
International Economic Law Clinic

PROTECTING THE AMAZON

A Report on Mechanisms of Redress for Potential Human Rights and Environmental
Breaches in Brazil

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Executive Summary

This report appraises a variety of global mechanisms of redress for the protection of the rights of indigenous peoples and the environment in the Brazilian Amazon.

The **key products of this report** are as follows:

- › Provision of a **cartography of the relevant events** and developments that have led to the violation of indigenous peoples' rights and the deforestation of the Amazon, or are likely to lead to such violations in the future (Chapter 2);
- › Identification and assessment of **potential violations of international rules** (Chapter 3);
- › Identification and appraisal of the **avenues of action** to seek redress for the likely violations of international rules (Chapter 4);
- › Provision of **a practical guide to utilisation** of the most pertinent mechanisms selected in consultation with the beneficiary of this report, and **detailed arguments to be deployed** when utilizing these mechanisms. (Chapter 5)

Cartography of the Relevant Events

The report finds that there are four different – but partly interrelated – sets of events leading to the violation of indigenous peoples' rights and the deforestation of the Amazon.

- › **Agribusiness and Forestry:**

Agribusiness is the backbone of the Brazilian economy, and agribusiness-related events are the primary reasons for the violation of indigenous peoples' rights and the deforestation of the Amazon. There has lately been a pronounced movement towards relaxing environmental and human rights regulations of agribusiness for further economic development.

- › **Infrastructure:**

Brazil has a large economy which is in need of further infrastructure to sustain its growth. Many infrastructure projects, such as hydroelectric dams, contribute to the deforestation of the Amazon and to the violation of cultural and economic rights of indigenous peoples. The Bolsonaro Administration's proposals to loosen the protections against such infrastructure projects are also of concern.

› **Mining and Illegal Goldmining:**

Brazil is a country rich with mineral resources, including gold. There have been several large-scale industrial accidents involving mining-related activities in recent years. In addition, illegal small-scale goldmining is of particular concern. Not only does it produce environmental pollution and deforestation, but there are also death threats and murders emanating from the criminal networks behind these illegal operations.

› **Administrative and Legislative Developments:**

Other developments of concern include the attempts by the Bolsonaro administration to halt the demarcation of indigenous lands, in addition to weakening or the complete dismantlement of the environmental and indigenous protection agencies.

The report finds that there are three broad groups of actors related to these events who can be found to be in violation international rules and standards: **states** (Brazil and other states), **businesses** and **financiers**.

Potential Violations of International Rules


The report identifies international rules that could be argued to have been violated and assesses the strength of the arguments of their violation in light of the facts. 14 instruments are assessed:

- › 9 instruments are related to the activities of **states** (mainly Brazil). These range from instruments that make state officials liable for international crimes (e.g. Statute of the International Criminal Court) to human rights instruments that require states to respect the human rights of indigenous peoples (e.g. Convention on the Elimination of All Forms of Racial Discrimination).
- › 3 instruments are related to **businesses**. An example is the UN Guiding Principles on Business and Human Rights, which are the most important norms on corporate responsibility. None of the instruments discussed in this section are universally binding legal obligations.
- › 4 instruments are related to **financiers** (two of the instruments relevant for businesses are relevant for financiers as well). An important set of instruments solely relevant for financiers are the internal standards of

development banks, such as the World Bank Operational Policies, which apply to projects funded by the bank.

The strength of the arguments pertaining to the different instruments are categorised in three levels which can be seen in the following table:

The Statute of the International Criminal Court	UN Guiding Principles on Business and Human Rights	American Convention on Human Rights
	World Bank Operational Policies and ESF	International Covenant on Economic, Social and Cultural Rights
	IDB Operational Policies	OECD Guidelines for Multinational Enterprises
	Paris Agreement	IFC Performance Standards
		International Covenant on Civil and Political Rights
		Convention on the Elimination of Racial Discrimination
		Convention on the Rights of the Child
		The United Nations Declaration on the Rights of Indigenous People
		ILO Convention 169
○	+	++



Strength of Arguments

This first level of analysis does not provide a greatly useful analytical tool, as most instruments analysed fall in the same category. Therefore, the report further considers the viability of the different avenues available to seek redress for the violations of the instruments. This next level of analysis adds to the analytical edge of the report.

Avenues of Action

The report identifies **22** mechanisms of redress and avenues of action to address the violations of the instruments discussed in the foregoing. **3** of these avenues are purely informal and of **political character** but could nevertheless draw on legal standards and related arguments. The remaining **19** avenues are of more **formalised or legal character** and are directly based on international rules and standards. They can be categorised into four groups according to the level of formality: **judicial, quasi-**

judicial, complaint mechanisms, and communications or reports. These mechanisms are assessed on the basis of two criteria:

› First, their **accessibility**:

This is based on the ease of access for victims and other stakeholders (including the beneficiary of this report), the costs (financial and otherwise) and the duration of the procedure.

› Second, their **expected outcome**:

This is based on the likelihood of a positive outcome, the potential for the results to induce practical change, and the direct relevance of the results for the rights of the indigenous peoples and the environment of the Amazon rainforest.

This assessment allows for an appraisal of the different avenues as seen in the table below:

+	<ul style="list-style-type: none"> UNESCO Human Rights Complaints Procedure 	<ul style="list-style-type: none"> NCPs for the OECD Guidelines Export Credit Agencies Complaint Mechanisms Communications to UN Special Rapporteurs 	
+	<ul style="list-style-type: none"> Universal Periodic Review Canadian Office of the Extractive Sector Corporate Social Responsibility Counsellor 	<ul style="list-style-type: none"> IFC Compliance Advisor/Ombudsman World Bank Inspection Panel IDB Independent Consultation and Investigation Mechanism ILO Complaint Procedure Inter-American Commission of Human Rights 	<ul style="list-style-type: none"> CERD Committee Human Rights Committee CRC Committee
o		<ul style="list-style-type: none"> Inter-American Court of Human Rights Human Rights Council Complaint Mechanism Paris Agreement Non-Compliance Procedure 	<ul style="list-style-type: none"> International Criminal Court International Court of Justice
o	o	+	++

The last two tables allow the beneficiary to gauge the different options available to them. Those mechanisms that are highlighted in the table above, which also correspond to the instruments highlighted in the table previous to that represent the most promising avenues. These are:

- Committee on the Elimination of Racial Discrimination (CERD Committee)

- Committee on the Rights of the Child (CRC Committee)
- Communications to the UN Special Rapporteurs
- Export Credit Agencies Complaint Mechanisms
- Human Rights Committee
- International Finance Corporation (IFC) Compliance Advisor/Ombudsman
- International Labour Organisation (ILO) Complaint Procedure
- Inter-American Commission of Human Rights
- National Contact Points for the OECD Guidelines

These listed mechanisms show avenues where there are potentially persuasive arguments to be made in possibly viable fora.

Practical Guide to Utilisation of, and Detailed Arguments to be Deployed in Selected Mechanisms

According to the appraisal made by the report as well as in discussion and at the instruction of its beneficiary, **four complaint mechanisms were chosen for detailed research:**

1. **Committee on the Elimination of all Forms of Racial Discrimination** – most prominent findings:
 - › There is a possibility to make use of the Early Warning and Urgent Action Procedure to address the attempts of the Brazilian government to halt demarcation of indigenous land. This avenue is not only prompt, but also does not require the exhaustion of local remedies.
2. **Human Rights Committee** – most prominent findings:
 - › It is possible to make use of the individual complaints procedure to address violations of the right to life of indigenous peoples. These include the murders (and death threats) of indigenous activists and leaders. Recent development in law also opens the door for arguing that states other than Brazil could be held liable for breaches of the right to life due to the activities of their corporations in Brazil.
3. **International Labour Organisation Complaint Procedure** – most prominent findings:
 - › The recent legislative moves of the Brazilian government regarding indigenous peoples' land demarcation and fast-track business and

infrastructure development can be challenged through a representation, once the proposed bills or amendments are realised. Such a case is likely to succeed especially concerning the right to consultation as well as the direct and indirect rights to land.

4. Complaint to the IFC Compliance Advisor/Ombudsman – most prominent findings:

- › An IFC investment supporting a Brazilian beef processing company that is likely to contribute to Amazon deforestation could be identified and may be challenged through a complaint. Further critical investments may come up in the near future.

The report offers a practical guide for utilizing the mechanisms, explores the arguments to be made in depth, and briefly outlines the steps after the delivery of decisions.

1. Introduction

The following research report has been prepared to assist with identifying avenues of redress for recent events unfolding in the Brazilian Amazon that threaten the rights of the indigenous peoples of Brazil.

The report consists of four substantive chapters. Chapter 2 deals with the *factual matrix* of the situation in Brazil. This chapter contains information which may be relied upon as a basis for specific claims or general arguments alleging a violation of international legal rules or norms. Reports of incidents that may be seen as amounting to such violations have been categorised into four groups. First, the facts regarding agribusiness and forestry practices are discussed. Second, some of the significant infrastructure projects or planned projects that affect the Brazilian Amazon and its indigenous peoples are discussed. These include dams and hydroelectric dams, as well as other significant infrastructure projects. Third, some facts regarding mining projects and illicit gold mining activities will be discussed. In recent years, this informal form of mining has been on the rise in Brazil and is contributing to the events affecting the Amazon rainforest and the indigenous peoples. Fourth, some facts regarding demarcation of indigenous lands and other recent administrative and legislative decisions by the Bolsonaro administration are mentioned.

Chapter 3 introduces the different *international rules* – be they formally legal or “softer” standards – that may be considered to be violated in light of the facts or could be violated if potential future developments are realised. This chapter is structured according to the actors addressed by the different listed instruments, which we consider to play key roles in such violation – namely the state of Brazil (and potentially other states), (multinational) business enterprises, and financial institutions. For each instrument, the report briefly outlines what legal arguments could be raised based on their relevant provisions with a view to strengthening the protection of the Brazilian Amazon. Annex I complements on this analysis by offering a detailed list of applicable legal provisions with short comments of their relevance.

Chapter 4 then lays out the many different *avenues of action* that could be followed to address the problems at hand. These are very different in character. Thus, we structure them according to their degree of formality, ranging from actual legal procedures to communications mechanisms of a non-legal nature, and give brief assessments of their

advantages and disadvantages for the purpose of protecting the rights of indigenous peoples and the environment in the Brazilian Amazon. For the sake of brevity and readability of these assessments, further information on the different avenues has been catalogued in tables found in Annex II. We then turn to some of the cross-cutting difficulties of some of the mentioned avenues. Finally, we address potentially promising issues for political campaigns, with the “legal arguments” that could be used to bolster such campaigns.

In Chapter 5, the final substantive part, we build upon the preceding analysis to identify 4 particularly promising avenues for action. We assess these options in more detail, focussing in particular on the practical requirements to their utilisation, on possible arguments alleging a particular violation based on the relevant facts, and on follow-up steps of the procedures once the claims are invoked.

2. The Situation in Brazil and Grounds for Action

After years of decreasing rates of deforestation, the clearing of the Brazilian rainforest has sharply increased again in recent years, with the year 2019 and its massive forest fires being particularly destructive.¹ During the first 9 months of 2019, there have also been twice as many instances of land invasion, alleged illegal exploitation of natural resources and damage to property on indigenous territories as in the preceding year.² In 2018 alone, 135 indigenous people were murdered in Brazil.³ To allow for a systematic cartography of the different factors leading to these developments, we divide these factors according to the four broad categories of agribusiness and forestry, infrastructure, mining, and legislative and administrative decisions.

2.1. Agribusiness and Forestry

Agriculture is a highly important economic sector for Brazil, accounting for 44% of Brazilian exports and 23% of the country's overall GDP in 2017.⁴ In particular, cattle ranching is a main driver of Amazon deforestation, while soy production has rapidly increased deforestation of native forests in the neighbouring Cerrado region since a moratorium has been put in place for soy cultivated in the Amazon region.⁵ It is no secret that Brazil's new president Jair Bolsonaro has very close links to agribusiness and landowners (often called "*ruralistas*").⁶ Since he took office, reports have come out about several legislative initiatives in support of large agriculture, including plans of the Ministry of Agriculture to alter legislation in order to permit industrial agriculture

¹Sue Branford and Maurício Torres, 'As 2019 Amazon fires die down, Brazilian deforestation roars ahead' (*Mongabay*, 23 October 2019) <<https://news.mongabay.com/2019/10/as-2019-amazon-fires-die-down-brazilian-deforestation-roars-ahead/>> accessed 10 January 2020.

² Clarissa Beretz, 'Violence against indigenous peoples explodes in Brazil' (*Mongabay*, 17 October 2019) <<https://news.mongabay.com/2019/10/violence-against-indigenous-peoples-explodes-in-brazil/>> accessed 10 January 2020.

³ Ibid.

⁴ Amazon Watch, 'Complicity in Destruction II: How Northern Consumers and Financiers Enable Bolsonaro's Assault on the Brazilian Amazon' (2019) <<https://amazonwatch.org/assets/files/2019-complicity-in-destruction-2.pdf>>, accessed 10 January 2020.

⁵ Ibid., 17.

⁶ Gabriel Stargardter and Anthony Boadle, 'Brazil farm lobby wins as Bolsonaro grabs control over indigenous lands', (*Reuters*, 2 January 2019) <<https://www.reuters.com/article/us-brazil-politics-agriculture-idUSKCN1OW00S>> accessed 10 January 2020.

on traditional indigenous lands,⁷ and a proposed law to grant automatic approval for agribusiness projects, reducing environmental impact assessment requirements and abandoning consultation obligations with indigenous peoples.⁸

The government has also recently offered 60% of the Amapá National Forest in the Amazon basin for timber exploitation.⁹

Many of the proposed initiatives by the Bolsonaro administration are thus far only suggestions or rhetoric. It will thus be fundamental to closely monitor and scrutinize future action by the government, in order to identify developments that could be challenged.

In addition to the government, **private actors** also play a crucial role in agricultural projects that affect the Amazon. This concerns Brazilian companies, mainly in the cattle ranching sector, but also foreign and multinational companies both *supplying* Brazilian agriculture and *buying* Brazilian agricultural products. The Brazilian economy is extremely dependant on foreign investments and export. The EU is Brazil's second largest trading partner (after China), accounting for around 18% of Brazilian exports – mainly agricultural products.¹⁰

There have also been reports about increasing invasions of indigenous territories by illegal loggers.¹¹ These illegal loggings are closely linked to agribusiness, since the main areas of forest which have been logged for valuable timber are subsequently burnt

⁷ Amazon Watch (n 4), 9.

⁸ Ibid., see also Denis Abessa, Ana Famá and Lucas Buruaem, 'The systemic dismantling of Brazilian environmental laws risks losses on all fronts' (2019) *Nature Ecology & Evolution* 3.

⁹ Jenny Gonzales, 'Amazon infrastructure puts 68% of indigenous lands / protected areas at risk: report', (*Mongabay*, 28 June 2019) <<https://news.mongabay.com/2019/06/amazon-infrastructure-puts-68-of-indigenous-lands-protected-areas-at-risk-report/>> accessed 10 January 2020.

¹⁰ Amazon Watch (n 4), 12.

¹¹ César Muñoz Acebes, 'Brazil's Amazon – and Its Defenders – Are Under Attack from Illegal Loggers' (*Foreign Policy*, 14 November 2019) <<https://foreignpolicy.com/2019/11/14/brazil-amazon-indigenous-defenders-deforestation-illegal-loggers/>> accessed 10 January 2020.

down and used for agriculture.¹² The loggings have also been linked to the massive 2019 fires in the region.¹³

An investigative study by the NGO Amazon Watch has disclosed the involvement of a number of European and US-based companies in agribusiness- and forestry-induced deforestation. This includes the US-based food processing and trading companies Cargill, Bunge and ADM, as well as the Dutch company Louis Dreyfus Holding, which have all been allegedly linked to soy producers that have recently been involved in deforestation.¹⁴ A number of Italian leather tanneries have been shown to receive leather from cattle ranching on deforested land¹⁵, and a large number of European and US-American timber companies have allegedly received timber from illegally logged lands.¹⁶ Lastly, British and US companies, according to the report, have been importing sugar from a company involved in illegal deforestation.¹⁷ Other studies have linked beef imports by the German supermarket chains Aldi and Lidl, as well as by the meat company Tönnies and the restaurant chain Block House, to Amazon deforestation.¹⁸ Beef processed by Burger King and McDonald's could similarly be traced back to deforestation practices.¹⁹

Brazilian agribusiness is furthermore backed up by finance from abroad. Almost half of the EU's investments in Latin America went to Brazil in 2015.²⁰ Key international

¹² Human Rights Watch 'Rainforest Mafias - How Violence and Impunity Fuel Deforestation in Brazil's Amazon' (2019) <https://www.hrw.org/sites/default/files/report_pdf/brazil0919_web.pdf> accessed 10 January 2020.

¹³ John C. Cannon, 'Deforestation preceded fires in 'massive' areas of Amazon in 2019', (*Mongabay*, 14 November 2019), <<https://news.mongabay.com/2019/11/deforestation-preceded-fires-in-massive-area-of-amazon-in-2019/>> accessed 10 January 2020.

¹⁴ Gethin Chamberlain, 'They're killing us': world's most endangered tribe cries for help', *The Guardian* (London, 22 April 2012) <<https://www.theguardian.com/world/2012/apr/22/brazil-rainforest-awa-endangered-tribe>> accessed 10 January 2020.

¹⁵ Amazon Watch (n 4), 28-29.

¹⁶ Ibid., 30-33.

¹⁷ Ibid., 34.

¹⁸ Andrew Wasley and Alexandra Heal, 'German Appetite for Beef Eats into Brazilian Rainforest' (*The Bureau of Investigative Journalism*, 21 October 2019) <<https://www.thebureauinvestigates.com/stories/2019-10-21/german-appetite-for-beef-linked-to-destruction-of-protected-brazilian-habitat>> accessed 10 January 2020.

¹⁹ Andrew Wasley, Alexandra Heal and André Campos, 'UK purchased £1bn of beef from firms tied to Amazon deforestation' (*The Bureau of Investigative Journalism*, 17 September 2019) accessed 10 January 2020.

²⁰ Amazon Watch (n 4), 13.

financial actors have announced to increase their activities in the country since Bolsonaro took office.²¹ Amazon Watch has identified a large number of European and US-based banks and other financial actors to be financing agribusiness companies involved in rainforest destruction. Among European banks most implicated in this kind of financing are BNP Paribas, Deutsche Bank and HSBC. Other European banks include ABN Amro, ING Group, Crédit Agricole, Crédit Suisse and Banco Santander. Major non-bank financiers include many large US-based asset management companies such as BlackRock, but also European companies such as Storebrand and Azimut Holding.²² Crucially, the International Finance Corporation, which forms part of the World Bank group, has also been alleged to have given out a credit (as of yet unmatured) to a Brazilian company involved in illegal Amazon deforestation for beef production.²³

2.2. Infrastructure

In addition to the agriculture industry, infrastructure projects are also alleged to play a key role for the rapidly increasing rate of deforestation in Brazil.²⁴ Some developments in recent months, under Bolsonaro's administration, are of particular interest. The Ministry of Agriculture and the Ministry of Mines and Energy have announced plans for making the environmental licensing rules much more lenient.²⁵ This is in the context of the proposed bill or project of law (Projeto de Lei) PL#3729/2004.²⁶ Particularly, there are proposals for the fast track approval of infrastructure development, which at the same time would put aside the obligation to consult with threatened communities.²⁷

²¹ Deutsch-Brasilianische Handelskammern and Germany Trade and Invest, 'IFC investiert 2,5 Mrd. US\$ in Brasilien' (2019) *Wochenbericht Brasilien*, 39 <https://www.ahkbrasilien.com.br/fileadmin/AHK_SaoPaulo/Publicacoes/Wochenbericht/Wochenbericht_2019/WB_39_-_04.10.19.pdf> accessed 10 January 2020. See also Mick Bowen, 'IFC arranges more loans for Brazil' (*Latin Finance*, 18 December 2018) <<https://www.latinfinance.com/daily-briefs/2018/12/18/ifc-arranges-more-loans-in-brazil>> accessed 10 January 2020.

²² Amazon Watch (n 4), 20-26.

²³ *Ibid.*, 43.

²⁴ Amazon Watch (n 4) 7.

²⁵ *Ibid.*, 9.

²⁶ Available at <https://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=257161#marcao-conteudo-portal>. See also Denis Abessa, Ana Famá and Lucas Buruaem, 'The systemic dismantling of Brazilian environmental laws risks losses on all fronts' (2019) *Nature Ecology & Evolution* 3 <<https://www.nature.com/articles/s41559-019-0855-9>> accessed 31 December 2019.

²⁷ Amazon Watch (n 4) 9.

Therefore, as the regulations are loosened, industrial lobbies work to access indigenous lands for mining and infrastructure development.²⁸ The proposed changes in law are of interest given that there have been multiple incidents involving infrastructure projects which will be discussed below and the further loosening of environmental regulations could potentially lead to further incidents in the future. The report discusses some of the past incidents and flags some of the proposed projects below. These concern dams and hydroelectric plants and other significant infrastructure projects.

Dams and hydroelectric plants are of particular interest both in terms of their current construction and plans for future constructions. Existing dams are already perceived to pose serious threats to the environment and the indigenous communities. For instance, the Sinop dam, built and operated by the Brazilian government and the French company Electricité de France (EDF, a French state-owned company), caused a massive fish kill earlier in 2019. This has led to an investigation into the matter and the operators of the dam being fined.²⁹ There are proposals for at least 100 more projects for the Juruena basin alone.³⁰ The map below illustrates the vast number of dams and planned projects in this area.³¹

An important *example* is the story of those concerned with the construction of the Castanheira Dam. Eduardo Morima is a member of the Apiaká community. He dedicates his days to raising awareness of the construction of the Castanheira dam in his neighbouring towns and villages.³² The Castanheira dam is a project among many in the Juruena region. The construction of this dam is worrisome to Eduardo as it is less than 40 kilometres away from indigenous lands. He fears that the dam will destroy the fishing grounds and the food supply of the Apiaká/Kayabi, Erikpatsa and Japuira

²⁸ Amazon Watch (n 4) 10.

