazon States, in order to implement internationally agreed conservation outcomes.

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[136] Draft Article 17 of the Trade and Sustainable Development Title, part of the EU-Mercosur Association Agreement < https://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156339.pdf >.
[137] The EU has created a new complaints system to enforce specifically sustainable trade commitments. < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2213>.
[138] TE Lovejoy and C Nobre, 'Amazon Tipping Point: Last Chance for Action' (2019) 5 Science Advances eaba2949.
[139] ibid.
[140] See J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679, 704.