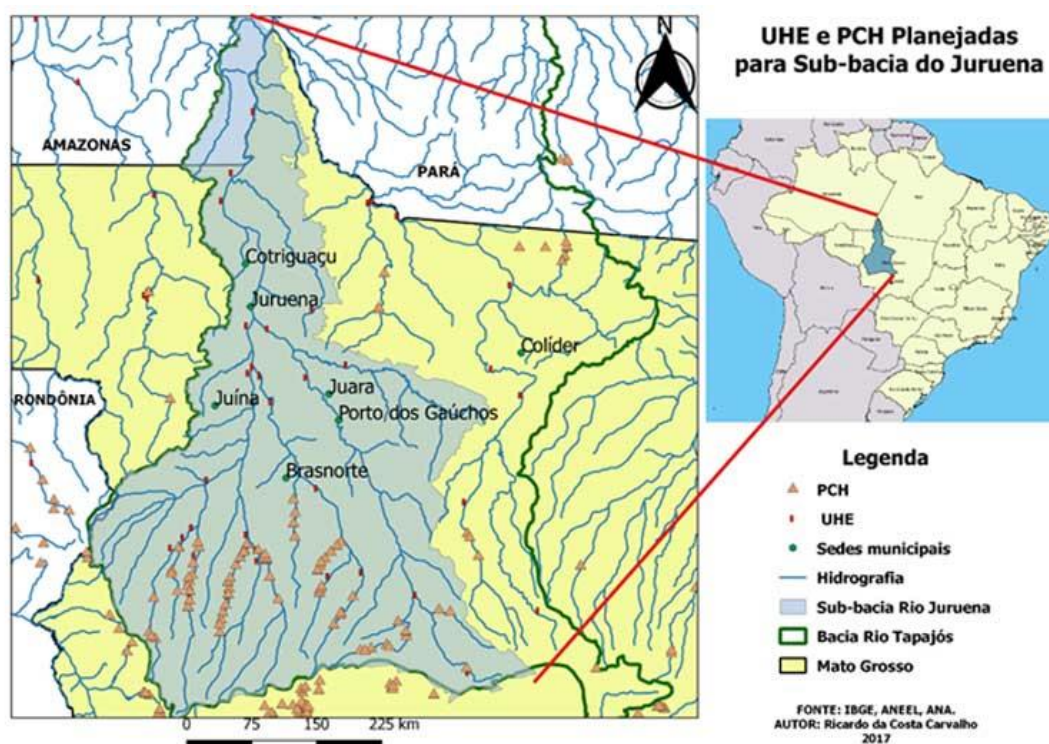
²⁹ Caio Freitas Paes, 'Amazon fish kill at Sinop spotlights risk from 80+ Tapajós basin dams' (Mongabay, 29 April 2019) <<https://news.mongabay.com/2019/04/amazon-fish-kill-at-sinop-spotlights-risk-from-80-tapajos-basin-dams/>> accessed 4 January 2020.

³⁰ Thaís Vilela and Pedro Gasparinetti, 'Better Hydropower Decisions: Economic Feasibility of the Proposed Castanheira Dam' (May 2018) Conservation Strategy Fund: Conservation Policy in Brief No. 37 <<https://www.conservation-strategy.org/publication/better-hydropower-decisions-economic-feasibility-proposed-castanheira-dam#.WvrZuCOvzIV>> accessed 31 December 2019.

³¹ Map was found in a report by Conservation Strategy Fund conducting a cost benefit analysis for the Castanheira dam, available in Portuguese: Vilela (n 30).

³² Luna Gamez, Caio Mota, 'A Life Fighting Against Hydroelectricity' (Pulitzer Center, 2 July 2019) <<https://pulitzercenter.org/reporting/life-fighting-against-hydroelectricity>> accessed 31 December 2019.

indigenous groups.³³ It is feared that the diminishing food supply which will be caused by the flooding of the indigenous lands.³⁴ Furthermore, this dam is being built close to extensive copper, diamond and gold reserves, leading to speculation that its construction could lead to mining firms' expanding their operations to extract resources on an industrial level. Therefore, the Castanheira dam has become a cause to galvanise action by indigenous groups.



For those concerned, the statements of Brazilian officials about the loosening of environmental regulations to allow for the expedited building of dams is an unwelcome development. The concerns of the indigenous communities in the vicinity of the planned dams could be grounds for action, as will be discussed further in Chapters 4 and 5 of this report.

Other significant infrastructure projects include a proposal for a major railway project spanning Brazil and Peru. The Inter-Oceanic Railway aims to link the Pacific and Atlantic Oceans. With the rail-line spanning 3000 to 5000 kilometres, the impact on the Amazon and indigenous peoples is expected to be substantial. Chinese, Czech,

³³ Caio Freitas Paes, 'Amazon fish kill at Sinop spotlights risk from 80+ Tapajós basin dams' (Mongabay, 29 April 2019) <<https://news.mongabay.com/2019/04/amazon-fish-kill-at-sinop-spotlights-risk-from-80-tapajos-basin-dams/>> accessed 4 January 2020.

³⁴ Vilela (n 30).

French, German, Spanish and Swiss investors and construction companies have expressed interest for the project.³⁵

Another specific infrastructure project that could be a potential basis for action in international fora is the building of the transmission powerline on indigenous lands to deliver power to the state of Roraima. Currently, the state of Roraima is receiving the bulk of its power from Venezuela. Due to Venezuela's volatile conditions and the worsening of relations between the Bolsonaro administration and Maduro administration, Brazil has announced that the building of the powerline is a matter of national security.³⁶ The 125 kilometres long powerline will pass through the Waimiri Atroapi territory. An official is reported to have held that although the government shall continue its dialogue with the indigenous communities, their permission is no longer seen as a condition for the grant of a licence.³⁷

2.3. Mining

Fast expansion of **mining projects** in the Amazon causes concern in light of the past industrial incidents involving mining projects. In 2015, the Fundão tailings (mine waste) dam collapsed in Mariana (south-eastern Brazil). The disaster released nearly 49 million cubic metres of toxic sludge and killed 19 people, displacing more than 1 million nearby inhabitants.³⁸ Another such mine waste dam collapsed in January 2019, killing 250.³⁹ The owner of the waste dam had failed to report the early warning signs, and the mining giant corporate Vale, and a German safety firm TÜV Süd are facing criminal charges regarding such failure.⁴⁰

³⁵ Gus Greenstein, 'Chinese/Western financing of roads, dams led to major Andes Amazon deforestation' (Mongabay, 1 August 2018) <<https://news.mongabay.com/2018/08/chinese-western-financing-of-roads-dams-led-to-major-andes-amazon-deforestation>> accessed 5 January 2020.

³⁶ Jan Rocha "Brazil to build long-resisted Amazon transmission line on indigenous land" (Mongabay, 13 March 2019) <<https://news.mongabay.com/2019/03/brazil-to-build-long-resisted-amazon-transmission-line-on-indigenous-land/>> accessed 8 January 2020.

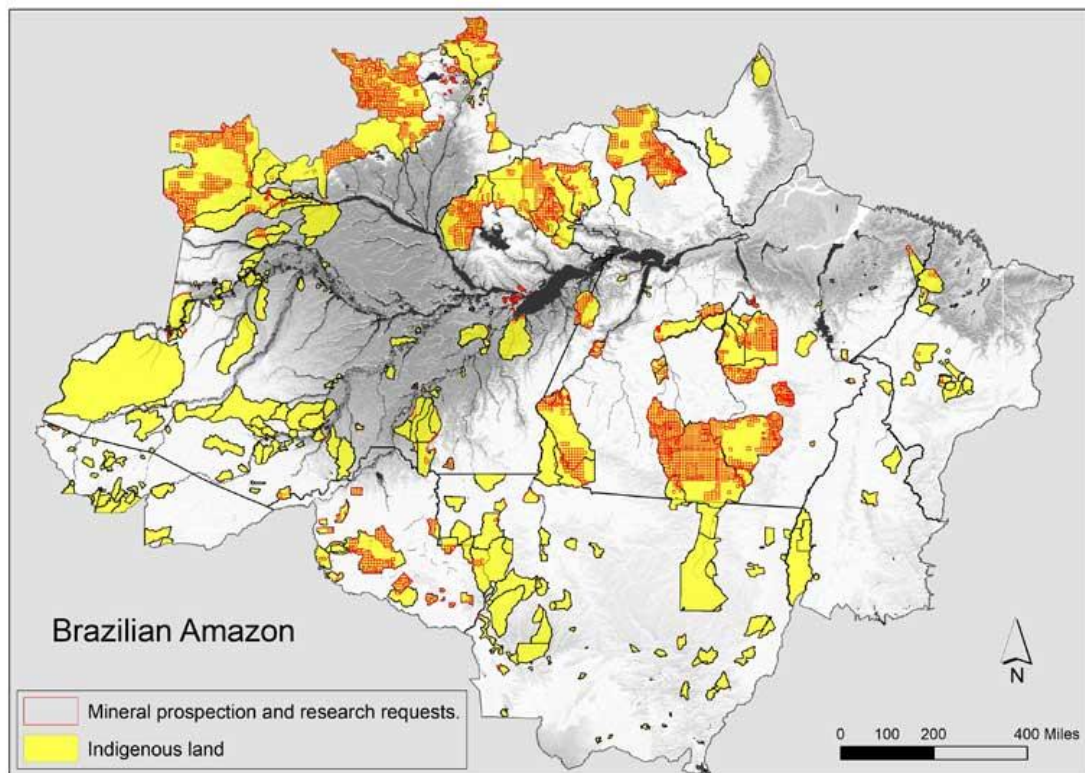
³⁷ Ibid.

³⁸ Tchéna Maso, 'In Bolsonaro's Brazil, dams are ticking time bombs' (*New Internationalist*, 5 November 2019) <<https://newint.org/features/2019/11/05/bolsonaro-brazil-dams-are-ticking-time-bombs>> accessed 8 January 2020.

³⁹ ibid; 'Brazil dam owner Vale failed to report danger signs – regulator' (*BBC News*, 5 November 2019) <<https://www.bbc.com/news/world-latin-america-50310768>> accessed 8 January 2020.

⁴⁰ BBC News (n 39).

Yet, the new Brazilian Minister of Mines and Energy Admiral Bento Albuquerque announced plans to authorize mining on demarcated indigenous lands, in March 2019. Such a plan is in direct opposition to indigenous land rights as guaranteed under Brazil's 1988 Constitution. Especially, Brazil's mining industry has a very poor safety and environmental record as mentioned above. The Minister also said that he intends to allow mining concessions up to Brazil's borders, abolishing the current 150-kilometer (93-mile) wide mining buffer zone at the frontier (see the map below). Meanwhile, mining companies stand ready to move into indigenous reserves, if the measure goes forward. Brazil's mining ministry has received 4,073 requests from mining companies and individuals for mining-related activities on indigenous land.⁴¹



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Among others, **illegal goldmining** is of particular concern. Wildcat gold mining in the Brazilian Amazon is practiced through deforestation, destroying habitats and creating

⁴¹ Sue Branford and Maurício Torres 'Brazil to open indigenous reserves to mining without indigenous consent' (*Mongabay*, 14 March 2019) <<https://news.mongabay.com/2019/03/brazil-to-open-indigenous-reserves-to-mining-without-indigenous-consent/>> accessed 8 January 2020.

⁴² Ibid.

a danger for the food and numerous animals in the Amazon rainforest.⁴³ Despite being less pervasive than logging, mining can be more insidious when it comes to deforestation: whereas loggers usually harvest valuable trees and leave the rest, miners tend to cut *everything*. During the Presidency of Inácio Lula da Silva from 2003 to 2010 deforestation decreased for a time. However, in the short span of time from January 2019, when the new administration entered office, there are worrisome trends.

Mercury contamination of Amazon rivers is another problem. It is a less visible than deforestation, but no less serious threat to the lives of the Brazilian indigenous peoples. According to a recent study, more than 92 percent of Yanomami Indians tested in Aracaçá (the closest community to illegal mining sites) had unsafe rates of mercury in their bodies, while in the Papiú region (located further away from illegal mining sites), just 6 percent were diagnosed with mercury-contamination.⁴⁴ Mercury exposure to human leads to short lifespan, brain damage and low IQ, and damages the immune system.⁴⁵

But deforestation and mercury poisoning is only a part of the problem. As 90% of the gold mining in the Amazon is illegal, run by organized crime and “the logging mafia”, it is also linked to the problems of child labour exploitation, intimidation and money laundering, illegal drug trade, and gold smuggling.⁴⁶

The annual revenues from illegal gold mining in Brazil are estimated to reach more than one billion US dollars.⁴⁷ The size of this industry correlates with its harmful impacts and difficulties in addressing it.

⁴³ Sr. Rose Pacatte, “‘River of Gold’ documents another threat to the Amazon: illegal gold mining’ (*NCR Online*, 16 September 2019) <<https://www.ncronline.org/news/opinion/river-gold-documents-another-threat-amazon-illegal-gold-mining>> accessed 8 January 2020.

⁴⁴ Instituto Socioambiental, ‘The Yanomami people are contaminated with the mercury from gold-digging’ (*Social Environmental Stories*, 17 May 2016) <<https://medium.com/social-environmental-stories/the-yanomami-people-is-contaminated-with-the-mercury-from-gold-digging-6ef8740bd4d0>> accessed 8 January 2020.

⁴⁵ Pacatte (n 43); for more information of the danger of mercury exposure, see Mrinalini Erkenwick Watsa, ‘The quicksilver demon: rogue gold-mining is the world’s largest source of mercury pollution’ (*Mongabay*, 20 November 2013) <<https://news.mongabay.com/2013/11/the-quicksilver-demon-rogue-gold-mining-is-the-worlds-largest-source-of-mercury-pollution/#zqYw3kfy2u6Bm28u.99>> accessed 8 January 2020.

⁴⁶ Pacatte (n 43).

⁴⁷ John Lee Anderson, ‘Blood gold in the Brazilian Rain Forest’ (*The New Yorker*, 4 November 2019) <https://www.newyorker.com/magazine/2019/11/11/blood-gold-in-the-brazilian-rain-forest> accessed 8 January 2020.

2.4. Legislative and Administrative Decisions

In addition to the categories discussed above, there have been governmental attacks on institutions for indigenous rights. For instance, the current administration stripped the indigenous agency FUNAI of its mandate to identify and grant title to indigenous territories, transferring this authority to the Agriculture Ministry, through the presidential decree (MP 870/2019).⁴⁸ The move immediately paralyzed land demarcations of more than 232 indigenous territories and threatens to incite new conflicts on indigenous lands. Although the Brazilian Supreme Court made a decision later that the power to demarcate indigenous lands must remain with FUNAI,⁴⁹ the Brazilian government continues to question the legality of existing titling processes.

The dismantling of environmental institutions is another factor threatening to induce further deforestation and encroachment upon indigenous lands and resources. Since previous government, Brazil's Environmental Ministry (MNA) suffered devastating cuts, restructuring, and loss of autonomy.⁵⁰ The ministry no longer has the jurisdiction to combat deforestation. Now that the Agriculture Ministry manages Brazil's forestry service, there are indicators that the MNA's mission has become subordinate to the interests of agribusiness and other anti-environmental actors.⁵¹

In addition, the Brazilian environmental agency IBAMA has suffered severe budget cuts and disempowerment.⁵² While deforestation rapidly grew during the past months, the amount of fines imposed for illegal deforestation decreased by more than half. In April, decree 9760 was passed that gives those fined the possibility to have their fines reduced or even cancelled.⁵³

⁴⁸ Sue Branford, 'Brazil's Bolsonaro presses anti-indigenous agenda; resistance surges' (*Mongabay*, 27 June 2019) <<https://news.mongabay.com/2019/06/brazils-bolsonaro-presses-anti-indigenous-agenda-resistance-surges/>> accessed 8 January 2020.

⁴⁹ 'Rainforest Mafias' (*Human Rights Watch*, 2019) 154 <https://www.hrw.org/sites/default/files/report_pdf/brazil0919_web.pdf> accessed 8 January 2020.

⁵⁰ Associated Press, 'Brazil slashes environmental protection budget as Amazon burns' (*New York Post*, 17 September 2019) <<https://nypost.com/2019/09/17/brazil-slashes-environmental-protection-budget-as-amazon-burns/>> accessed 8 January 2020.

⁵¹ 'Complicity in Destruction II: How Northern Consumers and Financiers Enable Bolsonaro's Assault on the Brazilian Amazon' (*Amazon Watch*, 2019) <<https://amazonwatch.org/assets/files/2019-complicity-in-destruction-2.pdf>> accessed 8 January 2020.

⁵² See Branford/Torres.

⁵³ Ibid.

Also of extreme concern is the set of bills (about 25) that affect the rights of indigenous and traditional populations and protected areas. These bills are encompassed in a proposed constitutional amendment #215/2000 that seeks to prevent demarcation procedures for new indigenous and protected areas and may lead to the revocation of areas that have already been designated. A large portion of indigenous land is located in areas of significant environmental importance, including the Amazon region, thus, the suspension of new demarcations would not only deny indigenous rights, but also increase the risk of land occupation by agricultural and infrastructure activities, which would lead to an increase in deforestation rates.⁵⁴




⁵⁴ Denis Abessa, Ana Famá and Lucas Buruaem, 'The systematic dismantling of Brazilian environmental laws risks losses on all fronts' (*Nature Ecology & Evolution*, 18 March 2019) <<https://www.nature.com/articles/s41559-019-0855-9>> accessed 8 January 2020; note that the dismantling of Brazilian laws that protect environment and/or the rights of indigenous peoples is not totally new with the Bolsonaro administration, but it does represent a turning point in the history of environmental conservation and cultural protection efforts in the country.

3. Potential Violations of International Legal Obligations and Rules

The factual matrix provided above in Chapter 2 shows that there are a number of key actors who are contributing to the developments in Brazil. This chapter categorises some of these actors and lists and discusses the potential violations of international rules and norms in relation to each category. The actors whose obligations are discussed in the following are:

1. Brazil (and other states),
2. (multinational) businesses,
3. and financiers.

The overview table below outlines the categories of actors and the corresponding international instruments that may have been violated by each group of actors.

 Brazil and Other States	 Businesses	 Financiers
<ul style="list-style-type: none"> - American Convention on Human Rights (ACHR) - International Covenant on Civil and Political Rights (ICCPR) - Convention on the Elimination of All Forms of Racial Discrimination (CERD) - Convention on the Rights of the Child (CRC) - International Covenant on Economic, Social and Cultural Rights (ICESCR) - United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - The Statute of the International Criminal Court (The Rome Statute) - ILO Indigenous and Tribal Peoples Convention (ILO C169) - Paris Agreement 	<ul style="list-style-type: none"> - OECD Guidelines for Multinational Enterprises - International Finance Corporation (IFC) Performance Standards - UN Guiding Principles on Business and Human Rights 	<ul style="list-style-type: none"> - OECD Guidelines for Multinational Enterprises (relevant against financiers in addition to businesses) - International Finance Corporation (IFC) Performance Standards (relevant against financiers in addition to businesses) - World Bank Operational Policies and Environmental and Social Framework (ESF) - Inter-American Development Bank (IDB) Operational Policies

3.1. Brazil and Other States

a) American Convention on Human Rights (ACHR)

The ACHR is a human rights convention ratified by Brazil, on the basis of which claims can be brought to the Inter-American Commission for Human Rights (IACHR), which can pass these on to the Inter-American Court for Human Rights (IACtHR) (see Chapter 4.2. and Annex II).

Legal arguments based on the ACHR could focus on:

- › Art. 21 (right to property)
 - The plans of the Brazilian state to loosen requirements for consultation with indigenous communities, as well as for social and environmental impact assessments for activities affecting the lands or natural resources of these communities, are likely to violate the right to “cultural identity” proclaimed by the IACtHR under this article.
 - Claims under Art. 21 could also focus on specific projects in the Amazon which involve insufficient consultation, impact assessments, resettlement practices or judicial protection, as well as violence against local communities.
 - Furthermore, the precedents indicate that insufficient demarcation of indigenous lands in an area where industry projects are carried out can be challenged under the Convention.
- › Art. 26 (progressive development)
 - The emergent right to a healthy environment under Art. 26 (see Annex I) could furthermore function as a basis for various claims related to adverse environmental effects of activities in the Amazon, potentially even without directly showing that these involve any adverse effects on individuals.

Precedents (see Annex I for more detail)

In *Saramaka People v. Suriname* (2007), the IACtHR found that Suriname, by giving out logging and mining concessions to private companies without the consultation or consent of the traditional community living on the land, had violated their right to property and to judicial protection. It asked the state to review all concessions granted, demarcate the community's land, grant them a right to be consulted and effective remedies, and pay compensation.

b) International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a major international human rights instrument. Brazil allows for individual complaints under the First Optional Protocol to ICCPR by virtue of its ratification of the Protocol in 2009. The Human Rights Committee may issue views on individual complaints pursuant to Article 5 of the Optional Protocol. These views are authoritative, although not binding (see Chapter 5.2 for detailed analysis and Annex I for further information).

A range of legal arguments could be made with regard to developments in the Brazilian Amazon based on provisions of the conventions (which are addressed also in Annex I). Arts. 6 and 27 are of particular interest, given the previous decisions by the Human Rights Committee (see in more detail Chapter 5.2):

› Art. 6 (right to life)

The right to life obliges states to take measures to protect those who are at particular risk due to existing patterns of violence, particularly mentioning human rights defenders and indigenous peoples.⁵⁵ As discussed in Chapter 2, there have been a number of murders and death threats involving indigenous peoples. It can be argued that the continued death threats and the murders are indications of a failure by Brazil to meet the obligations under Art. 6.

› Art. 27 (minority rights)

⁵⁵ CCPR 'General Comment No. 36: Article 6 (Rights to Life)' (3 September 2019) CCPR/C/GC/36, at para. 23.

Cultural rights extend to the use of land by indigenous peoples.⁵⁶ The issue of the attempts of the Bolsonaro Administration to halt of the demarcation procedures, as well as permitting infrastructure or agribusiness projects on lands claimed by indigenous communities (such as dams discussed in Chapter 2), could be argued to be a violation of Art. 27

Precedents

In *Ominayak v. Canada (1987)*, the Human Rights Committee had to deal with leases issued by the federal government of Canada for oil and gas exploration on lands claimed by an indigenous group, the Lubicon Lake Band. The Committee decided that this permission by the state was in violation of the cultural rights of the indigenous community under Art. 27.

c) International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The CERD is another important international human rights convention. Brazil has accepted the individual complaints procedure under CERD in 2002. Individual Complaints can be brought to the CERD Committee under Art. 14 CERD. CERD issues non-binding but authoritative opinions (See Chapter 5.1 for detailed analysis).

Legal arguments based on CERD could focus on:

- › Art. 1 (non-discrimination) & Art. 4 (condemnation of propaganda)
 - Art. 1 requires states' public authorities and institutions not to discriminate, and not to sponsor, defend or support discrimination by other persons. Art. 4 obliges states to condemn propaganda. Indigenous groups could argue that senior officials in the Brazilian government are themselves a source of discriminatory propaganda in addition to failing to condemn acts of discrimination. This is due to the rhetoric used by the officials of the current Brazilian administration. This is further discussed in Chapter 5.

⁵⁶ CCPR 'General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) CCPR/C/21/Rev.1/Add.5, at para. 7.

› Art. 5(d)(v) (right to property)

Art. 5 extends to protection of the right of indigenous people to communal ownership of lands.⁵⁷ It can be argued that not only this right has not been fully respected as the demarcation of indigenous lands in Brazil is not complete, but the new Brazilian administration seems to be taking active steps to halt the demarcation process as discussed in Chapter 2.

Precedents

The Human Rights Committee found that the *Foreshore and Seabed Act 2004* of New Zealand violated the rights of the indigenous people of New Zealand by barring them from making claims under the native title doctrine to coastal lands. The New Zealand government extinguished all possibilities of customary ownership by the indigenous people through the mentioned Act. The Committee found New Zealand in breach of its obligations under Articles 5 and 6 of the CERD Convention.¹ The international pressure caused by this decision contributed to the repeal of the Act in 2011.

d) Convention on the Rights of the Child (CRC)

The CRC is the most widely ratified human rights treaty in the world, with 196 parties having joined since the Convention was signed in 1989. The Convention establishes the Committee on the Rights of the Child, which gives the views and recommendation of the Committee a significant normative value. Brazil ratified the Optional Protocol to CRC accepting the individual complaints procedure in 2017.

Some legal arguments based on the CRC include:

› Art. 6 (right to life, survival and development)

- According to [General Comment 7](#), the right to life, survival and development are to be implemented in connection with rights to health (Art. 24), adequate standard of living and a healthy and safe environment. There are a number of events discussed in Chapter 2 that

⁵⁷ Patrick Thornberry *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), at 349.

can be seen as contributing to the violation of this rights. For instance, the mercury contamination due to illegal goldmining directly affects the health of indigenous children as well as standards of living and the safety of their environment.

› Art. 30 (right to culture)

- According to [General Comment 11](#) the use of traditional lands is of significant importance to the development of indigenous children. The attempts to halt the demarcation process, as well as the industrial activities such as dam construction near traditional lands (that will affect the use of indigneous of the land) can be construed to violate the right of children to their culture.

Examples

[General Comment 11](#) deals with indigenous children and their rights under the CRC Convention. The Committee on the Rights of the Child recognises the importance of particular attention to meet the rights of indigenous children. Of particular interest is Art. 30 discussed in the foregoing. The Committee holds that the best interests of indigenous child is closely linked to the collective cultural rights. In relation to the right to life (Art. 6) and right to health (Art. 24), the Committee points out the cultural importance of traditional land as well as the significance of the status of the natural environment for protecting these rights of indigenous children.

e) International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR is one of the two major international human rights covenants (together with the ICCPR). Brazil has ratified it but does not allow for individual complaints to the Committee overseeing its implementation (the Committee on Economic, Social and Cultural Rights, or ESC Committee). Alleged violations of the ICESCR can nevertheless be referenced through other avenues (see Chapter 4.2. and Annex II). The interpretation of the ICESCR through the ESC Committee is not legally binding in a strict sense but is regarded as authoritative.

A range of legal arguments could be made with regard to developments in the Brazilian Amazon. The ICESCR has been interpreted to include some of the most detailed international legal rules concerning business activities that affect indigenous traditional lands and resources.

- › Art. 15 (right to take part in cultural life)
 - The ESC Committee has asserted a right of indigenous peoples to free, prior and informed consent (FPIC), based, inter alia, on this article. Thus, the Convention sets particularly strict procedural standards for consultation with indigenous communities. Legislative initiatives by the Brazilian government to dilute consultation standards, as well as insufficient consultations in the course of on-going projects, are likely to violate this requirement (see for detailed overview Annex I).
- › Art. 11 (right to adequate housing, right to food)
 - Any involuntary displacement of indigenous peoples is likely to violate this article, as well as Art. 15 of the Convention.
- › Art. 12 (right to health)
 - When it comes to deleterious effects on health and food resources – such as in the case of some the dams built in the Brazilian Amazon – this provision is likely to be violated

Examples

The ESC Committee's [General Comment No. 24](#) on state obligations in the context of business activities is highly relevant for the context of the events in the Brazilian Amazon. In addition to detailing the requirements to be fulfilled to free, prior and informed consent (FPIC), the Committee also held that expected effects of business projects on indigenous peoples need to be included in human rights impact assessments, which must be conducted prior to business projects. It also decided that there is a need for effective access to justice and remedies for indigenous peoples if business activities are affecting their lands or resources.

**f) The United Nations Declaration on the Rights of Indigenous People
(UNDRIP)**

A number of legal arguments can be raised on the basis of UNDRIP:

› Art. 10 (right not to be displaced)

UNDRIP was adopted in 2007 and concerns the rights of indigenous peoples. The Declaration cannot be considered to be an international treaty or an instrument that binds the parties. However, the Declaration and the rights therein are often referenced as the most comprehensive document on indigenous rights, with many of its provisions reflecting customary international law (see Annex I for further information).

- The potential displacement of indigenous populations due to infrastructure projects discussed in Chapter 2 (such as dam projects) would be a basis for arguing this right was violated.

› Art. 26 (right to land)

- Attempts to halt demarcation as well as failure to protect the land and resources from both legal and illegal agribusiness, mining and infrastructure projects could be a basis to argue the violation of the right to land.

› Art. 29 (right to conservation and environment)

- The state is to take measures to assist indigenous people in the protection of the environment. Brazil, however, is taking steps backwards by cutting funding for the country's environmental and indigenous agencies (FUNAI).

The Importance of UNDRIP

Several factors give UNDRIP great normative weight. The document took over 20 years to be negotiated – which involved not only states, but also indigenous peoples and their advocates. Therefore, UNDRIP represents an important development in international human rights law. Furthermore, it has been approved in the UN General Assembly, with many of its provisions even reflecting customary international rules.⁵⁸

⁵⁸ See Jessie Hohmann and Marc Weller (eds.) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018), 24-26, 48-60.

g) The Statute of the International Criminal Court (The Rome Statute)

The Rome Statute establishes the ICC. Brazil is a party to the Rome Statute having ratified it in 2002, meaning any alleged crimes in Brazil can be prosecuted in the ICC according to Article 12 of the Rome Statute. The Rome Statute deals with individual crimes of serious concern to the community where national jurisdictions are unwilling or unable to, on the basis of the Rome Statute of the International Criminal Court. In recent months there has been interest in the potentials of the Rome Statute to invoke the individual responsibility of Brazilian officials.

It is very unlikely for persuasive legal arguments to be made on the basis of the Rome Statute. The Rome Statute discusses a number of crimes. None of them are likely to have taken place in Brazil:

- › Art. 6 (Genocide), Art. 7 (Crimes Against Humanity) & Art.8 (War Crimes)
 - There is a requirement of “substantial gravity” under Art. 17(1)(d) in relation to Arts. 6 and 7. This is a very difficult test to pass and unlikely to be met in the Brazilian context. Furthermore, Art. 6 requires evidence that the indigenous people are intended to be destroyed in whole or in part. This is unlikely to be established. Art. 7 also requires a systematic and wide-spread nature which is difficult to establish in the Brazilian context.
 - Art. 8 cannot be said to be breached. There is no armed conflict in Brazil that could lead to war crimes.
- › There are suggestions for the crime of ecocide to be the basis of a potential violation. Reference is to Art. 10 of the Statute in this regard, as Art. 10 is read by some to mean that the developments of international law could create new grounds for action, such a new crime of ecocide. However, the lack of any prior case (successful or unsuccessful) means that such arguments would have a low legal strength.

h) ILO Convention on Indigenous and Tribal Peoples (C169)

Considering the situation in the Brazilian Amazon, legal arguments based on the ILO

The ILO C169 is the major binding international convention concerning the rights of indigenous and tribal peoples and a forerunner of the UN Declaration on the Rights of Indigenous Peoples. It is ratified by Brazil and compliance is observed through the ILO complaint procedures. (see Chapter 4.2., Chapter 5.3. and Annex II).

C169 could focus on:

- › Art. 6 & 7 (right to consultation)
 - The proposed Brazilian bills for the fast track approval of infrastructure development could be used as a basis for claims of violation. For such legislative decision, governments have an obligation to consult the indigenous peoples who are likely to be affected. If consultation is not undertaken in accordance with ‘appropriate procedure’, through the indigenous peoples representative institutions”⁵⁹, in good faith, and with the objective of achieving agreement or consent, Article 6 and 7 can be invoked. However, note that it is not required to arrive at an agreement or consent.
- › Art. 14, 15 & 16 (right to lands)
 - A potential allegation can be made regarding Brazil’s proposed constitutional amendment #215/2000 that seeks to prevent new demarcation procedures for indigenous land. If realized, the amendment would directly affect indigenous people’s right to their lands and the government would be hold accountable for not taking necessary steps in realizing such amendment.

⁵⁹ *Brazil – C169 (2009)* ILO, Complaint Procedures by Representations (Article 24) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507317,en> accessed 10 January 2020.

Precedents

In the Brazil Case (2009) before the ILO Compliance Procedure, the Brazilian government was found to have failed to take consultation steps despite three consultation sessions offered to the indigenous peoples. According to the Committee, the consultations were not enough to meet the requirements of appropriate procedures, good faith and the objective of reaching an agreement, nor were they undertaken through the indigenous peoples' representative institutions.

i) Paris Agreement⁶⁰

Considering the situation in the Brazilian Amazon, legal arguments based on the Paris Agreement could focus on:

- › Brazil's NDC submitted in 2015⁶¹
 - According to Brazil's NDC submitted in 2015, Brazil committed to strengthen policies and measures with a view to achieve zero illegal

The Paris Agreement on climate change to regulate greenhouse gas emissions is a legal instrument that binds 187 Parties (as of January 2020). However, the compliance mechanism for the Paris Agreement is weak, relying entirely on its Committee in a manner that is "non-adversarial and non-punitive". Also, obligations for each Party depend on their nationally determined contributions (NDCs), on a voluntary basis.

deforestation by 2030 in the Brazilian Amazonia, and to restore and reforest 12 million hectares of forests by 2030. Both of those commitments would compensate for greenhouse gas emissions, which Brazil is expected to reduce by 37% below 2005 levels in 2015 and by 43% below 2005 levels in 2030⁶² (see Annex I).

- Meanwhile, it should be noted that all Parties are expected to submit their updated NDCs in 2020.

⁶⁰ Status of Treaties, UN Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en> accessed 10 January 2020.

⁶¹ Brazil, Intended Nationally Determined Contribution (2015) interim NDC registry <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/BRAZIL%20iNDC%20English%20FINAL.pdf>>.

⁶² Brazil, Intended Nationally Determined Contribution (2015).

› Trade for Sustainable Development Chapter for the EU-Mercosur Free Trade Agreement⁶³

Chapter 14 of the agreed principle for the new EU-Mercosur trade deal, which Brazil is a Party to, obliges Parties to comply with the Paris Agreement.

Precedents

Recently, some European countries refused to ratify the new EU-Mercosur Trade Agreement expressing their concerns with the environmental and human rights degradation in the Amazon area that has been escalated to another level since 2019. This indicates that not only formal dispute settlement mechanisms but also informal trade negotiations can be used to convince Brazilian government. (see Chapter 4.3.)

3.2. Businesses

a) OECD Guidelines for Multinational Enterprises

The OECD Guidelines are a legally non-binding document specifying standards for the conduct of multinational enterprises which are headquartered or operate in an OECD member country or one of the other “adhering countries” to the Guidelines (see Chapter 4.2. and Annex II).

There are many conceivable different arguments to be raised against businesses involved in activities in the Amazon. Claims could be based on:

› Chapter II (General Policies)

- One could argue for the insufficient monitoring of supply chains as a basis for violations under this chapter. Such a supply-chain-related claims could address the US-based and Dutch food-trading companies, Italian leather tanneries, European and US timber companies, and British and US sugar importers that have all been linked to illegal deforestation in Brazil (see Chapter 2.1)

⁶³ New EU-Mercosur trade agreement, The agreement in principle (2019) Chapter 14; note that this not a legal text as it is currently being drafted.

› Chapter IV (Human Rights)

- This can form the basis for any claims addressing the direct involvement of a company in a harmful activity for indigenous communities in the Amazon – such as that of the French Electricité de France or of Canadian mining companies mentioned above.

› Chapter VI (Environment)

- Under this chapter, any direct harm inflicted on the environment by companies active in the Amazon can be pursued (see in detail Annex I).

Examples⁶⁴

Admitted cases addressing company behaviour in Brazil have in the past dealt with the consequences of mining and industrial projects on the environment as well as on local communities. A number of admitted cases have addressed indigenous rights. They have dealt with such issues as the right to free, prior and informed consent (FPIC), indigenous land claims, livelihoods and traditional sites. Two of them were issued before the Swiss NCP (one by the Society for Threatened Peoples). Other cases have dealt with the purchase of illegally logged timber and other forms of environmental destruction in forests. The success of cases concerning supply chains has thus far been mixed.

b) International Finance Corporation (IFC) Performance Standards

The IFC Performance Standards are one of the most influential set of standards for corporate responsibility worldwide – they thus do not only apply to the operations of the IFC (see below, as well as Chapter 4.2. and Annex II) but are also a widely accepted “code of conduct” for the operations of businesses involving environmental or social risks.

A number of different arguments could be made addressing companies based on the situation in Brazil. Given the prestige of the Standards, large corporations are rather

⁶⁴ For a detailed database on NCP cases with many different search tools, see <https://complaints.oecdwatch.org/cases>.

likely to want to show that they comply with them, even if not formally challenged through any sort of complaints mechanism. Likely violations could concern:

- › Performance Standard 4 (Community Health, Safety, and Security)
 - The provisions of this standard could be used to challenge the deleterious health effects resulting from some of the dams in the Amazon area.
- › Performance Standard 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources)
 - European or other foreign companies alleged to purchase primary products that involve illegal deforestation in Brazil (be it cattle, timber, soy, leather, or sugar) could be considered to violate this standard.
- › Performance Standard 7 (Indigenous Peoples)
 - This standard sets very detailed and relatively strong restrictions for any activities affecting indigenous traditional lands and resources.

Examples

Many of the companies that have recently been linked to deforestation in the Amazon (see Chapter 2) have reacted to the allegations by re-affirming their commitments to “international standards” or internal sustainability policies.⁶⁵ Many of these standards or policies make direct or indirect reference to the IFC Performance Standards. While violations of these commitments can often not be challenged through any formal mechanisms, they can be pointed out through campaigns or other channels.

⁶⁵ See the company responses to a request by the Business & Human Rights Resource Centre: <https://www.business-humanrights.org/en/brazil-ngo-report-alleges-companies-complicit-in-deforestation-human-rights-abuses-in-the-amazon/?dateorder=datedesc&page=1&componenttype=1>.

c) The UN Guiding Principles on Business and Human Rights

The UN Guiding Principles are the most important globally agreed document on corporate responsibility. They explicitly are not asserting any legal obligations for businesses, but only social expectations – but they can nevertheless be used to point to the non-compliance of business enterprises with these social expectations.

Despite the non-legal character of the Guiding Principles, they are rather detailed in their prescriptions for business actors. Arguments based on their provisions and addressing harmful business operations could thus largely follow the logic of allegations of legal violations. The Guiding Principles potentially cover a large field of corporate misbehaviour. Allegations immediately addressing human rights are likely easier to sustain than those addressing environmental harm.

> Principle 12

- This could be a basis for arguing any violation of the indigenous rights prescribed by the UN Declaration (UNDRIP, see above in this chapter) in which corporations are involved. This could be through the construction of dams or other infrastructure, such as the company Electricité de France (EDF, see Chapter 2), mining, or agribusiness.

> Principle 13 and Principle 19

- These principles emphasize a company's responsibility for its business relationships and value chains. Thus, they could be a basis for arguing a violation in the case of foreign companies indirectly linked to deforestation in the Amazon, wherever this deforestation constitutes a human rights violation.

Examples

The UN Guiding Principles are an even more common document of reference than the IFC Performance Standards. Most multinational corporations have committed to complying with the Principles. Many of the corporations allegedly linked to Amazon deforestation have directly referred to them in their responses to the allegations.⁶⁶

⁶⁶ See *ibid.*

Thus, a violation of the Principles can be a strong argument to be deployed through campaigns and other informal avenues, or as supporting evidence when submitting a complaint, e.g. to an OECD National Contact Point (see above).

3.3. Financiers

a) OECD Guidelines for Multinational Enterprises

The above-mentioned OECD Guidelines do also apply to banks and other private actors in the financial sector. Statements by several National Contact Points (NCPs) have confirmed that this also includes minority shareholdings.

Claims against financiers under the OECD Guidelines could potentially concern:

- › Chapter IV (Human Rights) and Chapter VI (Environment):
 - These could be a basis for arguing violations by the many European and US-based banks and asset managers that have been linked to deforestation in Brazil (see Chapter II).
 - The OECD Guidelines also apply to the loans and insurances given out by Export Credit Agencies (ECAs) (see Chapter 4.2 and Annex II). ECA support allegedly violating human rights or harming the environment has been challenged through NCPs, albeit with limited success thus far.

b) International Finance Corporation (IFC) Performance Standards

The above-mentioned IFC Performance Standards also govern the investments of the IFC itself and can be challenged before its internal Compliance Advisor/Ombudsman (CAO) (see Chapter 5.4 and Annex II).

Precondition for such a violation is that an investment can be identified. For such an identified investment and the analysis of how to possibly bring it before the CAO, see Chapter 5.4. Some of the relevant standards could be:

- › Performance Standard (PS) 3 (Resource Efficiency and Pollution Prevention), PS 4 (Community Health, Safety, and Security), PS 5 (Land Acquisition and Involuntary Resettlement), PS 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources), PS 7 (Indigenous Peoples)

- These Standards also apply to other financial actors, such as Export Credit Agencies (ECAs), in this case through the *OECD Common Approaches* (see Chapter 4.2 and Annex II).

Examples

For a detailed discussion of the CAO procedure, including past and possible future complaints in Brazil, see Chapter 5.4.

c) World Bank Operational Policies and Environmental and Social Framework (ESF)

The World Bank – the most important and influential multilateral global financial institution for all sorts of state-funded development projects – has recently revised its environmental and social safeguards. The new Environmental and Social Framework (ESF), replacing the old “Operational Policies”, largely resembles the IFC Performance Standards, though with some differences in application. It applies to all projects funded by the bank that were launched after October 2018. For the older projects, the Operational Policies still apply.

Potentially relevant Operational Policies include:

- › Bank Policy 8.60 (Development Policy Financing), Operational Policy (OP) 4.01 (environmental assessments), OP 4.10 (indigenous peoples), OP 4.12 (involuntary resettlement), OP 4.36 (forests), OP 4.37 (safety of dams)

Potentially relevant standards within the ESF include:

- › Environmental and Social Standard (ESS) 1 (Assessment and Management of Environmental and Social Risks and Impacts), ESS3 (Resource Efficiency and Pollution Prevention and Management), ESS4 (Community Health and Safety), ESS5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement), ESS6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources), ESS7 (Indigenous Peoples), ESS9 (Financial Intermediaries)

- A precondition for a violation by the World Bank is of course to find a project that is (co-)financed by the World Bank and likely to have violated the above-mentioned standards. No such current project affecting the Brazilian Amazon is known to the authors.
- In addition to applying to projects financed by the World Bank, the Operational Policies (and in the future likely the ESF) are also an important set of standards for other contexts. As the IFC Performance Standards, they apply to the activities of Export Credit Agencies (ECAs) through the *OECD Common Approaches* (see Chapter 4.2 and Annex II).

d) Inter-American Development Bank (IDB) Operational Policies

The Inter-American Development bank is a major public financial institution for development (e.g. infrastructure) projects in Latin America. As most other multilateral development banks, it set itself a number of social and environmental standards that apply to all its projects.

As the name indicates, the IDB Operational Policies are largely aligned with those of the World Bank, although much more scattered and less systematized in character. Following the example of the World Bank, the IDB is also revising its safeguards system and is planning to introduce a new Environmental and Social Policy Framework (ESPF) in 2021. It can be expected that the new system will again be largely modelled after that of the World Bank. Accordingly, these sets of standards apply to similar contexts as those of the World Bank. Among the relevant ones are:

- › Multisectoral Policies on Environment and Safeguards Compliance, Involuntary Resettlement, and Indigenous Peoples
 - To raise arguments alleging a violation of the IDB Operational Policies, as with the World Bank, critical projects financed by the bank would need to be identified. The IDB has recently authorised some industry


projects with potential consequences for indigenous territories⁶⁷, but no such projects in the Amazon region are known to the authors.

Examples

Only very few cases brought before the IDB’s Independent Consultation and Investigation Mechanisms (MICI) in Brazil have thus far been successful. Generally, past successful claims have addressed, among other issues, insufficient environmental impact assessments, impacts of hydropower plants on the environment, livelihood and health of communities, and the land titling of indigenous traditional lands in the Peruvian Amazon.

3.4. Interim Conclusions: Strength of Arguments Alleging Violations

The Statute of the International Criminal Court	UN Guiding Principles on Business and Human Rights	American Convention on Human Rights
	World Bank Operational Policies and ESF	International Covenant on Economic, Social and Cultural Rights
	IDB Operational Policies	OECD Guidelines for Multinational Enterprises
	Paris Agreement	IFC Performance Standards
		International Covenant on Civil and Political Rights
		Convention on the Elimination of Racial Discrimination
		Convention on the Rights of the Child
		The United Nations Declaration on the Rights of Indigenous People
		ILO Convention 169
○	+	++



Strength of Arguments

The table above summarizes our assessment of Chapter 3. We roughly classify the strength of the discussed arguments according to three groups, ranging from less

⁶⁷ See e.g. IDB, ‘BR-L1531 : Klabin S.A.’ - Puma II’ (IDB, 2020) <<https://www.iadb.org/en/project/BR-L1531>> accessed 10 January 2020.

convincing instruments to very plausible arguments for legal violations. The result shows that only the Statute of the ICC appears to be more difficult to apply. Although the Policies of the two public funding development bank standards (World Bank and IDB) include many provisions that deal with issues similar to those in the Amazon, no relevant projects could be identified. They are however sometimes used as standards of reference in other contexts. While the UN Guiding Principles and the Paris Agreement could serve as the basis for convincing arguments, they cannot be applied to as many different facts as the other instruments.

As can be seen, many of the instruments that were preliminarily considered to be applicable to the set of facts in the Brazilian Amazon and thus included in this analysis could indeed form the basis for strong claims. Their usefulness for complaints will however also depend on the access to complaint *procedures*, and on the potential results of accessing these procedures. These procedures will be assessed in the next chapter.

4. Avenues of Action

4.1. Categories of Avenues

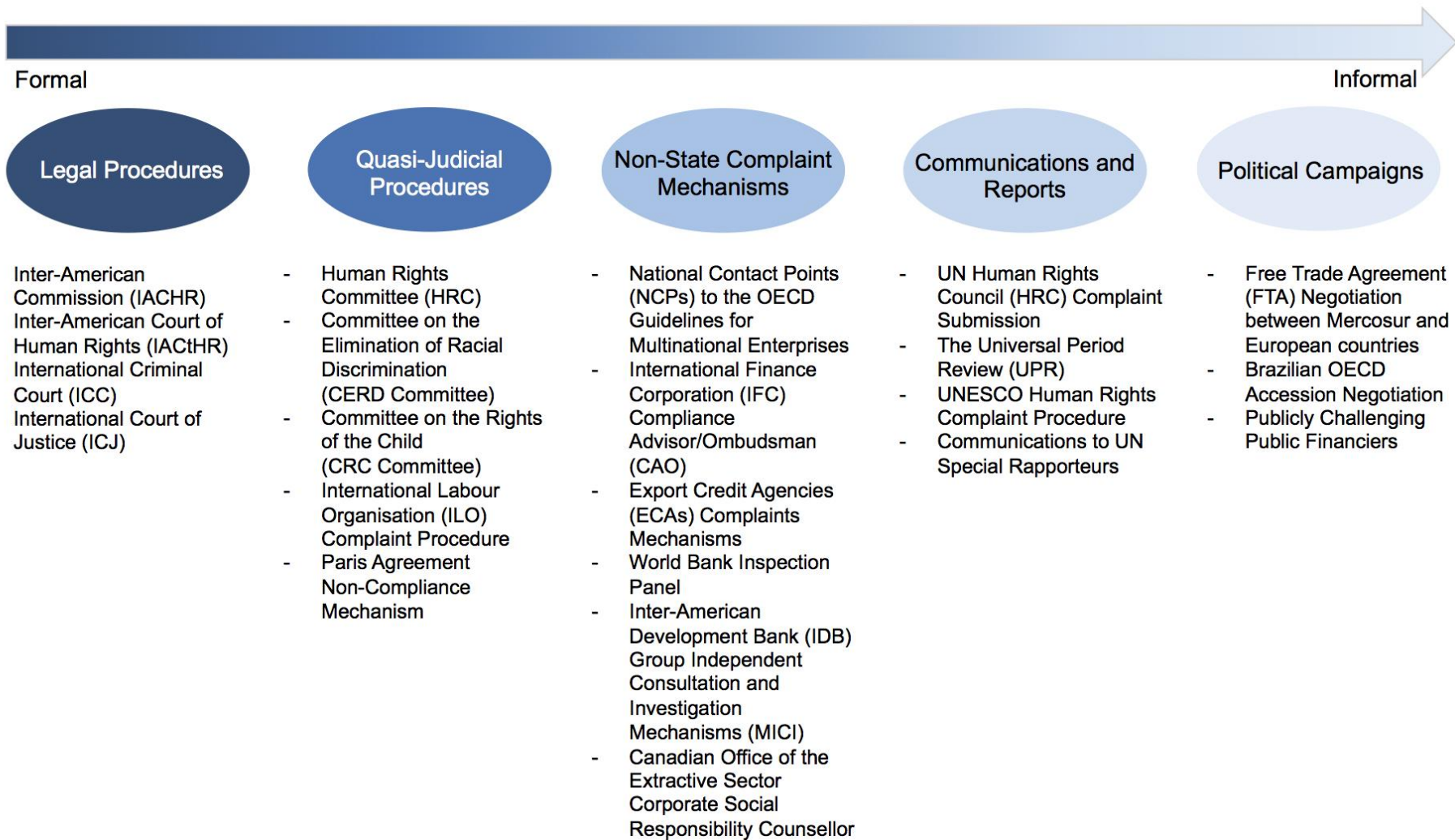
To better structure the possible avenues of action for addressing the above-mentioned potential violations, we are introducing an arrow illustrative of a spectrum:

1. one end indicates the avenues that are very **formal/legal procedures**;
2. the other end indicates the avenues that are purely **informal/political avenues**.

As many of the avenues fall in between those two extremes, we also separated those into three different sections, according to their level of formality:

3. **quasi-judicial procedures** are the avenues that are based on legal instruments but are interpreted through bodies that issue opinions which are not strictly legally binding;
4. **non-state complaint mechanisms** are less formal than quasi-judicial procedures as they are avenues that address non-state actors and based on documents that are not or only internally binding, mostly related to economic activities;
5. **communications and reports** are closer to political actions than non-state complaint mechanisms, but there still are some formal requirements to be followed, which is what distinguishes them from purely *political avenues*.

The table below shows the avenues as allocated to the explained five groups.



4.2. Formal Avenues

4.2.1. Analytical Criteria

In the following sub-section, we briefly assess the potential of a number of different (more or less) formal avenues of action to serve as instruments for the protection of the Brazilian Amazon, and the rights of the indigenous peoples living in it. To ensure comparability, we identified several crucial criteria that serve as analytical categories for the different options. For the sake of brevity, we include only the overall assessment of each avenue in this Chapter. The detailed application of these criteria to the respective mechanism can be found in Annex II of this report.

- › The **first** criterion we examine is the **access, costs and duration** of the respective avenue. In this category, we look at factors such as who can make use of the respective procedure, under what conditions, and what are the required steps to take advantage of the procedure. If applicable, we also mention the approximate duration of the procedure until a result is achieved, as well as the costs of using it. “Costs” in this case can mean financial as well as other types of costs, such as the amount of work needed or reputational costs.
- › The **second** criterion are the **applicable rules** and their potential violations. These are outlined in detail in Chapter 3, as well as in Annex I to this report. Thus, the following short overview does not make extensive reference to these applicable rules. Annex I contains a detailed allocation of the rules assessed in Chapter 3 to the different formal avenues of redress.
- › The **third** crucial criterion is the **expected outcome** of each procedure. By outcome we mean the potential of the option for (any type of) success, as well as possible risks. This includes factors such as compliance, the influence and prestige of the procedure, and the danger of creating backlash.

While, as mentioned, a detailed application of the above-mentioned criteria can be found in Annex II, in the following sub-section we provide short strategic assessments. With the mentioned criteria in mind, we summarise some of the key advantages or disadvantages of the mechanisms.

4.2.2. Overview of Options

4.2.2.1. Legal Procedures

As outlined in the foregoing table, the legal procedures of interest are:

1. Inter-American Commission (IACHR)
2. Inter-American Court of Human Rights (IACtHR),
3. International Criminal Court (ICC),
4. International Court of Justice (ICJ)

(For a detailed overview, see Annex II).

Regarding the criteria of *access, costs and duration*, the IACHR and IACtHR are the most promising of the three. It must be mentioned that all three avenues are lengthy procedures that typically take many years before a final decision is rendered. However, access to the Inter-American System is possible for individuals, and it is possible for NGOs to make applications on behalf of individuals. By contrast, access to the ICJ and ICC is not possible for individuals. Access to ICJ is limited to states and certain international organisations, and the only influence an NGO could have is through lobbying states to bring a claim. In the context of the ICC, the Court's Prosecutor initiates proceedings. Furthermore, the ICJ does not have automatic and compulsory jurisdiction, which hampers access to the Court significantly as Brazil has not made a declaration under Art. 36 of the ICJ Statute to accept the compulsory jurisdiction of the Court. The most important obstacle to access to the Inter-American System is the requirement of the exhaustion of local remedies.

Regarding the criterion of *applicable rules*, Chapter 3.1 and Annex I discuss the relevant rules and their potential violations in detail (the rules applicable in the ICJ include the international treaties that Brazil is a party to as well as any rules of customary international law reflected in other documents such as UNDRIP). It suffices to mention that the most egregious of violations and strongest of claims were found to fall under the Inter-American System.

Lastly, we must assess the *expected outcome* from each avenue. The ICC and the ICJ issue binding decisions that are almost always complied with. This is due to the history and prestige of these courts. The decisions from the Inter-American System are also

legally binding. However, given the lack of enforcement measures available to the Court and the disparity of power between the claimant and the respondent in comparison with the ICJ and ICC, it is far less certain that Brazil's government would comply with a decision from the Inter-American System. Furthermore, we are concerned – after discussing the possibility of using the Inter-American system with an expert mentor of this project – that there is a risk of creating a serious backlash against the whole of the Inter-American System by bringing a case before against Brazil, especially while the Bolsonaro administration remains in office.

Given the foregoing, none of the legal avenues outlined seem to be optimal avenues of redress for the potential violations in Brazil.

4.2.2.2. Quasi-Judicial Procedures

As mentioned in the table in section 4.1, there are a number of important quasi-judicial procedures that may be of interest:

1. Human Rights Committee (HR Committee)
2. Committee on the Elimination of Racial Discrimination (CERD Committee)
3. Committee on the Rights of the Child (CRC Committee)
4. International Labour Organisation (ILO) Complaint Procedure
5. Paris Agreement Non-Compliance Mechanism

(For a detailed overview, see Annex II as well as Chapter 5 for avenues 1, 2 and 4).

Regarding the criteria of **access, costs and duration**, all four avenues are assessed to be promising. The HR Committee and CERD Committee are accessible to the victims of a violation of their parent conventions, while the CRC Committee could be accessed by or on behalf of the victims. The ILO Complaints Procedure, on the other hand, is only accessible to an industrial association of workers. Identifying such an association to initiate the complaint may prove challenging. Overall, the role of an NGO to initiate proceedings is limited, with the emphasis mostly on the specific victims. The requirement of exhaustion of local remedies regarding HR Committee, CERD Committee and CRC Committee are important obstacles to accessing the procedures. It is also important to be aware of the non-duplication rule related to the CRC Committee and HR Committee. This means that the Committees may not consider a

case already under consideration in another international avenue. These issues will be discussed further below. The costs in the quasi-judicial procedures are not prohibitive. Lastly, regarding the issue of duration, the HR Committee and the CERD Committee are of particular interest due to their ability to respond quickly to urgent matters. In the case of HR Committee, this expedited procedure is by requesting a state to take interim measures, and in the case of the CERD Committee by way of early warning measures. In relation to the ILO Complaint Procedure, the rather lengthy procedure can take years to result in a decision.

Regarding the criterion of **applicable rules**, Chapter 3.1 and Annex I have discussed the relevant legal conventions under the ICCPR, CERD, CRC and ILO Convention 169. As discussed in Chapter 3 and Annex I, there are strong arguments to be made for the breach of the rules in all these avenues. The existence of precedents and authority renders the ILO Complaints Procedure, HR Committee and CERD Committee particularly interesting. For instance, there have been 20 cases brought under the ILO Convention 169 so far, with one successful case against Brazil.

In terms of the question of **expected outcome** from each avenue, all the quasi-judicial procedures analysed are ‘naming and shaming’ instruments which do not produce binding decisions. This is somewhat mitigated by the over-all widespread ratification of the Conventions in question, adding normative weight to the decisions of the Committees and Complaint Procedure. Their widespread recognition means decisions will be important assets in increasing awareness and generating further pressure from publicity.

4.2.2.3. Non-State Mechanisms

The Non-State Complaints Mechanisms analysed in this report are aimed at (non-Brazilian) companies and financiers. We are analysing the following mechanisms:

1. National Contact Points (NCPs) to the OECD Guidelines for Multinational Enterprises
2. International Finance Corporation (IFC) Compliance Advisor/Ombudsman (CAO)
3. Export Credit Agencies (ECAs) Complaints Mechanisms
4. World Bank Inspection Panel

5. Inter-American Development Bank (IDB) Group Independent Consultation and Investigation Mechanisms (MICI)
6. Canadian Office of the Extractive Sector Corporate Social Responsibility Counsellor

(For a detailed overview, see Annex II).

The **access** to these procedures will mostly depend on whether a financial transaction or company can be identified that falls within the scope of application of these instruments. Thus, the IFC CAO, the World Bank Inspection Panel and the IDB MICI mechanism only cover projects that are financed by the respective financial institution (i.e. the IFC, World Bank, or IDB). Similarly, a complaint to an Export Credit Agency is only possible if the involvement of a company receiving financial support or guarantees from this agency can be linked to critical events, while the Canadian Mining Counsellor can only be addressed in cases involving Canadian companies. The NCP system of the OECD Guidelines is the only broader mechanism in this regard, given that NCPs exist in many states and claims can be filed in both home and host states of the respective companies.

All of the analysed procedures furthermore allow groups, including NGOs, to bring cases, while some (the World Bank Inspection Panel and MICI) do not allow for claims by individuals and many (the CAO, World Bank Inspection Panel, MICI, and Canadian Mining Counsellor) require demonstrating *specific affectedness* by the challenged measure.

Concerning **costs and duration** of the procedures, non-state complaints mechanisms have usually lower barriers than “traditional” legal avenues. The procedures discussed here do not involve any procedural costs and hiring lawyers would usually not be necessary to make use of them. While cases can take several years, they would usually be concluded much faster than, for example, in the Brazilian legal system (see Chapter 4.4).

The pertinent **applicable rules** and their relevant substance in light of the events in the Amazon are discussed in Chapter 3 and Annex I. The NCPs, CAO, World Bank Inspection Panel, and MICI have their own respective sets of rules, while Export Credit Agencies and the Mining Counsellor draw on the rules of other organisations, mainly the IFC Performance Standards and the OECD Guidelines.

As to the **expected outcome** of these mechanisms, the picture is far from clear-cut. None of them provides for the payment of compensation for suffered harm, even if a case is successful. Consequently, the best victims can hope for is usually a stop of the harmful activities – and even this will usually depend on the discretion of the addressed company or financier. A finding of violation will however create pressure on the respective entity to act. From a broader perspective, even unsuccessful cases can contribute to long-term behavioural change in the addressed financier or company (e.g. leading to stricter internal controls or a reduction of investments in certain sectors).

4.2.2.4. Communications and Reports

Apart from the legal, quasi-judicial and non-state complaint mechanisms, we also would like to introduce some less formal procedures that enable complainants to submit communications or reports:

1. UN Human Rights Council (HRC) Complaint Submission
2. The Universal Period Review (UPR)
3. UNESCO Human Rights Complaint Procedure
4. Communications to UN Special Rapporteurs

(For a detailed overview, see Annex II).

Regarding the *access, costs and duration*, any individuals, groups or NGOs can submit their complaint to the HRC and UNESCO, regardless of their affectedness. The UPR submission is allowed only for NGOs. Since none of the discussed procedures are legal, no lawyer fee or other financial cost is required, although pursuing any procedures would of course include human resources. There are different criteria for admissibility of the reports and communications such as the timeframe in relation to the events invoked (for the case of UNESCO), or other formalities. The HRC complaint procedure, most importantly, requires “consistent patterns of gross and reliably attested violations”.⁶⁸ It also presupposes the exhaustion of local remedies and non-duplication in the field of human rights.

⁶⁸

<https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

In terms of *applicable rules*, a great degree of latitude is allowed for all four avenues in this chapter. Human rights complaints through these avenues can be made irrespective of ratification status of related conventions, and even the existence of related domestic rules or laws is not required. However, a report that refers to any related laws is likely to make a stronger case (see Annex II for related international treaties for each avenue).

On the contrary, the *expected outcome* for these communications and reports is little. There is no ‘ruling’ or enforceability of findings. The best that can be hoped for when making use of these procedures is an intervention by the respective institutions, or to affect a country’s reputation by making the findings public. The UPR review session is open to public, and thus, it is a good avenue for ‘naming and shaming’. However, it contains rather weak follow-up and monitoring mechanisms. On the contrary, the UNESCO mechanism is confidential, and little is known about the precedents. The complaint results allow UNESCO to intervene, but the aim is not to condemn or penalize concerned governments. In case of a submission to the HRC, although the procedure is confidential, the Council can decide to discontinue the procedure in order to take up public consideration.

4.2.3. Cross-Cutting Difficulties

Exhaustion of Local Remedies

A recurring issue, particularly when it comes to internationally claiming human rights violations, is the need to exhaust local remedies prior to having access to the respective mechanism. More specifically, the Inter-American system, the individual claims procedures for ICCPR, CERD and CRC, the communications mechanism to the Human Rights Council, and the UNESCO complaints procedure refer in some way or another to this requirement (see Annex II in detail).

Having to go through all levels of jurisdiction of, in our case, Brazil can mean a significant impediment for access to international procedures due to a number of factors, including time and costs. Info Box 1 gives an overview of the different levels of jurisdiction in Brazil, including an estimation of the time it can take for a

Info Box 1: Legal Procedure in Brazil

The Brazilian judicial system, generally speaking, consists of:

- lower courts,
- courts of appeal,
- the Superior Court of Justice (last instance reviewing uniform interpretation of federal laws) and the Supreme Court (last instance for constitutional matters)

A case is usually first brought before a lower court and can then be appealed. As a third step, the case can be brought before the Superior or the Supreme Court. According to Brazilian jurists consulted for this report, each of these steps can take up to 7 years, which can lead to the whole process taking up to 20 years.

Since Brazil is a federal state, claims need to be brought, depending on the issue area, either to *state* or *federal* courts. Claims concerning indigenous rights must be brought before federal courts.⁶⁹ Many cases concerning the violation of indigenous rights or environmental issues may need to be filed by the public prosecutor, and not the affected individuals themselves.

case to be decided. If one of the mentioned international avenues is to be addressed, it may therefore be advisable to not start a claim “from scratch”, but to actively look out for claims that have already been filed in Brazil but were unsuccessful or have become “stuck”, with a judgment getting excessively delayed.

It additionally needs to be emphasized that the local remedies requirement is not an absolute rule but has been interpreted by the responsible international courts and committees to entail a certain flexibility. For example, the local remedy needs to be reasonably *available* for the complainants. Unavailability of the remedy can be caused through a variety of circumstances, including those of a “practical” nature.⁷⁰ It also

⁶⁹ Rogério Carmona Bianco et al., ‘Litigation and enforcement in Brazil: overview’ (*Thomson Reuters Practical Law*, 2019) <[https://uk.practicallaw.thomsonreuters.com/9-502-2479?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1#co_anchor_a783116](https://uk.practicallaw.thomsonreuters.com/9-502-2479?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a783116)> accessed 10 January 2020.

⁷⁰ Silvia D’Ascoli and Kathrin Maria Scherr, ‘The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection’ (2007) *EUI Working Papers* 2007/02 <https://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf> accessed 10 January 2020, 12.

needs to be effective, which, as mentioned, can be impeded through disproportionate delay of the proceedings. This is explicitly mentioned in Art. 46 II ACHR and Art. 5 II lit. a ICCPR. In addition, particularly in cases of gross and systematic human rights violations, remedies that are available domestically but are of a merely disciplinary or administrative

Non-Duplication

The non-duplication requirement exists so that a case which is already being dealt with (or has been dealt with in the past) under one international avenue is not replicated in another avenue, avoiding repetition. A number of avenues involve this requirement, hence its cross-cutting nature.

The HR Committee complaint procedure cannot take up the consideration of a case that is already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure Art. 5 of the Optional Protocol to ICCPR. CRC Committee will also not consider that the same matter that is under consideration in another procedure of international investigation according to Art. 7(d) of Optional Protocol 3 to the CRC. The extent of the requirement under the Human Rights Complaint Procedure includes matters that have been dealt with by special rapporteurs as well as other avenues mentioned above.⁷¹ The Rules of Procedure of the Inter-American Commission on Human Rights also maintain that a petition will not be considered if it is pending in another international avenue and duplicates a pending or existing petition before the Commission (Art. 33(1)). The Commission does make an exemption if the other procedure was purely a general examination (Art. 33(2)).

This non-duplication principle in human-rights related mechanisms can cause difficulties especially when the mechanisms are confidential and not all actors working on the issues around the Amazon are in cooperation with each other. Aside from that, and generally speaking, complainants must be vigilant when initiating proceedings. Complainants must be aware if they are starting a process which may prevent them from pursuing another avenue due to the non-duplication requirement. In light of this,

⁷¹ Complaint Procedure- Frequently Asked Questions' (OHCHR, n.d.), <<https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx>> accessed 1 January 2020.

the choice of avenues, and the appraisal of the persuasiveness of arguments related to each avenue must be carried out carefully not to squander complaints opportunities.

Standing

Standing is a widely spread difficulty that almost all avenues share, be it human rights, environmental or economic-activity-related mechanisms. Often in legal avenues, individuals do not have standing. For instance, ICJ is accessible only for states and certain international organizations and ICC procedure can be initiated by the Court's prosecutor alone. Paris Agreement's Non-Compliance Mechanism as well can be used by the states who are parties to the Agreement and individuals or NGOs do not have standing.

Although individuals have standing to use HR Committee and CERD Committee, it is limited to the victims of violation of their parent conventions. On the other hand, CRC Committee could be accessed both by and on behalf of the victims. ILO Complaint Procedure is in the same line that it allows representation of victims standing to file complaints, but representation is limited to industrial association of workers or employers, due to the specific character of the ILO as an organization. Similarly, only Canadian national companies have standing to make use of the Canadian Mining Counsellor.

Often, mechanisms related to economic activities require specific affectedness to have standing as representation. IFC CAO, World Bank Inspection Panel and IDB MICI mechanisms belong to this group that they only cover the projects that are financed by them. Likewise, only companies receiving financial aid from Export Credit Agency have standing to use their complaint procedure. Communications such as HR Council Complaint Submission or UNESCO Procedure, on the other hand, are more open and give standing to any individuals or NGOs regardless of their affectedness. UPR, on the other hand, allows standing for NGOs but not for individuals.

The standing issue poses a difficulty to access many avenues in different areas, albeit with different degrees. Therefore, assessment of the standing issue should be always taken into account before pursuing an avenue.

4.2.4. Interim Conclusions: Usefulness of Avenues of Action

++	<ul style="list-style-type: none"> UNESCO Human Rights Complaints Procedure 	<ul style="list-style-type: none"> NCPs for the OECD Guidelines Export Credit Agencies Complaint Mechanisms Communications to UN Special Rapporteurs 	
+	<ul style="list-style-type: none"> Universal Periodic Review Canadian Office of the Extractive Sector Corporate Social Responsibility Counsellor 	<ul style="list-style-type: none"> IFC Compliance Advisor/Ombudsman World Bank Inspection Panel IDB Independent Consultation and Investigation Mechanism ILO Complaint Procedure Inter-American Commission of Human Rights 	<ul style="list-style-type: none"> CERD Committee Human Rights Committee CRC Committee
o		<ul style="list-style-type: none"> Inter-American Court of Human Rights Human Rights Council Complaint Mechanism Paris Agreement Non-Compliance Procedure 	<ul style="list-style-type: none"> International Criminal Court International Court of Justice
	o	+	++

The matrix displayed above summarizes the analysis conducted in Chapter 4.2. Its two dimensions – access and expected outcome – are subdivided into three different groups, indicating their varying usefulness. None of the analysed avenues falls into the field marking relatively high barriers to access *and* a limited expected outcome (two times “o”). Similarly, none of them falls into the field indicating low access barriers *and* relatively promising outcomes. This indicates that all the assessed avenues have their weaknesses and strengths.

The less formalized avenues for *communications and reports* generally fall into the group indicating relatively easy access and low costs and duration, with the exception of the Human Rights Council Complaint Mechanism, which only deals with “consistent patterns of gross and reliably attested violations” – this is a very high threshold and is currently unlikely to apply to the situation in the Amazon. The more formal *legal and quasi-judicial* procedures, in turn, tend to fall into the two groups indicating more promising outcomes. The Inter-American Court was not included into the highest group of this dimension due to the potential risk of backlash. The three human rights committees, in turn, were included in the highest group due to their international reputation and the authoritative character of their interpretation, which are often treated analogous to legal judgments.

By combining the results of the table above with the conclusions to Chapter 3, we can derive a number of avenues of redress that are more promising than the others. Namely, when only considering the mechanisms that are represented at least in the middle category (i.e. “+”) in the above table *and* are linked to rules that have been classified as likely violated in Chapter 3 (i.e. “++” in the table in Chapter 3.4), the following list of mechanisms results:

- Committee on the Elimination of Racial Discrimination (CERD Committee)
- Committee on the Rights of the Child (CRC Committee)
- Communications to the UN Special Rapporteurs
- Export Credit Agencies Complaint Mechanisms
- Human Rights Committee
- International Finance Corporation (IFC) Compliance Advisor/Ombudsman
- International Labour Organisation (ILO) Complaint Procedure
- Inter-American Commission of Human Rights
- National Contact Points for the OECD Guidelines

Based on consultations with the beneficiary of this report, the detailed assessment in Chapter 5 below focuses on the *Human Rights Committee, the CERD Committee, the ILO Complaint Procedure, and the IFC Compliance Advisor/Ombudsman*.

4.3. Political Campaigns

Free Trade Agreement (FTA) Negotiation between Mercosur and European countries

Last year, Austrian government vetoed the ratification of the new trade agreement between the EU and Mercosur – Argentina, Brazil, Paraguay, Uruguay.⁷² Their reason for the rejection is based on environmental and human rights concerns regarding the recently escalated fire in the Amazon region. Behind such decision, there were campaigns against the deal, raising awareness of the danger that the Amazon rainforest and the indigenous peoples encounter. Likewise, France, Ireland and Luxembourg have

⁷² ‘Austria blocks EU-Mercosur trade deal with South America’ (BBC, 19 September 2019) <<https://www.bbc.com/news/world-europe-49753210>> accessed 10 January 2020.

also warned that they are not to ratify the proposed trade agreement with Mercosur, unless the Brazilian government takes responsibility over the series of issues around the Amazon.⁷³ Considering that the EU is Brazil's second biggest trade partner, and that even one EU member state's opposition would result in a failure of ratification by the EU as a whole, political campaigns in EU member countries can affect Brazilian government's course of action.

Another way of using trade negotiation to 'save' the Amazon is to use legal provisions that are parts of the agreement. For instance, Norway, who recently halted their funding for the Brazilian Amazon accusing Brazilian government for failing to fight against deforestation, defended the new trade agreement between Mercosur and the EFTA countries – Switzerland, Norway, Liechtenstein, Iceland – for including provisions to preserve the Amazon rainforest.⁷⁴ Similar argument can be made with the EU-Mercosur trade agreement, which has a whole chapter devoted to sustainable development, and be used when the agreement is ratified. (see Chapter 3.1.)

There is a precedent of this political avenues. The Transatlantic Trade and Investment Partnership between the US and the EU (TTIP) negotiation was halted before due to the negative public opinion about it in the Europe.⁷⁵ Using this as an example, we think that the trade negotiations around Mercosur have potential leverage.

Brazilian OECD Accession Negotiation

Since 2017, Brazil has been in the process of negotiating accession to the OECD membership, as OECD membership is seen as a stamp of approval that boosts investor confidence in a country. Because the OECD Convention requires consensus for decision making, other member states' opinion will be a decisive factor for Brazilian

⁷³ Benoit Van Overstraeten, 'France will not sign Mercosur deal under current conditions: minister Borne' (Reuters, 8 October 2019) <<https://www.reuters.com/article/us-france-mercocur/france-will-not-sign-mercocur-deal-under-current-conditions-minister-borne-idUSKBN1WN0LD>> accessed 10 January 2020.

⁷⁴ 'Norway says EFTA-Mercosur pact has guarantees on Amazon forests' (The Local, 25 August 2019) <<https://www.thelocal.no/20190825/norway-says-efta-mercocur-pact-has-guarantees-on-amazon-forests>> accessed 10 January 2020.

⁷⁵ European Commission, The Transatlantic Trade and Investment Partnership (TTIP) <<https://ec.europa.eu/trade/policy/in-focus/ttip/>> accessed 10 January 2020.

OECD accession. This leverage could be used to convince Brazilian government to protect the Amazon and the indigenous peoples.⁷⁶

Evidently, the Bolsonaro administration even gave up “developing country” status with preferential treatment under the WTO in order to obtain US support in OECD accession, which shows Brazil’s strong desire for OECD membership.⁷⁷ Similarly, in 2018, the Secretary General of the OECD and the Secretary of the Brazilian local tax authorities launched an OECD-Brazil work programme to start making local transfer pricing (TP) rules more compatible with the OECD TP guidelines.⁷⁸ Therefore, political campaigns to convince other OECD member states to take a stance against Brazil’s accession, or insisting on other OECD guidelines such as the one for multinational enterprises to be incorporated into Brazil’s domestic legal system, have high potential to create leverage.

Publicly Challenging Public Financiers

Public financial institutions are typically regarded as carrying a heavier societal responsibility for the ethical implications of their financing decisions. Past campaigns by civil society actors have thus, sometimes successfully, demanded that these actors take back their support for critical projects or actors (‘divest’).

We have already lined out the possibilities to challenge multilateral development banks and export credit agencies through their respective complaint mechanisms based on their respective social and environmental standards. Multilateral development banks, in addition to these standards, often set themselves particular goals or strategies for specific sectors or topics, often with particular quantified goals (such as to reduce the financing for particular practices that are considered unsustainable). An alleged non-adherence to such strategies can sometimes not easily be challenged through a

⁷⁶ Anthony Boadle, ‘Amazon fires could burn Brazil’s bid to join OECD rich nations club’ (Reuters, 23 August 2019) <<https://www.reuters.com/article/us-brazil-environment-wildfires-oecd/amazon-fires-could-burn-brazils-bid-to-join-oecd-rich-nations-club-idUSKCN1VD2A9>> accessed 10 January 2020.

⁷⁷ Marcela Ayres, ‘Update 5 – U.S. backs Brazil for OECD membership, but Argentina first’ (CNBC, 10 October 2019)<<https://www.cnbc.com/2019/10/10/reuters-america-update-5-u-s-backs-brazil-for-oecd-membership-but-argentina-first.html>> accessed 10 January 2020.

⁷⁸ ‘OECD and Brazil share outcomes of project to align Brazil’s transfer pricing rules to OECD standard (OECD, 11 July 2019) <<https://www.oecd.org/tax/oecd-and-brazil-share-outcomes-of-project-to-align-brazil-s-transfer-pricing-rules-to-oecd-standard.htm>> accessed 10 January 2020.

complaint procedure (e.g. because no individuals that are affected by a non-adhering project can be identified, see the rules on specific affectedness outlined in Chapter 4.2 and Annex II). Yet, it could be used to rhetorically put pressure on the respective banks. Projects financed by multilateral development banks have also been challenged on the basis of international commitments, such as those specified in the Paris Agreement.⁷⁹

Another instrumental type of financial institution are public pension funds. Many of these have committed to internal environmental and human right standards for their investments, but do not provide for a formalised complaints procedure, so that critical financing decisions might need to be challenged through public campaigns. Among the pensions funds that claim to apply a set of environmental and human rights standards to their investment decisions are the Norwegian Government Pension Fund⁸⁰, the French Fonds de Réserve pour les Retraites⁸¹ and the US CalPERS⁸².

⁷⁹ See, for example Gaia Larsen, Caitlin Smith, Nisha Krishnan, Lutz Weischer, Sophie Bartosch and Hanna Fekete, 'Towards Paris Alignment – How the Multilateral Development Banks Can Better Support the Paris Agreement' (*World Resources Institute*, 2018) <<https://germanwatch.org/en/16085>> accessed 10 January 2020.

⁸⁰ See Government Pension Fund, 'Guidelines for observation and exclusion from Government Pension Fund Global' (2017) <<https://www.regjeringen.no/globalassets/upload/fin/statens-pensjonsfond/formelt-grunnlag/guidelines-for-observation-and-exclusion-from-the-gpfg---17.2.2017.pdf>> accessed 10 January 2020.

⁸¹ See Fonds de Réserve pour les Retraites, 'Socially Responsible Investment Principles of the SRR' (2020) <<http://www.fondsdereserve.fr/en/socially-responsible-investment/principles>> accessed 10 January 2020.

⁸² See CalPERS, 'Environmental, Social and Governance Integration' (2019) <<https://www.calpers.ca.gov/page/investments/sustainable-investments-program/esg-integration>> accessed 10 January 2020.

5. Detailed Assessment of Selected Avenues

In light of the foregoing analysis, and in consultation with and at the request of the beneficiary of this report, the following avenues are assessed in detail in this chapter:

- › **The CERD Committee**
- › **The Human Rights Committee (HR Committee)**
- › **The ILO Complaints Procedure**
- › **Complaint to the IFC Compliance Advisor/Ombudsman**

This Chapter aims to meet three general aims. First, to discuss the practical steps necessary to pursue each of the avenues in detail. Second, to develop the legal arguments that may be raised for the consideration of the beneficiary. Third, to discuss the consequences or the expected outcomes of pursuing each of the avenues.

5.1. The CERD Committee

In addition to the role of the Committee in individual complaints (pursuant to Art. 14 CERD) briefly touched upon in Chapters 3.1 and 4.2, the Committee is also responsible for producing general recommendations and concluding observations on the status of implementation by state parties (pursuant to Art. 9 CERD). The same is true of the Human Rights Committee (discussed in the next section). Although the analysis in this chapter is limited to the individual complaints procedure, we must also address the importance of the other functions of the Committees for the beneficiary to be aware of the full range of options available with the CERD Committee.

The Committee periodically review the status of implementation of the Convention in the State Parties. These reviews are based on a State Report and, parallelly, NGOs can submit shadow reports to the committee. Committee might use information from NGOs for the List of Issues given to the state after the submission of the report or raise them in the constructive dialogue with the state party. They might also influence the concluding observations published by the committee after concluding their review. While such shadow reports may have a significant influence, Brazil is currently overdue with its reports for the CERD Committee since January 2008. While the review is currently still dependent on the submission of a report for the review, the chairpersons of the committees have agreed in July 2019 to implement a predictable review cycle in

which the states are reviewed at a scheduled date irrespectively of whether they have submitted a report. This gives NGOs the opportunity to regularly highlight the issue of indigenous people to the committees.

Having flagged the potentials of filing a shadow report, we move on to the question of the individual complaints for CERD Committee below and the HR Committee in the section after. However, it is important to recall that the argument raised in the context of an individual complaint before the CERD Committee and the HR Committee could also be used in a shadow report by the beneficiary.

5.1.1. How to Make Use of this Procedure

What are the modes of complaint?

1. Individual complaints for the violations of any rights in CERD
2. Early warning and urgent action (EW/UA):⁸³ for addressing serious violations in an urgent manner – including:⁸⁴
 - Pattern of escalating racial hatred/violence, racist propaganda or appeals to racial intolerance particularly by state officials;
 - New discriminatory legislation, or lack of adequate legislations for addressing all forms of racial discrimination;
 - *Encroachment on traditional lands of indigenous peoples or forced removal for exploitation of natural resources;*
 - *Pollutions or hazardous activities with substantial harm to specific groups*

Who can complain?

- Individuals or groups may bring a complaint unlike the HR Committee (Art. 14(1)). They must show to be victims of a violation by a state party
- Confidentiality can be requested by the complainants (Art. 14(6)(a))

⁸³ Guidelines for the Early Warning and Urgent Action Procedure, Annual report A/62/18, Annex III.

⁸⁴ For complete list see Guidelines for the Early Warning and Urgent Action Procedure, para. 12.

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What are the preconditions for a complaint?

- The complainant or group of complainants must have been the victims of a violation by a state party of Art. 14(1) CERD
- The victims must have exhausted local remedies before submitting the complaint (see Chapter 4.4) – *Note: the EW/UA (early warning procedure) does not require the exhaustion of local remedies*⁸⁵
- The complaint must be submitted to the Committee within six months of the final decision on the issue by national authorities; otherwise the complaint will be ruled inadmissible
- There are no “non-duplication” requirements; the same issue can be subject to other international procedures⁸⁶

What steps do you need to take to make a complaint?

- The complaint must be submitted in a written form and signed, addressed to the Petitions Team of the Office of the High Commissioner of Human Rights
- For the exact contact data, check the OHCHR website: www.ohchr.org

What information should the complaint contain?

1. Name and contact details of the complainant, name(s) of the affected person(s) and, if applicable, proof of authorization to present the complaint on behalf of this/these affected person(s)
2. State concerned and Articles violated
3. Exhaustion of domestic remedies – which procedures pursued, which claims made, at which time, with which outcome? If local remedies not exhausted, explain the reasons, such as: remedies were unduly prolonged, not effective, not available

⁸⁵ Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016) 51.

⁸⁶ Theo van Boven, ‘The Petition System under the International Convention on the Elimination of All Forms of Racial Discrimination. A Sobering Balance-sheet’ in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law vol. 4* (Kluwer Law International 2000) 275.

4. Detailed facts of the alleged violations and circumstances, in chronological order and including all matters relevant to the case – how do facts violate rights?
5. Complaints to and decisions by any other procedure of international investigation or settlement
6. Documentation or corroborating evidence to substantiate the facts

A model complaint letter can be found on the [OHCHR website](#).

5.1.2. Possible Cases

A complaint to the CERD Committee may be on several grounds. The different violations that could be argued are discussed below.

5.1.2.1. The Right to Own Property

According to Art. 26 UNDRIP, Brazil shall both recognise and protect the rights of indigenous peoples to their lands and the resources therein. The question is whether the land rights of indigenous peoples based on their traditional uses and occupation are protected under CERD. If so, the question becomes whether it could be persuasively argued that this right has been (or is likely to be) violated.

The relevant *rule* in CERD is Art. 5(d)(v), which recognises the right to own property alone or in association with others. This amounts to a recognition of the right of indigenous peoples to communal ownership of lands.⁸⁷ The CERD Committee has been vocal on this issue. On a general level, the [Committee's General Recommendation 23](#) requires states to recognise and protect the rights of indigenous peoples to own land, territories and resources communally.⁸⁸ If there are policies and laws that do not respect this rule (and therefore are discriminatory), Brazil would have a duty to nullify such laws, as well as a duty not to defend or support discrimination. More specifically, the Committee's concluding observations on Brazil in 2004 recognised the importance of

⁸⁷ Thornberry (n 85) 349.

⁸⁸ CERD Committee 'General Recommendation No. 23: Indigenous Peoples' (18 August 1997) A/52/18, annex V, para. 5.

the demarcation of indigenous lands in Brazil and recommended the completion of demarcation by 2007 in line with General Recommendation 23.⁸⁹

The *facts* on the ground are that Brazil has not managed to complete demarcation of the indigenous lands as of yet. More importantly, there has been a rather strong rhetoric from the Bolsonaro administration regarding the future demarcation of land and the legality of currently demarcated lands (see Chapter 2.4). Even more significantly, and as discussed in Chapter 2.4, the Bolsonaro administration has attempted to practically halt land demarcation by taking the responsibility away from the indigenous agency FUNAI. As mentioned, the recent Supreme Court decision in August has given the power of demarcation back to FUNAI for now. However, the administration continues to undercut FUNAI, and continues to boast of plans for drafting yet newer measures to put an end to demarcation.⁹⁰

Not allowing the demarcation of new lands and territories will most likely be seen by the CERD Committee as a breach of the rights bestowed in various human rights instruments, particularly in Art. 5(d)(v) of CERD itself. Such a situation would be similar to a case in New Zealand, addressed through the early warning procedure of the Committee discussed in the case box below. Another complaint which was successfully filed by indigenous peoples involved the Australian Aboriginal peoples' claim that the Native Title Amendment Act of 1998 were discriminatory and in breach of the rights mentioned.⁹¹ It can be argued that the right under Art. 5(d)(v) has not been respected without discrimination in Brazil, as the non-indigenous rights to land have not been comparatively affected. The Committee will likely view the undercutting of FUNAI and the practical implications of that for demarcation as a breach of CERD. However, anyone considering submitting a claim should continue monitoring the events as they unfold. Any future measure, such as new legislation, to prevent FUNAI from demarcation, would be a stronger ground for an argument of a violation of Art.5(d)(v).

⁸⁹ CERD Committee 'Concluding observations of the Committee on the Elimination of Racial Discrimination' (28 April 2004) CERD/C/64/CO/2, para. 15.

⁹⁰ Mia Alberti 'Bolsonaro to draft measures on indigenous land demarcations' (Aljazeera, 27 August 2019) <at <https://www.aljazeera.com/news/2019/08/190827195351319.html>> accessed 5 January 2020.

⁹¹ CERD 'Decision 2(54) on Australia' (1999) A/54/18.

5.1.2.2. Participatory Rights

An important right of indigenous peoples pursuant to UNDRIP Art.18 is the right to participate in the making of decisions affecting them, and Art 32. refers to consultation and cooperation with indigenous peoples. The *question* is whether these rights are protected under CERD, and if so, whether it could be persuasively argued that this right has been (or is likely to be) violated.

The relevant *rule* in Art. 5(c) of CERD discusses a range of political rights, including that of participation. This Article is linked with the principle of free, prior

Case: New Zealand's repeal of the Foreshore and Seabed Act of 2004

The Foreshore and Seabed Act barred the Māori (indigenous people of New Zealand) from making claims under the native title doctrine to the coastal foreshore and seabed area. This was an important battle for the rights of the Māori in New Zealand as the Island nation has more than 18,000 km of coastline.⁹² The Foreshore and Seabed Act was enacted in the aftermath of the Court of Appeal decision of *Attorney-General v. Ngāti Apa*, which recognised New Zealand's imperium (sovereignty) to be subject to the pre-existing rights of Māori.⁹³ This meant that the Māori had standing to bring claims to the Māori Land Court to establish proprietary rights in vast coastal areas of the foreshore and seabed. Concerned of the extent of the possible Māori claims, the government extinguished all possibilities of Māori customary ownership in the contested area.⁹⁴ This was challenged through the Early Warning procedure before the CERD Committee.⁹⁵ The Committee found New Zealand in breach of its obligations under Art. 5 (of relevance is Art. 5(d)(v): right to own property in groups) and Art. 6 (failure to provide guaranteed rights of redress). This international pressure, along with internal backlash,⁹⁶ led to the repeal of the Act by way of the Marine and Coastal Area (Takutai Moana) Act 2011. This was a success story for the rights of indigenous peoples to land.

⁹² RG Bell, TM Hume and DM Hicks, *Planning for Climate Change Effects on Coastal Margins* (Ministry for the Environment, September 2001) 15.

⁹³ *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA), para. 132.

⁹⁴ Foreshore and Seabed Act 2004, Article 13.

⁹⁵ CERD Committee, 'Decision 1(66) New Zealand Foreshore and Seabed Act 2004' (2005) CERD/C/66/NZL/Dec.1. See also Commission on Human Rights, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (2006) E/CN.4/2006/78/Add.3.

⁹⁶ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

and informed consent,⁹⁷ particularly in relation to the issues of resource exploitation.⁹⁸ The Committee advocates for range of obligations of consultation, including regarding environmental and land issues.⁹⁹ This is consistent with the Committee's General Recommendation 23 which also stresses the principle of free and informed consent.¹⁰⁰ The more serious the threat of harm to a community, the stronger the requirement of consent rather than mere consultation.¹⁰¹ Of particular interest for claimants may be that the Committee has recommended consultation with communities to gain their voluntary consent in relation to operations for the exploitation of natural resources,¹⁰² as well as for the construction of dams.¹⁰³ In relation to the question of the construction of a dam, the Committee also advised for protection against encroachment on community territories.¹⁰⁴

There are a number of *facts* that could be argued to demonstrate the violation of the rights in Art. 5(c). For instance, Chapter 2.2 discussed an infrastructure project involving the construction of a powerline which passes through indigenous lands (Waimiri Atroapi territory) through to the state of Roraima. As discussed, a Brazilian official was reported to say that the government will continue its dialogue with indigenous communities, though no longer deems it necessary to gain their consent. This could be the basis of an argument for breach of the principle of free, prior and informed consent. However, as mentioned, the obligation of consultation, or beyond that, the gaining of consent, is predicated upon the seriousness of the harm inflicted on a certain community. Therefore, in cases as the powerline to Roraima, there needs to be a careful assessment of the consequences of operations on the ground for determining the level of harm sustained.

On a more general level, the discussions in Chapter 2.2 regarding the proposals for fast track approval of infrastructure development, as well as the discussions in Chapter 2.1 regarding proposals for the automatic approval of agribusiness projects show that there

⁹⁷ Thornberry (n 85) 331.

⁹⁸ Thornberry (n 85) 331.

⁹⁹ Thornberry (n 85) 333.

¹⁰⁰ General Recommendation No. 23, para. 5.

¹⁰¹ Thornberry (2016) 332.

¹⁰² On Panama: CERD Committee, 'Concluding observations of the Committee on the Elimination of Racial Discrimination' (19 May 2010) CERD/C/PAN/CO/15-20, para. 14.

¹⁰³ On India: CERD Committee, 'Concluding observations of the Committee on the Elimination of Racial Discrimination' (5 May 2007) CERD/C/IND/CO/19, para. 19.

¹⁰⁴ Ibid, at para. 19. See also Thornberry (n 85), 333.

is a trend towards abandoning the obligation of consultation as well as obtaining free consent. These developments are particularly of interest due to the high number of planned dam projects. In addition to the existing dams, potential claimants could continue to monitor the developments on the ground to challenge particular projects that are assessed to have significant impacts on indigenous communities. In such circumstances, it could be claimed that the Brazilian government had the obligation to go beyond consultation and acquire the free consent of the respective indigenous people. One such project which is already underway is the Castanheira dam which was discussed in Chapter 2.2. As discussed, the dam threatens the food supply of the Apiaká/Kayabi, Erikpatsa and Japuira indigenous groups. Therefore, there are strong consultation obligations and arguably an obligation to obtain the free, prior and informed consent of the indigenous communities affected. To the knowledge of the authors of this report, there has not been an attempt to gain the free, prior and informed consent of the indigenous communities affected by this dam. NGOs considering to submit a claim could consider monitoring the events more closely and to connect to local actors to concretely determine the level of consultation with the indigenous by the Brazilian government.

5.1.2.3. Addressing the Official Brazilian Rhetoric

Many of the concerns that have arisen since the start of the Bolsonaro administration are regarding the rhetoric employed by holders of the highest offices of the government. The *question* is whether there is any possibility for indigenous peoples to lodge a complaint about the discussed rhetoric.

The rhetoric in question could contribute to the violation of *rules* found in Art. 1 and Art. 5(b) of CERD. Art. 1 requires Brazil's public authorities not to discriminate, and not to defend or support discrimination by any person.¹⁰⁵ According to Art. 5(b), the state is obliged to protect individuals against violence from individuals and groups. In 2017, the Committee found that the government of the United States had failed to

¹⁰⁵ Discrimination is defined in Art. 1(1) as any distinction, exclusion, restriction, or preference based on race, color, descent, national or ethnic origin has purpose or effect of nullifying or impairing the recognition, enjoyment, exercise, on an equal footing of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life.

unequivocally condemn and reject the racist violence in Charlottesville which led to a death and many injuries. The Committee made use of its EW/UA procedure to recommend the United States to take concrete measures to address such racist violence.¹⁰⁶ This is in line with the obligations under Arts. 1 and 5 discussed above.

The obligations may be argued to have been breached in Brazil due to the rhetoric employed which does not adequately condemn and could be construed to support wrongdoing. The concern is that the language and rhetoric employed by Brazil's President Bolsonaro encourages wrongdoing and hinders law enforcement and prevention of possible violations of the CERD. Take the murder of the Waiãpi leader Emyra Waiãpi discussed in Chapter 2.3 – the official response was not condemnation, but rather a denial that a murder had taken place. The official response does not seem to be compliant with the obligation under Art. 5(b). The Committee will likely take issue with this response and would recommend a clear condemnation as it did for the US government. Another example would be President Bolsonaro's comment that indigenous peoples are living "like animals in a zoo" in their demarcated lands, concluding that companies should be allowed to exploit indigenous resources, allegedly for the good of the indigenous peoples' prosperity.¹⁰⁷ This could be construed as an instance of defending or supporting discrimination by individuals, if not discriminatory in and of itself. The Committee is also likely to take issue with such language.

5.1.2.4. The Importance of the Early Warning and Urgent Action Procedure (EW/UA)

The foregoing has made multiple references to EW/UA. In particular, a number of past successful cases that were passed through the EW/UA were discussed. It is important for potential claimants to be cognizant of the importance and benefits of this procedure. As discussed already in the "Individual Complaints" part of this section – 5.1 – on the CERD Committee, the EW/UA procedure does not require the exhaustion of local remedies.¹⁰⁸ This is important for clear reasons. The exhaustion of local remedies, as

¹⁰⁶ CERD Committee, 'Decision 1(93) United States of America' (2017).

¹⁰⁷ "Brazil judge blocks transfer of control over indigenous land" (Aljazeera, 25 June 2019). <<https://www.aljazeera.com/news/2019/06/brazil-judge-blocks-transfer-control-indigenous-land-190625080628133.html>> accessed 29 January 2019.

¹⁰⁸ Thornberry (n 85) 51.

discussed in Chapter 4, is a lengthy process in Brazil. Given that many of the issues of concern are regarding projects currently under way or being proposed, waiting for the exhaustion of local remedies could mean that the project is completed before a recommendation could be made by the CERD Committee. This obviously should be avoided. Furthermore, as the name suggests, the EW/UA is a much more accelerated procedure. Claimants should ideally take these factors into consideration in deciding the nature of the complaint procedure that they wish to pursue.

5.1.3. What happens after you submit the complaint?

It is important to note that there is no right of appeal against the decision of the CERD Committee. Naturally, if no violation is found, there are no further steps. It is important to be aware of a number of important timelines. The state party is required to respond to the committee in written form within three months of communications being received by the Committee (Art. 14). If the Committee decides for the claimant and finds a violation, it will invite Brazil to supply information on steps to address the violation within three months.

Measures that could be taken by the Committee following EW/UA include:¹⁰⁹

- Request Brazil for urgent submission of information on the situation
- Request the UN Secretariat (OHCHR being a part of it) to collect information from the field, including from NGOs
- Adoption of decisions – expression of concern and recommendation for actions to Brazil, Special Rapporteurs, other relevant human rights bodies or special procedures of the Human Rights Council, regional human rights mechanisms – the Inter-American system in this case – and the UN Secretary General
- Offer to send members of the Committee to Brazil to facilitate implementation, and make recommendation to Brazil to avail itself of advisory services and technical assistance

¹⁰⁹ See Guidelines for the Early Warning and Urgent Action Procedure, para. 13.

5.2. The Human Rights Committee

5.2.1. How To Make Use of this Procedure

The requirements for making an individual complaint are very similar to the requirements for the CERD Committee. Therefore, this section only discusses the situations where the requirements are different for bringing a complaint before the Human Rights Committee.

What are the modes of complaint?

1. Individual complaints for the violations of any rights in the ICCPR
2. Request the state party to take interim measures.¹¹⁰ This is not a separate mode of complaint, rather it is for the period while the complaint is pending for consideration. There are a number of important issues:
 - An interim measure will only be requested on the basis of urgency, to avoid irreparable consequences for the rights invoked
 - The request for an interim measure is not a decision on the admissibility or the merits of the complaint
 - The Committee can revisit the request for interim measures at any stage of the proceedings.

The request for an interim measure differs from the EW/UA in that the interim measures are requested as part of the proceedings. The state may continue with the hearing and refute the grounds for the measures.

Who can complain?

- Only an individual or individuals may bring a complaint unlike before the CERD Committee (Rule 91).¹¹¹

What are the preconditions for a complaint?

- The victims must have exhausted local remedies before submitting the complaint (see Chapter 4.4)

¹¹⁰ HR Committee 'Rules of procedure of the Human Rights Committee' (9 January 2019) CCPR/C/3/Rev.11, Rule 94.

¹¹¹ CERD Committee 'Rules of procedure', Rule 94.

- The exhaustion of local remedies is not necessary if it is futile – futility cannot be based on the subjective belief of the complainant¹¹²
- An example of the exception to the rule of exhaustion of local remedies is *Ominayak v Canada*: the claimants sought an interim order which was rejected after two years, leaving the destitute claimants with the legal fees – the Committee did not insist on the exhaustion of Canadian remedies at that point¹¹³

5.2.2. Possible Cases

5.2.2.1. The Right to Life

Art. 6 ICCPR states:

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

There is a range of different ways this provision could be argued to be violated based on the facts lined out in Chapter 2. These will be briefly analysed in the following.

a) Violence by illegal miners and loggers

As lined out in Chapter 2, recent years, and increasingly so the months since the Bolsonaro administration took office, have seen a large number of murders of and death threats to indigenous peoples. Many of these have been linked to the encroachment of illegal gold miners and loggers onto the traditional lands of indigenous peoples (see Chapter 2). For most of these crimes, no one has been convicted. Many indigenous people and other civil society actors argue that these trends are exacerbated through the Bolsonaro administration's severe budget cuts to the environmental ministry (see Chapter 2), as well as insufficient police capacity.

The right to life includes state duties that could well be argued to be applicable to the failure of the Brazilian state to both prevent and investigate the violence against

¹¹² Sarah Joseph and Melissa, *Castan The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press, 2013) 127.

¹¹³ HR Committee 'Bernard Ominayak and the Lubicon Band v. Canada' (26 March 1990) HRC Communication No. 167/1984.

indigenous peoples. The recent General Comment 36 issued by the Human Rights Committee details that under Art. 6, state parties have the obligation to take “special measures of protection” for persons who are at particular risk due to existing patterns of violence, specifically mentioning human rights defenders and indigenous peoples.¹¹⁴ No such measures seem to have been taken by the Brazilian state, and Brasil has consistently been the deadliest country for environmental defenders, especially indigenous people, in recent years.¹¹⁵ Art. 6 also includes the duty to effectively respond to death threats.¹¹⁶ But most of the threats against indigenous people in the Brazilian Amazon are not even investigated.¹¹⁷

In addition, Art. 6 mentions the need to tackle broader conditions of threats to life such as “high levels of criminal and gun violence, ... degradation of the environment... [and] deprivation of indigenous peoples’ land, territories and resources”.¹¹⁸ Finally, the right to life, according to the Human Rights Committee, entails an obligation for the state to conduct a criminal investigation into murders and prosecute perpetrators,¹¹⁹ including an autopsy of the victim’s body, and to aim at preventing similar violations in the future.¹²⁰ Once again, there is substantial evidence that murders of environmental defenders in the Amazon have not been adequately investigated.¹²¹

b) State duty to regulate activities of multinational corporations

As explained in Chapter 2, several large-scale infrastructure and industry projects are currently discussed for the Amazon region. The state obligation to protect its citizens from threats to their lives also includes protection from the harmful activities of

¹¹⁴ *General Comment No. 36: Article 6 (Rights to Life)* [2019] CCPR/C/GC/36, para. 23.

¹¹⁵ Natahlie Butt, Frances Lambrick, Mary Menton and Anna Renwick, ‘The supply chain of violence’ *Nature Sustainability* 2, 743.

¹¹⁶ *General Comment No. 36: Article 6 (Rights to Life)* [2019] CCPR/C/GC/36, para. 53.

¹¹⁷ Human Rights Watch (n 12), 98-100.

¹¹⁸ *General Comment No. 36: Article 6 (Rights to Life)* [2019] CCPR/C/GC/36, para. 26.

¹¹⁹ *Ibid.*, para. 27.

¹²⁰ *Ibid.*, para. 28.

¹²¹ See, for example, Human Rights Watch (n 12), 89-98.

corporations and to take “appropriate measures” to prevent these.¹²² Interestingly, the recent General Comment also states the duty to

“take appropriate legislative and other measures to ensure that all activities...having a direct and foreseeable impact on the *right to life of individuals outside their territory, including activities undertaken by corporate entities* based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy”.¹²³

Case Study: *Norma Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016)

In a rural area of Paraguay which is home to extensive industrialized soybean cultivation, severe health and environmental risks were produced through the use of large amounts of toxic pesticides. These included the contamination of water sources, the death of farm animals and severe physical harm, including the death of one person. After seeking redress through both a constitutional and a criminal complaint in Paraguay remained largely ineffective, the family members of the deceased person complained to the HR Committee. The Committee decided in August 2019 that Paraguay needed to investigate the use of the pesticides, pay full reparations to victims, and prosecute those responsible for the environmental and health effects.

This is of yet untested in litigation, but could – depending on future developments around the direct involvement of foreign corporations in the Brazilian Amazon – potentially be an option to direct a claim not at the *Brazilian* state, but at the (e.g., European) *home state* of a company that is involved in violations

of the right to life. This way, for example, European governments could be challenged for not adequately preventing European *companies* from violations of the right to life, e.g. through the provision of deadly pesticides to agribusiness (see the text box) or the construction of insecure dams (see Chapter 2). This interpretation could be detailed further in light of the views of the ESC Committee on extraterritorial obligations for

¹²² *General Comment No. 36: Article 6 (Rights to Life)* [2019] CCPR/C/GC/36, para. 22.

¹²³ *Ibid.*

business activities under the ICESCR.¹²⁴ The ESC Committee, evidently, draws on a different Covenant, and its view are therefore not immediately applicable to the ICCPR – but they can provide an important indication. Of course, the home state of a corporation involved in violations of the right to life could also directly be addressed through the individual complaint procedure of the ESC Committee, if the respective state has accepted the use of this avenue.¹²⁵

c) Negative effects on the environment and health

Most of the facts mentioned in Chapter 2 involve degradation of the environment, often causing health risks to indigenous peoples and other local communities. Another recent development in the interpretation of the right to life has been its application to interference with the environment and health. General Comment 36 indicates that “[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.”¹²⁶ In a very recently decided case against Paraguay, the HR Committee held that spraying with toxic pesticides could violate the rights to life of local residents (see text box above).¹²⁷ This decision could be seen to open up a window for strategic litigation on environment-related claims under Art. 6 ICCPR. In the context of the Brazilian Amazon, such litigation could build on the mercury poisoning resulting from illegal gold mining and the fish kill caused by the Sinop dam (see Chapter 2).

5.2.2.2. The Right to Enjoy Culture

Art. 26 of UNDRIP recognises the rights of indigenous peoples to land based on their traditional uses and occupation. The *question* is whether this right is protected under

¹²⁴ *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* [2017] E/C.12/GC/24.

¹²⁵ For ratification status, check <https://indicators.ohchr.org/>.

¹²⁶ CCPR General Comment 26, para. 62.

¹²⁷ See *Norma Portillo Cáceres et al. v. Paraguay*.

the ICCPR and whether it could be persuasively argued that such a right was violated under the ICCPR.

The relevant *rule* under ICCPR is Art. 27 which recognizes the rights of indigenous peoples – among other minorities – to enjoy their own culture. According to the [HR Committee's General Comment 23](#), the cultural rights protected under Art. 27 extend to the use of traditionally occupied lands and resources in the case of indigenous peoples.¹²⁸ The rights include traditional activities such as fishing and, more importantly for our purposes, the right to live in protected areas. These rights are particularly predicated upon a positive obligation on the states to provide protection measures and ensure participation of members of the indigenous peoples.¹²⁹ In *Ominayak v. Canada*, the complainant was successful in arguing that the issuing of leases for oil and gas exploration on the community's land was a breach of the rights of the Ominayak of the Lubicon Lake Band to enjoy their culture.¹³⁰

There are a number of relevant *facts* that could demonstrate a breach of the right under Art. 27. These are similar to the facts discussed regarding a complaint to the CERD Committee. Namely, the powerline to the state of Roraima that passes through Waimiri Atroapi territory as well as the Castanheira dam which affects the fishing grounds of the Apiaká/Kayabi, Erikpatsa and Japuúra indigenous groups. There are also relevant facts for the extraction of natural resources that could lead to a complaint analogous to *Ominayak v. Canada*. This specifically concerns the many (planned) mining activities, in both its forms discussed in Chapter 2.3. First, the legal mining projects that may negatively affect the ability of the indigenous peoples to enjoy their land. As the Brazilian government would be involved at the very least through the licensing of such projects, there would be direct liability for Brazil if there are violations linked to legal mining projects. Second, there are also circumstances of illegal mining which may negatively affect the right to enjoy culture. This would result in liability due to failure to *protect* the rights of the negatively affected indigenous communities.

¹²⁸ Human Rights Committee, 'General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) CCPR/C/21/Rev.1/Add.5, para. 7.

¹²⁹ Ibid, para. 7.

¹³⁰ *Ominayak v. Canada*, at para. 13.3-14.

5.2.3. What happens after you submit the complaint?

It is important to note that there is no right of appeal against the decision of the HR Committee. Naturally, if no violation is found then further steps are taken. After a communication is brought to the Committee, the receiving state (in this case Brazil), would have six months to submit written explanations, clarifications and outlining any remedies that have been provided (Art. 4). If the Committee decides for the claimant and finds a violation, it will invite Brazil to supply information on steps to address the violation within three months. This is because Brazil is under an obligation pursuant to Arts. 2 and 3 of the ICCPR to provide for effective remedies for violations of the claimant's rights.

Recall that the interim measures are not final. The measures will be at the mercy of the final decision of the HR Committee.

5.3. ILO Complaints Procedure

5.3.1. How to make use of this procedure

Who can complain?

- Any of the Member States, the tripartite Governing Body¹³¹ itself, or a delegate¹³² to the Conference can file a complaint alleging Member States' non-observance of the ILO Conventions that are ratified by the respective governments.¹³³
- Alternatively, *any representation being made to the ILO by an "industrial association of employers or of workers"*¹³⁴ (concerning C169, complaints have been made only through such representations thus far!).

¹³¹ Consists of 28 members from governments', 14 members from employers' and 14 members from workers' side.

¹³² Consists of 2 members from governments', 1 member from employers' and 1 member from workers' side.

¹³³ The ILO Constitution, Article 26.

¹³⁴ Ibid, Article 24.

- The term "industrial associations" has traditionally been applied to trade unions but may also refer to national and international employers' and workers' associations;¹³⁵ thus, theoretically, it can also include indigenous peoples' organizations that directly represent communities of farmers, fishermen, trappers or other kinds of artisanal workers.¹³⁶
- Thus far, under the ILO non-observance complaint procedure, 4 representations have been submitted against the Brazilian government by the "industrial associations", and one them may be relevant to our case:
 - o *The Union of Engineers of the Federal District in 2009, concerning C169.*
- Of note is that it is made clear by the ILO that individuals cannot make representations directly to the ILO but can pass on relevant information to a workers' or employers' organization.¹³⁷

What are the preconditions for a representation?

- In terms of receivability of the representation, there are two substantive condition: one related to the industrial character of the association and the other regarding so-called indication of the non-observance in the proposal.
 - o First condition is that the character of the representation must emanate from an industrial association of employers or workers. This condition allows the widest possible discretion to the Officers of the Governing Body in determining the actual character of the representation. Of note is, however, that the criterion to be applied in this context is the general policy of the ILO and not national legislation of States.¹³⁸

¹³⁵ <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>.

¹³⁶ <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm>.

¹³⁷ <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/making-most-ilo-convention-169>.

¹³⁸ Standing Orders concerning the procedure for the examination of representations under article 24 and 25 of the Constitution of the ILO (1932), Article 2.2(b).

- Second condition is so-called indication of non-observance, meaning that it must be made clear in what respect it is alleged that the Member State concerned failed to secure the effective observance of the said Convention(s) within its jurisdiction. In examining this condition, the Governing Body does not consider the substance of the representation (as in whether it is related to the alleged non-observance) and limits its examination to whether the representation legitimately substantiates the allegation, regardless of their organisational relation to the event.¹³⁹

5.3.2. Possible Cases

Thus far, under the ILO complaint procedures, 20 cases have been invoked for non-observance of the C169, all of them through industry representations, as the table below shows:¹⁴⁰

Years	Country
2018 – pending	Nepal
2014 – 2014	Chile
2014 – 2014	Peru
2009 – 2012	Peru
2006 – 2008	Argentina
2005 – 2009	Brazil*
2005 – 2007	Guatemala
2002 – 2006	Mexico
2002 – 2004	Mexico
2001 – 2004	Mexico
2001 – 2004	Mexico
2001 – 2004	Mexico
1999 – 2001	Denmark
1999 – 2001	Colombia
1999 – 2001	Colombia

¹³⁹ Ibid, Article 2.2(f).

¹⁴⁰ https://www.ilo.org/dyn/normlex/en/f?p=1000:50010:11677007755779:::P50010_DISPLAY_BY:1

1999 – 2001	Ecuador
1998 – 1999	Bolivia
1998 – 1999	Mexico
1997 – 1998	Mexico
1997 – 1998	Peru

The case successfully brought against Brazil* in 2005-2009 will be discussed in the case box in next page, as it has important similarities with our case including the main allegation about consultation obligation, which can be reused. The series of cases against Mexico (7 cases), Peru (3 cases) and Colombia (2 cases) can also give insight regarding repetitive complaints against a same Member State and are highly recommended to be explored further if to pursue a complaint procedure against Brazil.

5.3.2.1. Right to Consultation

Indigenous peoples' right to consultation as well as the right to decide their priorities for the process of development are protected under Arts. 6 and 7 C169. Notably, Article 6 was successfully invoked in the Brazil Case in the 2005-2009 case. As outlined in the Brazil Case, the requirements for consultation are as below:

- in accordance with procedures that are appropriate to the circumstances;
- through the indigenous peoples representatives institutions;
- in good faith;
- with the objective of achieving agreement or consent to the proposed measures.

Appropriate procedures in this sense are those that create the conditions necessary to reach an agreement or consent concerning the proposed measures. Therefore, while reaching an agreement is not required, a meeting conducted merely for information purposes cannot be considered as consistent with the terms of the Convention and it must be understood in relation to the aims of the consultation.

Thus, Article 6 can be a pertinent basis for arguing non-observance cases in relation to the Brazilian government's announcement of any new bills, or plans of them, be it about

Case: REPRESENTATION (article 24) – BRAZIL* - C169 - 2009¹⁴¹

During its drafting of Act No. 11284 of 2 March 2006 concerning the administration of public forests, the Brazilian government allegedly did not take consultation steps with the indigenous peoples likely to be affected by it, in particular regarding the impact of the Act on the peoples in question in view of the fact that timber exploration and exploitation would take place on, or in the vicinity of, their lands. Regarding this issue, the Regional Conference of Indigenous Peoples of *Matto Grosso* alleged that it had not been consulted on the impact of timber exploration and exploitation on lands occupied by indigenous peoples, or in areas close to their lands. Upon appointment, the Committee noted that in the official maps of the Ministry of Justice and FUNAI, there is an overlap between national forests and lands of varying legal status which were occupied by indigenous peoples. The Committee further noted that the indigenous peoples were consulted in some form at three meetings, according to the Brazilian Government.

The Committee then set out important criteria regarding the consultation obligation provided by Article 6 of the ILO C169. It pointed out that the obligation includes specific requirements, and not just any consultation process will be in compliance with the Convention. According to the Committee, the consultation must take place in accordance with procedures that are appropriate to the circumstances, through the indigenous peoples' representative institutions, in good faith and with the objective of achieving agreement or consent to the proposed measures. Appropriate procedures in this context are those that create the conditions necessary to reach an agreement or consent concerning the proposed measures. Furthermore, the Committee emphasized that the validity of the consultative processes depends on the creation of fruitful mechanisms for participation and merely a formal requirement does not satisfy the conditions. In light of these requirements, the Committee concluded that the three consultations the Brazilian government offered to the indigenous peoples were not enough to meet the requirements of the Convention.

demarcation or other specific issue such as the mining concession discussed in Chapter 2, as long as they may affect indigenous peoples. For example, the proposed bills of

¹⁴¹ *Brazil – C169 (2009)* ILO, Complaint Procedures by Representations (Article 24) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507317,en> accessed 10 January 2020.

PL#3729/2004 for the fast track approval of infrastructure development that would threaten indigenous communities can be targeted. If there is no consultation or merely formal and informative consultations to the indigenous peoples in the drafting process of those bills, a successful claim can be made as before.

5.3.2.2. Rights to Land

Apart from the official complaint procedure, the ILO also supervises the application of their standards in Member States through regular Observation followed Direct Request. These observations and requests by the ILO's supervisory body are important source of guidance as to what to what requires close monitoring for potential complaints. The last observation by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the supervisory body of the ILO, about Brazil's application was published in 2016. The list of requests to the Brazilian government as a result of the Observation is as below:¹⁴²

- Article 14 of the Convention in relation to the land demarcation and titling for *Quilombola* communities;
- *Guaraní Kaiowá* and *Guaraní Mbya* peoples in relation to demarcation;
- Article 6, 7 and 15 in relation to diversion of the San Francisco River;
- Forest exploitation and overlap of concessions with indigenous lands;
- *Belo Monte* hydroelectric plant in State of Pará;
- *Cinta Larga* people in relation to mining and unlawful logging;
- Article 16 in relation to relocation of *Quilombola* communities in State of Maranhao.

These issues need close monitoring especially considering that the situation now has worsened with the new administration of Brazil since early 2019.

¹⁴² CEACR, 'Observation' (2016) and 'Direct Request' (2016 ILO, Supervising the application of international labour standards) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:4024557> accessed 10 January 2020.

The rights to consultation related to the Article 6 and 7 are mentioned above. The Article 14, 15 and 16 concern indigenous peoples' right to lands or demarcation, and other related rights. Article 14 is about general protection over the indigenous peoples' lands whereas Article 15 and Article 16 protect more specific rights, namely the right to the natural resources in their lands and the prohibition of relocation from their lands, respectively.

Most importantly, Article 14 was successfully invoked in the Mexico Case in 2002-2006 where the Mexican government's infrastructure project failed to safeguard the indigenous peoples' right to lands and to take necessary steps. Similar allegation can be made regarding the the proposed constitutional amendment #215/2000 that seeks to prevent demarcation procedures for new indigenous (see Chapter 2), as it would directly threaten indigenous peoples' lands. Alternative or simultaneous/additional allegations are also possible if the amendment turns out to be affecting indigenous peoples' rights to the natural resources or to residence.

5.3.3. What happens after you submit the complaint?

5.3.3.1. Examination of the Representation

- If the representation is receivable, the Governing Body usually sets up a tripartite committee to examine the representation. However, *if the representation relates to matters and allegations similar to the previous cases, the Governing Body may decide to postpone the appointment until the Committee of Experts on the Application of Conventions and Recommendations at its following session has been able to follow-up the recommendations adopted in the previous case.*¹⁴³
- Once appointed, the tripartite committee is charged with examining the representation.¹⁴⁴ The committee examines the *merits of the allegation* that the Member State concerned has failed to secure effective observance of the Convention(s) ratified; for the examination, the committee may take into

¹⁴³ Ibid, Article 3.1 and Article 3.3.

¹⁴⁴ Ibid, Article 6.

consideration the *interest that the association making the representation has in taking action*. Such interest exists if the representation emanates from a national association directly interested in the matter or from other international workers' or employers' associations when the representation concerns matters directly affecting their affiliated organizations¹⁴⁵

- On the basis of the report of the tripartite committee, the Governing Body considers the issues of substance raised by the representation and what follow-up to undertake.
- An electronic form for the submission of a representation can be found [here](#).

5.3.3.2. Examination of the Allegation

- Once a complaint is filed, the Governing Body takes over the case and may communicate with the government in question and/or appoint a Commission of Inquiry to consider the complaint. A Commission of Inquiry is the ILO's highest-level investigative procedure.¹⁴⁶
- The Commission of Inquiry shall prepare a report embodying its findings and recommendations.¹⁴⁷ Since the reports of the Commission often suggest ILO's technical assistance for complying with the convention, it is often the case that the governments concerned simply accept the offer and the remedial ILO aid¹⁴⁸
- As an action on the report of Commission of Inquiry, the Director-General of the ILO, in close consultation with the Governing Body and the governments in concern, can cause it to be published. This can have a potential "naming and shaming" effect.
- Furthermore, each of these governments shall within three months inform the Director-General whether or not it accepts the recommendations contained in

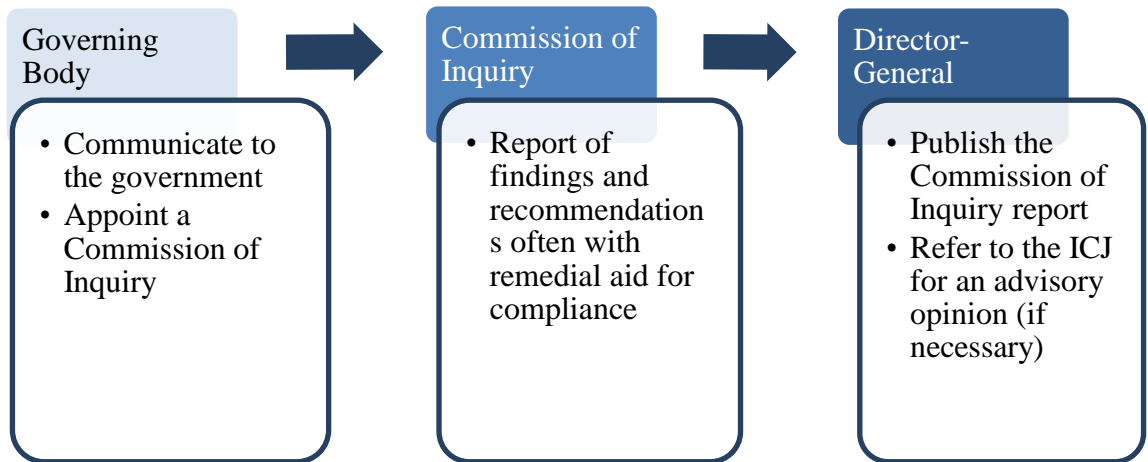
¹⁴⁵ Ibid, para 16.

¹⁴⁶ The ILO Constitution, Article 26.

¹⁴⁷ The ILO Constitution, Article 28.

¹⁴⁸ <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/making-most-ilo-convention-169>.

the report of the Commission; and if not, whether it proposes to refer the



complaint to the International Court of Justice (ICJ) for an advisory opinion.¹⁴⁹

The decision of the ICJ in regard to a complaint or matter which has been referred to it is final.¹⁵⁰

5.4. The IFC Compliance Advisor/Ombudsman (CAO)

5.4.1. How to make use of this procedure¹⁵¹

Who can complain?

- Individuals or groups, or representatives or organisations on behalf of these individuals or groups
- Confidentiality can be requested by the complainants

¹⁴⁹ The ILO Constitution, Article 29.2.

¹⁵⁰ Ibid, Article 31.

¹⁵¹ This section is largely based on information provided on the CAO website, see <http://www.cao-ombudsman.org/howwework/filecomplaint/>.

What are the preconditions for a complaint?

- The complainant, or the person or group on whose behalf the complaint is submitted, need to have been negatively affected by the social or environmental

Info Box: What are IFC and MIGA?

The IFC and MIGA are the private-lending arm of the World Bank Group.

Thus, instead of lending money to governments (as does the World Bank, which is the public-sector arm of the World Bank *Group*), the IFC invests in the private sector. It provides loans and otherwise encourages the investment of private companies in developing countries. Its official aim is to reduce poverty and promote competitive markets.

The MIGA, in turn, aims to enhance foreign direct investment by *other* private investors in developing countries. To do so, it offers risk insurance and credit guarantees. These are meant to protect investors from non-commercial (e.g., political) risks in the host countries. The MIGA also assists in the resolution of conflicts between investors and host states.

consequences of a project financed by the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA).

- The complaint may have more chances to be admitted if it can be shown that prior attempts have been made to resolve the problem at issue (e.g. by contacting IFC staff or the company whose actions adversely affect the complainants, if viable)

- Complaints can be in any language

What steps do you need to take to make a complaint?

- The complaint must be submitted by e-mail, fax, mail or in person to the

CAO Office in Washington

- For the exact contact data, check the CAO website: <http://www.cao-ombudsman.org/> (also available in Portuguese)

What information should the complaint contain?¹⁵²

7. Name and contact details of the complainant, name(s) of the affected person(s) and, if applicable, proof of authorization to present the complaint on behalf of this/these affected person(s)
8. Name, location, and nature of the project in question (if possible with a map)

¹⁵² See CAO, 'Operational Guidelines' (CAO, 2013), <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>, accessed 10 January 2020, 12 and 32.

9. Information on whether identity of complainant or certain information should be kept confidential
10. Description of the actions taken to try and resolve the issues in question (attach copies of correspondence if possible)
11. List of other persons contacted in attempting to resolve the issue (attach copies of correspondence if possible)
12. Statement of how affected person(s) are (or are likely to be) negatively affected by the environmental and/or social impacts of the project in question, including potentially a specification of which IFC/MIGA policies, guidelines or procedures have been violated
13. Any other relevant facts
14. Proposal for how to resolve the conflict
15. Copies of any relevant documents and materials

These are not formal requirements, but recommendations by the CAO, which are likely to increase the chances for a complaint being admitted.

A model complaint letter can be found [on the CAO website](#). The CAO office offers to provide assistance in case anything remains unclear.

5.4.2. Possible Cases

5.4.2.1. Minerva Beef Investment

a) Issue

As mentioned above (see Chapter 2.1), the IFC has approved an 85 million USD ten-year loan to the Brazilian meat processing company Minerva in 2013.¹⁵³ Minerva is one of the three biggest Brazilian meat-processing companies and, with an export market share of 22%, exports to Europe and the US, among others.¹⁵⁴ The loan covers the company's operations in Brazil, Paraguay, Uruguay and possibly further Latin American countries.

¹⁵³ IFC, 'Minerva Beef – Summary of Investment Information' (IFC, 2019) <<https://disclosures.ifc.org/#/projectDetail/SII/32247>> accessed 10 January 2020.

¹⁵⁴ Ibid.

Minerva is associated not only with illegal deforestation in the Amazon region and in the Paraguayan Chaco but also with practices of forced labour in Paraguay, which has made the investment controversial from the beginning.¹⁵⁵ The IFC classified it in environmental risk category A, which is the category indicating the highest risk, due to supply-chain related issues such as “deforestation, child/forced labor, encroachment on Indigenous People land, and respect of customary rights by the Company’s primary suppliers”.¹⁵⁶ The United States abstained from the voting on the disbursement of the loan in the IFC’s Board of Directors due to “environmental and social policy concerns”.¹⁵⁷ It referred specifically to a lacking requirement for timely implementation of the IFC Performance Standards in Paraguay and Uruguay.¹⁵⁸

In a 2017 assessment of the Paraguay-related part of the loan, USAID concluded that “Minerva is making progress towards supply chain management; however, the company has not yet mitigated or lowered environmental or social risks” and that “IFC’s assessment prior to Board approval may not have sufficiently assessed Minerva’s capacity for environmental and socially sustainable supply chain management in the dynamic Paraguayan context”.¹⁵⁹ Amazon Watch showed in 2019 that Minerva was supplied by the Brazilian cattle ranching company Agropecuária Rio de Areia LTDA. This company, according to the NGO, was fined five times between 2017 and 2018 – that is, four to five years *after* the IFC loan was approved – for illegal Amazon deforestation (the fines amounting to around 1.2 million USD).¹⁶⁰ According to the supply-chain initiative Trase, Minerva’s beef exports can be linked to up to 100

¹⁵⁵ US Department of Treasury, ‘United States Position – Proposed Investment by IFC in Minerva S.A. for Minerva Beef Project’ (2013) <<https://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20-%20LatAm%20Region%20-Minerva%20Beef%20-%20May%2020%202013.pdf>> accessed 10 January 2020.

¹⁵⁶ IFC, “Minerva Beef – Environmental & Social Review Summary” (IFC, 2019), <<https://disclosures.ifc.org/#/projectDetail/ESRS/32247>> accessed 10 January 2020.

¹⁵⁷ US Department of Treasury, ‘International Development Banks – Monthly May’ (2019), <<https://www.treasury.gov/resource-center/international/development-banks/Documents/May.pdf>> accessed 10 January 2020, 8.

¹⁵⁸ See US Department of Treasury, ‘United States Position – Proposed Investment by IFC in Minerva S.A. for Minerva Beef Project’ (2013) <<https://www.treasury.gov/resource-center/international/development-banks/Documents/IFC%20-%20LatAm%20Region%20-Minerva%20Beef%20-%20May%2020%202013.pdf>> accessed 10 January 2020.

¹⁵⁹ USAID, “Monitoring Report. International Finance Corporation. Minerva beef Project – Brazil/Paraguay” (USAID, 2017) <https://ecd.usaid.gov/repository/titlexiii/2017/Trip_Report_8.pdf>, accessed 10 January 2020, 24-25.

¹⁶⁰ Amazon Watch (n 4), 24.

square kilometres of deforestation per year.¹⁶¹ In 2017, the NGO Imazon found that Minerva could be buying cattle from up to a million hectares of land linked to deforestation.¹⁶²

b) Possible Claims

The question is whether the mentioned evidence could serve as a ground for a CAO complaint. A basis for claims to the CAO can, as mentioned above, be any “IFC/MIGA policies, guidelines or procedures”.¹⁶³ The most prominent and detailed ones of these are arguably the IFC Performance Standards, but other documents can theoretically be included too.

The *Performance Standard (PS) 6* includes detailed provisions on the use of living natural resources and biodiversity. However, since Minerva appears to not be involved in deforestation through its *own* operations but rather “indirectly” by *purchasing* beef from cattle ranching companies that may in turn be encouraging deforestation, the relevant question concerns its supply chain and thus the requirements of the PS are narrower. According to the World Bank Group, it is primarily the indirect suppliers to Minerva that are considered to be involved in deforestation, and not the suppliers from which Minerva purchases directly.¹⁶⁴ However, the above-mentioned finding by Amazon Watch seems to indicate that there is evidence for illegal deforestation through one of Minerva’s *direct* suppliers.

PS6, paragraph 30, lines out that a company receiving an IFC loan should monitor its supply chain and “where possible...shift the...primary supply chain over time to suppliers that can demonstrate that they are not significantly adversely impacting

¹⁶¹ Andrew Wasley et al. (n 19).

¹⁶² Global Witness, ‘Money to Burn’ (*Global Witness*, 23 September 2019) <<https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/>> accessed 10 January 2020.

¹⁶³ See CAO, ‘Operational Guidelines’ (CAO, 2013), <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>, accessed 10 January 2020, 12 and 32.

¹⁶⁴ Global Witness, ‘Money to Burn’ (*Global Witness*, 23 September 2019) <<https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/>> accessed 10 January 2020.

[natural and/or critical habitats]”.¹⁶⁵ In a 2013 Good Practices Handbook on agricultural supply chains, the IFC further details that where a company has influence on its suppliers, it is expected to “effect change”, and where such influence does not exist, it should change suppliers.¹⁶⁶ In its publicly accessible information on “Environmental and Social Mitigation Measures” for the Minerva project, the IFC admits that “a significant portion of cattle supply chain (second and third tier suppliers) are not covered by existing monitoring scheme [sic]. Most of these suppliers also don’t have a final environmental license or legal land title document”.¹⁶⁷ Yet, no comment is made as to Minerva’s influence on these suppliers and attempts to remedy this situation. Complaints to the CAO could refer to this situation as well as to the above-mentioned deforestation link to one of Minerva’s direct suppliers, depending on the affected person(s) in whose name a claim is made. The USAID assessment report furthermore arrives at the conclusion that “IFC’s assessment prior to Board approval may not have sufficiently assessed Minerva’s capacity for environmental and socially sustainable supply chain management in the dynamic Paraguayan context”.¹⁶⁸ A similar claim could, based on the available facts, be made for Brazil.

There are other issues that could be further raised. PS1 and PS4 include detailed requirements for engagement with stakeholders, specifically those that are negatively impacted by a company’s project. PS7 outlines even stricter requirements when indigenous peoples are concerned (see Annex I). Indeed, in its initial assessment of the loan, the IFC found a risk of “encroachment on Indigenous People land, and respect of

¹⁶⁵ IFC, ‘Performance Standard 6: Biodiversity Conservation and Sustainable management of Living Natural Resources’ (IFC, 2012), <https://www.ifc.org/wps/wcm/connect/3baf2a6a-2bc5-4174-96c5-ee8085c455f/PS6_English_2012.pdf?MOD=AJPERES&CVID=jxNbLC0>, accessed 10 January 2020, para. 30.

¹⁶⁶ IFC, ‘Assessing and Managing Environmental and Social Risks in an Agro-Commodity Supply Chain’ (IFC, 2013) <https://de.scribd.com/fullscreen/182129565?access_key=key-1do8v46kzf4u4h6nu17e> accessed 10 January 2020, 64. Cited in USAID, “Monitoring Report. International Finance Corporation. Minerva beef Project – Brazil/Paraguay” (USAID, 2017) <https://ecd.usaid.gov/repository/titlexiii/2017/Trip_Report_8.pdf>, accessed 10 January 2020, 20.

¹⁶⁷ IFC, “Minerva Beef – Environmental & Social Review Summary” (IFC, 2019), <<https://disclosures.ifc.org/#/projectDetail/ESRS/32247>> accessed 10 January 2020.

¹⁶⁸ USAID, “Monitoring Report. International Finance Corporation. Minerva beef Project – Brazil/Paraguay” (USAID, 2017) <https://ecd.usaid.gov/repository/titlexiii/2017/Trip_Report_8.pdf>, accessed 10 January 2020, 25.

customary rights by the Company’s primary suppliers”.¹⁶⁹ However, as the IFC’s project description also states, “the Company does not typically engage with local communities on project related risks” and it seems that no stakeholder engagement plan has been developed yet.¹⁷⁰ This failure could be raised in a complaint by indigenous or other local communities who can claim to have been affected by deforestation caused by one of Minerva’s suppliers.

In addition to claims based on the PS, the IFC loan to Minerva has also been considered to go against the World Bank Group’s 2016 Forests Action Plan, which states the goal to “ensure that our work in other sectors does not come at the expense of forest capital”.¹⁷¹

c) Challenges

Likely the greatest challenge to submitting a complaint to the CAO will be to identify persons who can claim to have been in some way affected by Minerva’s operations. This could be done, for example, by investigating the exact areas that were deforested by Minerva’s supplier Agropecuária Rio de Areia LTDA, or by finding other communities affected by recent deforestation in the Mato Grosso region, where the processing plants financed by the IFC are located.¹⁷² In light of the opaque Brazilian beef supply chains, it is unclear how unambiguous the link between any occurring deforestation and Minerva needs to be. Successful past cases before the CAO have generally established a clear and unambiguous link between an IFC investment and negative effects on themselves. For example, they would concern environmental degradation on the complainants’ lands that was clearly caused by an industry

¹⁶⁹ IFC, ‘Minerva Beef – Summary of Investment Information’ (IFC, 2019) <<https://disclosures.ifc.org/#/projectDetail/SII/32247>> accessed 10 January 2020.

¹⁷⁰ IFC, “Minerva Beef – Environmental & Social Review Summary” (IFC, 2019), <<https://disclosures.ifc.org/#/projectDetail/ESRS/32247>> accessed 10 January 2020.

¹⁷¹ World Bank Group, World Bank Group Forest Action Plan FY16-20’ (2016) <<https://openknowledge.worldbank.org/handle/10986/24026>> accessed 10 January 2020, at vii. Cited in Global Witness, ‘Money to Burn’ (*Global Witness*, 23 September 2019) <<https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/>> accessed 10 January 2020.

¹⁷² IFC, “Minerva Beef – Environmental & Social Review Summary” (IFC, 2019), <<https://disclosures.ifc.org/#/projectDetail/ESRS/32247>> accessed 10 January 2020.

project.¹⁷³ At times, complaints do however mention a range of different effects caused by an investment, with only some of them being clearly linked to adverse impacts on the complainants.¹⁷⁴

5.4.2.2 Potential Other Cases

While the Minerva investment was the only IFC project that could be detected to be potentially linked to deforestation at the time of writing, other cases may come up in the future – in particular considering the recent surge of IFC investments in Brazil.¹⁷⁵ It may be useful to closely monitor future IFC projects, which are disclosed on the bank’s website.¹⁷⁶ Generally, any economic activity with adverse impacts on the Amazon should be scrutinized for the involvement of international development banks, most of which have complaint mechanisms somewhat similar to the one of IFC/MIGA. This includes the World Bank and the Inter-American Development Bank (see Chapter 3 and 4) but also, for example, smaller development banks set up by single countries.

5.4.3. What happens after you submit the complaint?

Upon receipt of a complaint, the CAO office takes the following steps:¹⁷⁷

1. Eligibility decision (15 working days)
 - Complaint must fulfil three criteria:
 - o Concern a project that IFC or MIGA are participating in or actively considering

¹⁷³ *Colombia / Eco Oro-01/Bucaramanga* [2012] CAO <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=187> accessed 10 January 2020.

¹⁷⁴ See *Guatemala / TCQ-01/Puerto Quetzal* [2014] CAO <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=219>, which alleges violations of national laws and insufficient environmental impact assessments, which do not seem to have an immediate impact on them. There have also been CAO complaints referring to negative impacts on climate change.

¹⁷⁵ Deutsch-Brasilianische Handelskammern et al. (n 21).

¹⁷⁶ IFC, ‘IFC Project Information & Data Portal’ (IFC, 2019) <https://disclosures.ifc.org/#/enterpriseSearchResultsHome/*> accessed 10 January 2020.

¹⁷⁷ See CAO, ‘Operational Guidelines’ (CAO, 2013), <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>, accessed 10 January 2020, 11-15.

- Concern environmental and/or social impacts of such a project
 - Complainant is, or may be, affected by the impacts raised
2. Assessment (120 working days)
- Develop a more detailed understanding of the issues raised in the complaint & engage with the parties and different stakeholders of the project
 - Determine if parties wish to trigger mechanism for
 - Dispute Resolution or
 - Compliance
3. Dispute Resolution and/or Compliance Review
- a) Dispute Resolution (no timeframe):
- Search for a resolution to the issues according to mutually agreed process among parties
 - If no agreement is reached, the case can be transferred to a compliance review
- b) Compliance¹⁷⁸:
- Compliance Appraisal (45 working days) to assess impacts of the program on the ground and decide whether compliance investigation is needed: includes discussions with IFC/MIGA and “other stakeholder”
 - Compliance Investigation (no timeframe): review of documents, interview, observation of activities and conditions etc.
4. Submittal of final report to IFC/MIGA senior management for official response (20 working days)
- Publication of the Investigation Report is dependent on approval by the World Bank Group President
 - A finding of non-compliance would usually not lead to the cancelling of a project, but to attempts to adjust the parts of the projects that were identified as critical
5. Monitoring and Follow-Up (no timeframe)
- If IFC/MIGA are found in non-compliance, investigation is kept open until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing non-compliance

¹⁷⁸ Ibid., 22-25.

6. Conclusion

This report has offered an appraisal of the options available to tackle the violations of the indigenous peoples' rights and the deforestation of the Amazon in Brazil. The drafters of this report do not presume that a small to medium sized NGO could make use of all these avenues simultaneously to “save the Amazon” single-headedly. What we hope to offer with our analysis is a critical appraisal of the advantages and disadvantages of the different avenues, and some more detailed examples of how some particularly promising options could serve in practice to address the situation in the Brazilian Amazon. It is also important to note that this report is specifically targeted to address the problems in the Brazilian Amazon, and for practical use by a Swiss NGO. If one of these variables were to change, the assessment of some of the avenues is likely to differ considerably too. Moreover, despite our efforts for the report to be as comprehensive as possible, the list of avenues suggested in this report is an open list, meaning that it is not conclusive. Thus, it is possible that there are additional avenues that we have missed.

Having said that, this report is an attempt at a systematic approach with different layers that can add to its analytical usefulness in canvassing the available options in international law and how to avail oneself of some possible mechanisms of redress.

The first level of analysis, in [Chapter 2](#), categorised the events into a coherent factual matrix, consisting of four groups. The report found that, in particular, three groups of actors could be held responsible for the events unfolding in the Amazon: *states (Brazil and other states)*, *businesses and financiers*. This led to the design of our next level of analysis. [Chapter 3](#) outlined the different international instruments that target each of the three aforementioned group of actors. Chapter 3 offered an analysis of the strength of the legal arguments to be raised pursuant to each instrument and according to the facts identified in Chapter 2.

The next logical step was identifying where these alleged violations could be pursued to find liability with each of the groups of responsible actors. Therefore, [Chapter 4](#) identified a list of 22 mechanisms and avenues of action to be analysed. Three avenues were of a more informal, political nature. Regarding these avenues, our contribution was offering arguments to be used in a political campaign to pressure the Brazilian government to change its policies regarding the indigenous people and the Amazon. 19

mechanisms were based directly on legal instruments and international standards and guidelines. These mechanisms involved a clearer procedure. Based on the assessment of these latter procedures, the authors of this report were in a position to offer an appraisal of the advantages and disadvantages of each avenues according to two analytical criteria. First, the accessibility of each avenue. Second, the *expected outcomes*. This Chapter offers an appraisal of the most promising of the mechanisms. However, to keep the report as short as possible, a more detailed appraisal of each of the avenues was transferred to Annex II. Therefore, the reader can consult the Annex for further analysis of the mechanisms.

The authors, in consultation with the beneficiary of this report, identified four promising avenues to explore further in **Chapter 5**. This decision was based on the analysis in the first three Chapters of the report and the discretion of the beneficiary. Chapter 5 aimed to allow a more practical understanding of what it means to try to find redress for the events in Brazil under international law. This Chapter achieves this goal by offering three contributions. First, the chapter outlines a practical guideline of the steps needed to utilise each mechanism of redress. Second, it offers a number of arguments that could be used to find violations of international rules and norms. Finally, it outlines the aftermath of a successful or unsuccessful decision briefly.

In closing, we must point out the limitations of this report to the reader. First, the authors of this report have not had a formal legal training from Brazil. Therefore, we encourage our beneficiary to consult with Brazilian lawyers. This is important as a number of key avenues of action involve an obligation to exhaust local remedies. Knowledge of and exhausting local remedies is naturally predicated upon close contact with Brazilian lawyers. Second, as events in Brazil were unfolding throughout the writing of this report, the gathering of reliable and litigable facts proved to be challenging. For instance, we identified a number of plans and initiatives by the Brazilian government to change laws and regulations that have not come to fruition, and cannot be a basis for taking action as of yet. We encourage our beneficiary to move beyond the factual matrix provided in the report, to gain first-hand information from actors on the ground in Brazil. Having said that, the categorisations provided in this report will prove a useful structure. Third, and connected to the second limitation, the situation in the Brazilian Amazon is fast moving. This means that some of the avenues that are thought to be promising in light of the current facts may prove to be less useful subject to the factual

development. This is while other avenues that were not seen as promising due to a lack of litigable facts could suddenly become viable. Therefore, we encourage the beneficiary to continue to closely monitor the factual developments in the Brazilian Amazon, to have an accurate ongoing appraisal of their options as they move forward.

Annex I: Overview of Relevant International Legal Obligations and Rules

1. Addressing States

American Convention on Human Rights (ACHR)

The ACHR is a human rights convention ratified by Brazil, on the basis of which claims can be brought to the Inter-American Commission for Human Rights (IACHR), which can pass these on to the Inter-American Court for Human Rights (IACtHR) (see Chapter 4.2. and Annex II).

Art. 21 ACHR (right to property) has been interpreted very progressively by the Inter-American Court for Human Rights (IACtHR) in a number of precedents on indigenous rights. According to the Court, it encompasses not only the duty for states to respect traditional titles to territory of indigenous peoples, but also a right to “cultural identity”. This includes a right of indigenous communities to be consulted according to specific criteria, a right to receive “reasonable benefits” from any projects that affect their traditional lands or culture, and an obligation to conduct an environmental and social impact assessment before a project can start.

For example, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001)*, the IACtHR ruled that Nicaragua had violated rights to judicial protection (see below) and property for giving out logging concession in tropical rainforest on indigenous traditional lands without providing for effective judicial protection for the affected indigenous communities. It also ruled that the state had to develop an effective mechanism for the demarcation of indigenous lands.

In *Yakye Axa Indigenous Community v. Paraguay (2005)*, the IACtHR held that Paraguay had violated rights to property and to life (see below) by resettling an indigenous community and thus not ensuring effective use of their traditional lands, and failing to ensure dignified living conditions for the time they were deprived of their land.

Art. 4 (right to life), 5 (personal integrity) and 25 (judicial protection) ACHR have been considered to be intrinsically linked to Art. 21 as interpreted above.

In *Saramaka People v. Suriname* (2007), the IACtHR found that Suriname, by giving out logging and mining concessions to private companies without the consultation or consent of the traditional community living on the land, had violated their right to property and to judicial protection. It asked the state to review all concessions granted, demarcate the community's land, grant them a right to be consulted and effective remedies, and pay compensation.

In *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), Ecuador had granted a concession for oil exploitation on indigenous territory in the Ecuadorian Amazon without consulting the indigenous people, let armed forces enter the territory and place explosives on the land. The IACtHR ruled that Ecuador had violated rights to property, life and personal integrity, and ordered it to remove the explosives, consult the Sarayaku people, and pay compensation.

Art. 26 (progressive development) has been interpreted as the basis of an independent right to a healthy environment.

In its *Advisory Opinion OC-23/17* (2018), the IACtHR proclaimed the existence of an independent, justiciable “right to a healthy environment” under the ACHR, which could become the subject of future claims by individuals or groups.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a major international human rights convention. Brazil allows for individual complaints under the First Optional Protocol to ICCPR by virtue of its ratification of the Protocol in 2009. The Human Rights Committee may issue views on individual complaints pursuant to Article 5 of the Optional Protocol. These views are authoritative, although not binding.

Art. 1 (right to self-determination) includes a right that a people may not be deprived of their own means of subsistence.

Art. 2 (non-discrimination) states are required to ensure rights to individuals without discrimination or distinction of any kind. In light of the factual circumstances that are of interest, it is noteworthy that [General Comment 31](#) interprets ICCPR to include an obligation for states to protect against acts committed by private persons

and entities. This relates to the rights stipulated in Arts. 6, 12, 17 and 27, which are discussed below.

Art. 6 (right to life) contains a right to life which shall be protected by law. The Human Rights Committee, in *Portillo Cáceres et al. v. Paraguay* (2019), decided that the right to life was violated due to pesticide pollution from a soy plantation that caused severe health problems. This decision links environmental pollution to the right to life. Given the nature of events unfolding in Brazil, this recent development in the interpretation of Art. 6 is useful as it allows the indigenous communities to formulate the environmental degradation to Art. 6. Recent developments in [General Comment 36](#) mean that there is now a possibility to argue that the home state (state of origin of a corporation) could also be held liable for violations of the right to life due to activity of its corporations outside its territory.¹⁷⁹

Art. 12 (right to liberty of movement) protects against all forms of forced internal displacement, according to [General Comment 27](#).

Art. 17 (right against unlawful interference with privacy, family, home) entails protections against interference with the place a person resides or where she carries out her occupation, according to [General Comment 16](#).

Art. 27 (minority rights) includes the right of individuals in a community with other members of their group to enjoy their own culture. The Human Rights Committee, in *Ominayak v. Canada* (1987), decided that the permission of the state to a corporation to use land claimed by the Lubicon Lake Band was a violation of the cultural rights of the indigenous community under Art. 27.

Convention on the Elimination of Racial Discrimination (CERD)

The CERD is another important international human rights convention. Brazil has accepted the individual complaints procedure under CERD in 2002. Individual

¹⁷⁹ CCPR ‘General Comment No. 36: Article 6 (Rights to Life)’, (3 September 2019) CCPR/C/GC/36, at para. 22.

Complaints can be brought to the CERD Committee under Art. 14 CERD. CERD issues non-binding but authoritative opinions.

Art. 1 (non-discrimination) mandates states not to practice racial discrimination. States are to ensure that no public authorities and institutions discriminate. They are not to sponsor, defend or support discrimination by any person. States are required to review governmental, national and local policies and amend or nullify laws leading to discrimination. Discrimination is defined in Art. 1(1) as any distinction, exclusion, restriction, or preference based on race, color, descent, national or ethnic origin has purpose or effect of nullifying or impairing the recognition, enjoyment, exercise, on an equal footing of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life.

Art. 4 (condemnation of propaganda) obliges states to condemn propaganda and all organisations based on ideas of superiority.

Art. 5(b) (right to security of person) obliges the state to protect individuals against violence from both government and any other individual, group or institution.

Art. 5(c) (political rights) particularly stresses to take part in the government and the conduct of public affairs at any level and to have equal access to public services.

Art. 5(d)(v) recognises the right to own property alone or in association with others. This amounts to a recognition of the right of indigenous people to communal ownership of lands

Convention on the Rights of the Child (CRC)

The CRC is the most widely ratified human rights treaty in the world, with 196 parties having joined since the Convention was signed in 1989. The Convention establishes the Committee on the Rights of the Child, which gives the views and recommendation of the Committee a significant normative value. Brazil ratified the Optional Protocol to CRC accepting the individual complaints procedure in 2017.

Art. 2 (non-discrimination) gives the right to children to be treated without any discrimination.

Art. 6 (right to life, survival and development) contains rights that are to be implemented holistically. According to [General Comment 7](#), the right to life, survival and development are to be implemented in connection with rights to health, adequate standard of living and a healthy and safe environment. According to [General Comment 36](#) (at paragraph 7) as well as *Chongwe v. Zambia* (2000), the right to life could be considered to be breached by exposing victims to a real risk of life even if the threats do not result in actual loss of life.

Art. 24 (right to health) concerns the right to the enjoyment of the highest attainable standards of health. According to [General Comment 4](#), environmental degradation could interfere with the standards of the right to health set out in the convention.

Art. 27 (right to housing) maintains that state parties recognise the right to an adequate standard of living for the child's development.

Art. 30 (right to culture) is of particular value and importance to indigenous communities. According to [General Comment 11](#) the use of traditional lands is of significant importance to the development of indigenous children.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR is one of the two major international human rights covenants (together with the ICCPR). Brazil has ratified it but does not allow for individual complaints to the Committee overseeing its implementation (the Committee on Economic, Social and Cultural Rights, or ESC Committee). Alleged violations of the ICESCR can nevertheless be referenced through other avenues (see Chapter 4.2. and Annex II). The interpretation of the ICESCR through the ESC Committee is not legally binding in a strict sense but is regarded as authoritative.

Art. 1 (right to self-determination) of the Covenant states the right of every people to freely determine their political, economic social and cultural development. This includes a prohibition to deprive a people of its means of subsistence. Past interpretation of the ESC Committee as well as the Human Rights Committee show however that it is difficult for individuals and groups to base their claims (exclusively) on this provision.

Art. 2 (non-discrimination) has been made use of by the ESCR Committee to point to social and economic disadvantages of indigenous peoples.

Art. 11 (right to adequate housing, right to food) has been interpreted, *inter alia*, to entail strict preconditions for displacements in the context of business activities. A lack of demarcation of and access to traditional lands, through provoking hunger and malnutrition, has been linked to this article. These interpretations were further specified in [General Comment No. 4](#) (on the right to housing) and [General Comment No. 7](#) (on the right to housing and forced evictions).

Art. 12 (right to health) entails, according to the ESC Committee, access to plants, animals and minerals which are essential for the health of indigenous peoples. It also held that displacement can have deleterious effects on indigenous peoples' health. Crucial for the interpretation of this right for indigenous peoples is [General Comment No. 14](#) (on the right to health).

Art. 15 (right to take part in cultural life) includes the rights of indigenous peoples to the territory and resources which they have traditionally owned or used. A detailed interpretation can be found in the ESC Committee's [General Comment No. 21](#) (right to take part in cultural life).

Art. 15 furthermore entails, according to the ESC Committee, indigenous peoples' right to free, prior and informed consent (FPIC), which includes a number of procedural requirements. See for this interpretation [General Comment No. 24](#) of the ESC Committee (on state obligations in the context of business activities). Here the Committee also held that expected effects of business projects on indigenous peoples need to be included in human rights impact assessments conducted prior to business projects and that there is a need for effective access to justice and remedies for indigenous peoples.

The United Nations Declaration on the Rights of Indigenous People (UNDRIP)

UNDRIP was adopted in 2007 and concerns the rights of indigenous peoples. The Declaration cannot be considered to be an international treaty or an instrument that binds the parties. However, there are many references to the Declaration and the rights therein, with many of its provisions reflecting customary international law.

Art. 5 (self-determination) consolidates the right to self-determination in other instruments of international human rights law.

Art. 7 (right to life) consolidates the right to life in other instruments of international human rights law.

Art. 8 (right against forced assimilation) maintains that indigenous peoples have the right not be forced to assimilate and have their cultures destroyed. The rights listed in Art. 8 include the right to prevention and redress for any form of propaganda to incite racial discrimination.

Art. 10 (right not to be displaced) gives indigenous peoples the right not to be forcibly removed from their territories. Such relocation must be predicated upon the free, prior and informed consent and include just and fair compensation.

Art. 15 (right to culture) recognises the rights of indigenous communities to their cultural diversity and traditions. States are to take measures to eliminate discrimination against indigenous communities.

Art. 18 (right to participate) recognises the right of indigenous peoples to participate in decision-making in issues affecting them. This right is also relevant to the ILO Convention 169.

Art. 26 (right to land) is of particular importance in the context of the recent developments in Brazil, particularly regarding the demarcation issue. Art. 26 advocates for the rights of indigenous peoples to their own lands and territories as well as the resources traditionally owned. Their rights are based on their traditional uses and occupation. States shall both recognise and protect the indigenous lands and resources.

Art. 29 (right to conservation and environment) is also fundamental to the events unfolding in Brazil. The state is to take measures to assist indigenous people in the protection of the environment.

The Statute of the International Criminal Court (The Rome Statute)

The Rome Statute establishes the ICC. Brazil is a party to the Rome Statute having ratified it in 2002, meaning any alleged crimes in Brazil can be prosecuted in the ICC according to Article 12 of the Rome Statute. The Rome Statute deals with individual crimes of serious concern to the community where national jurisdictions are unwilling or unable to, on the basis of the Rome Statute of the International Criminal Court. In recent months there has been interest in the potentials of the Rome Statute to invoke the individual responsibility of Brazilian officials.

Art. 6 (Genocide) in conjunction with the Genocide Convention relates to the acts that are intended to destroy a group in whole or in part. Although this may theoretically seem a promising argument, in light of the current facts it is unlikely that evidence of intent to destroy indigenous groups in whole or in part could be easily established. In relation to the crime of genocide, Art. 17(1)(d) requires a substantial gravity which is unlikely to be currently met in the Amazon.

Art. 7 (Crimes against humanity) is unlikely to be persuasively argued to have been breached. The requirement of substantial gravity under Art. 17(1)(d) discussed above is also unlikely to be met in the Amazon. There is a criterion of the offence to be a part of a systematic and widespread attack. Therefore, even if individual incidents in the Amazon have led to the death or injury of indigenous peoples, it would be difficult to establish a pattern of systematic and widespread attack to invoke the individual responsibility of officials.

Article 8 (war crimes and crime of aggression) which are the only other crimes that are capable of being prosecuted before the ICC are also not applicable to the circumstances in Brazil as there is no armed conflict in Brazil according to international law.

ILO Convention on Indigenous and Tribal Peoples (C169)

The ILO C169 is the major binding international convention concerning the rights of indigenous and tribal peoples and a forerunner of the UN Declaration on the Rights of Indigenous Peoples. States' compliance with the Convention is observed

through the ILO complaint procedures. (see Chapter 4.2., Chapter 5.3. and Annex II).

Art. 6 and 7 (right to consultation) concern participation of indigenous peoples in decision making processes that may affect their livelihood. Article 6(1)(a) obliges governments of the Member States to consult with indigenous peoples, whenever consideration is being given to legislative or administrative measures which may affect them directly. According to Article 6(2), the consultations must be undertaken in good faith and in a form ‘appropriate’ to the circumstances, with the objective of achieving agreement or consent to the proposed measures. Therefore, strictly speaking, reaching an agreement or consent is not required. Related to the discussion, Article 7 protects indigenous peoples’ right to decide their priorities for the process of development and this further support the right to consultation.

In *Brazil Case (2009)*, the Committee clarified the meaning of ‘appropriate’ procedures that they must create conditions necessary to reach an agreement or consent concerning the proposed measures. Thus, it says a meeting conducted merely for information purposes cannot be considered as consistent. Also, there is an additional requirement that the consultation must be undertaken “through the indigenous peoples’ representatives institutions”, which the Committee concluded the Brazilian government failed to conduct.¹⁸⁰

Art. 14, 15 and 16 (rights to land) concern indigenous peoples’ rights that are linked to their lands. While Article 14 protects directly the right to indigenous peoples’ lands or demarcated lands, Article 15 and 16 are more about specific rights namely the right to natural resources and the right to residence in the lands.

In *Mexico Case (2006)*, Article 14 was successfully invoked against the Mexican government for their failure to safeguard the indigenous peoples’ right to lands and to take necessary steps to protect them in relation to their infrastructure projects.¹⁸¹

¹⁸⁰ *Brazil – C169 (2009)* ILO, Complaint Procedures by Representations (Article 24) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507317,en> accessed 10 January 2020.

¹⁸¹ *Mexico – C169 (2006)* ILO, Complaint Procedures by Representations (Article 24) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507302,en> accessed 10 January 2020.

In order to make use of ILO C169, the Constitution of the ILO is relevant, as C169 is only about substance and does not contain non-compliance provision. **Art. 24 (representation), ILO Constitution**, offers an option for non-state actors to pursue complaint procedures through representation. The representation must be an “industrial association of employers or of workers”, but there is no other requirement as to the kinds of industrial association and any industrial association can be a representation to file complaints. For instance, it can be indigenous peoples’ organizations that represent communities of farmers, fishermen, trappers or other kinds of artisanal workers.

In *Brazil Case (2009)*, the *Union of Engineers of the Federal District* made a representation concerning compliance with ILO C169.¹⁸²

Paris Agreement

*The Paris Agreement on climate change to regulate greenhouse gas emissions is another legal instrument that binds the Brazilian government since 2016.*¹⁸³ *However, the compliance mechanism for the Paris Agreement is weak, relying entirely on its Committee in a manner that is “non-adversarial and non-punitive”.*¹⁸⁴ *Also, obligations for each Party depends on their nationally determined contributions (NDCs), on a voluntary basis.*

According to the **Article 15**, the implementation and compliance committee shall serve two distinct objectives: facilitating implementation and promoting compliance with the Agreement. Furthermore, the Committee shall be facilitative in nature, and adversarial or punitive measures are precluded from its toolbox. The Committee is consequently not an enforcement mechanism, as the possibilities to force parties to implement and comply are limited.

¹⁸² *Brazil – C169 (2009)* ILO, Complaint Procedures by Representations (Article 24) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507317,en> accessed 10 January 2020.

¹⁸³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

¹⁸⁴ Paris Agreement (2015) Article 15.

In addition, important questions such as how the Committee will be triggered and operationalised are still left open.¹⁸⁵

Alternatively, **Article 24**, offers a possibility of using the United Nation Framework Convention on Climate Change (UNFCCC) for dispute settlement.¹⁸⁶ According to the Article 14, UNFCCC, Parties can submit the dispute to the International Court of Justice and/or of proceed arbitration, if agreed to do so.

This might seem reliable measures to induce compliance, but this article has never been used by any Party so far.¹⁸⁷

2. Addressing Businesses

OECD Guidelines for Multinational Enterprises

The OECD Guidelines are a legally non-binding document specifying standards for the conduct of multinational enterprises which are headquartered or operate in an OECD member country or one of the other “adhering countries” to the Guidelines (see Chapter 4.2. and Annex II).

Chapter II (General Policies) of the Guidelines addresses the due diligence responsibilities of companies for their supply chains.

Chapter IV (Human Rights) holds that all human rights obligations of the country in which a company operates should also be complied with by the company itself. It also makes explicit reference to the UN Declaration on the Rights of Indigenous Peoples.

Chapter VI (Environment) contains a duty to protect the environment, monitor the environmental impact of activities, and conduct an environmental impact assessment.

¹⁸⁵ ‘The Implementation and Compliance Mechanism of the Paris Agreement’ (2017 University of Oslo, Faculty of Law) <<https://www.duo.uio.no/bitstream/handle/10852/61310/581.pdf?sequence=1&isAllowed=y>> accessed 10 January 2020.

¹⁸⁶ Paris Agreement (2015) Article 24.

¹⁸⁷ United Nations Framework Convention on Climate Change (1992) Article 14.

The accompanying **OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector** specifies the requirements for consultation with and consent of indigenous peoples for projects in the extractive industries.

International Finance Corporation (IFC) Performance Standards

The IFC Performance Standards are one of the most influential set of standards for corporate responsibility worldwide – they thus do not only apply to the operations of the IFC (see below, as well as Chapter 4.2. and Annex II) but are also a widely accepted “code of conduct” for the operations of businesses involving environmental or social risks.

Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) sets out the procedural basis for the remaining standards, and contains detailed provisions on an Environmental and Social Management System (ESMS) to be set up by a company operating in a project with environmental or social risks, including consultation with all relevant stakeholders affected by a project and disclosure of information about the project to these stakeholders. It is also the only standard that explicitly states that businesses need to respect human rights. At the same time it stresses that, while the term “human rights” is not used in the other Performance Standard, many of them do nevertheless include human rights aspects.

Performance Standard 3 (Resource Efficiency and Pollution Prevention) obliges businesses to consider alternatives for projects with high greenhouse gas emissions. It also entails certain requirements for waste management and prescribes restrictions on the use of pesticides.

Performance Standard 4 (Community Health, Safety, and Security) asserts the need to avoid community exposure to hazardous materials and substances released by a project, as well as adverse impact on the services provided to communities by ecosystems (e.g. natural resources). It also emphasizes that companies need to minimize the potential of exposure to diseases resulting from the activities they are involved in.

Performance Standard 5 (Land Acquisition and Involuntary Resettlement) contains a duty to avoid (physical and economic) resettlement. If it cannot be

avoided, displaced communities need to be offered compensation at full replacement cost (detailed provisions for the character of compensation are further lined out in the Standard). There also must be opportunities for displaced communities to derive development benefits from the project. In addition, businesses are to consult with affected communities according to detailed requirements prior to any resettlement, establish a grievance mechanism, and establish a resettlement and livelihood restoration plan.

Performance Standard 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources) prohibits projects in “critical habitats” (unique ecosystems) except under strict conditions. It also contains specific obligations for forestry and agriculture projects and a requirement to monitor supply chain in case of purchasing primary production.

Performance Standard 7 (Indigenous Peoples) requires companies to obtain free, prior and informed consent from indigenous communities in accordance with their institutions and customs, whenever their traditional lands or natural resources are affected, or their displacement is necessary.

The UN Guiding Principles on Business and Human Rights

The UN Guiding Principles are the most important globally agreed document on corporate responsibility. They explicitly are not asserting any legal obligations for businesses, but only social expectations – but they can nevertheless be used to point to the non-compliance of business enterprises with these social expectations.

Principle 12 refers to the need for businesses to respect the “International Bill of Rights”, which includes the ICCPR and ICESCR (see above). The commentary to this principle also mentions that “United Nations instruments...on the rights of indigenous peoples” may have to be considered in certain circumstances. This is a clear reference to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Principle 13 emphasises that this corporate responsibility to respect human rights does not only concern an enterprise’s own activities, but also a responsibility to “seek to prevent or mitigate adverse human rights impacts” that are caused by their business

relationships. The commentary specifies that these “business relationships” include a company’s responsibility for its value chain. **Principle 19** and its commentary further specify the appropriate action to be taken by a company depending on the closeness of its connection to the respective “business relationships”.

According to **Principle 16**, companies should develop a human rights policy commitment to specify the human rights expectations to its personnel and other parties linked to its operations. For companies whose business affects indigenous peoples, such a policy commitment arguably needs to reflect their rights.

Principle 18 raises the need for a human rights impact assessment and consultation with stakeholders potentially affected by the company’s operation.

Principles 22, 29 and 30 in addition provide that companies should set up or participate in operational-level (non-state-based) grievance mechanisms for people affected by their operations

3. Addressing Financiers

OECD Guidelines for Multinational Enterprises

The above-mentioned OECD Guidelines do also apply to banks and other private actors in the financial sector. Statements by several National Contact Points (NCPs) have confirmed that this also includes minority shareholdings.

For the relevant provisions, see the overview above in this Annex.

International Finance Corporation (IFC) Performance Standards

The above-mentioned IFC Performance Standards also govern the investments of the IFC itself and can be challenged before its internal Compliance Advisor/Ombudsman (CAO) (see Chapter 5.4 and Annex II).

There has also been a number of CAO cases involving indigenous peoples, addressing insufficient consultation, violence against members of indigenous communities, and impacts on indigenous traditional resources. In many cases, non-compliance of the IFC was found. For a detailed discussion, see Chapter 5.4.

For the relevant provisions, see the overview above in this Annex.

World Bank Operational Policies and Environmental and Social Framework (ESF)

The World Bank – the most important and influential multilateral global financial institution for all sorts of state-funded development projects – has recently revised its environmental and social safeguards. The new Environmental and Social Framework (ESF), replacing the old “Operational Policies”, largely resembles the IFC Performance Standards, though with some differences in application. It applies to all projects funded by the bank that were launched after October 2018. For the older projects, the Operational Policies still apply.

The **Operational Policies** include separate Policies with requirements for environmental assessments (OP 4.01), consultation with (not: consent of) indigenous

peoples (OP 4.10), conditions for involuntary resettlement (OP 4.12), and the financing of projects on forested areas (OP 4.36).

The **ESF** includes some stricter provisions than the Operational Policies and moves, for example, from the need for consultation with indigenous peoples for projects affecting their lands, to the requirement of free, prior and informed *consent* (Environmental and Social Standard 7). Its usefulness is however diminished by the increased possibilities for borrower countries to apply their own systems for environmental and social protection, the practical consequences of which are rather unclear as of yet.

The reform likely also diminishes the potential of former claims before the panel to serve as **precedents**. Such cases addressing projects in Brazil have dealt with issues such as displacement, lack of consultation with local communities, and deforestation and environmental degradation through the construction of infrastructure. Past claims by indigenous peoples have interestingly not only addressed financed projects but also the broader Development Policy Financing (DPF) loans given out to support certain government policies.

Inter-American Development Bank (IDB) Operational Policies

The Inter-American Development bank is a major public financial institution for development (e.g. infrastructure) projects in Latin America. As most other multilateral development banks, it set itself a number of social and environmental standards that apply to all its projects.

As the name indicates, the **IDB Operational Policies** are largely aligned with those of the World Bank, although much more scattered and less systematized in character. They consist of:

- General Operational Policies, a long list of different documents which mainly deal with technical aspects but may become relevant for the contexts discussed in this report in some cases,¹⁸⁸

¹⁸⁸ These can be found on the IDB website: <https://www.iadb.org/en/about-us/operational-policies>.

- Sector Policies and Sector Framework Documents,¹⁸⁹ which deal, inter alia with human rights and environmental aspects and include policies on Environment and Safeguards Compliance, Involuntary Resettlement, and Indigenous Peoples, as well as a large number of documents applying only to specific sectors

Following the example of the World Bank, the IDB is also revising its safeguards system and is planning to introduce a new **Environmental and Social Policy Framework (ESPF)** in 2021. It can be expected that the new system will again be largely modelled after that of the World Bank. Accordingly, these sets of standards apply to similar contexts as those of the World Bank.

The reform likely also diminishes the potential of former claims before the panel to serve as **precedents**. Such cases addressing projects in Brazil have dealt with issues such as displacement, lack of consultation with local communities, and deforestation and environmental degradation through the construction of infrastructure.

Past claims by indigenous peoples have interestingly not only addressed financed projects but also the broader Development Policy Financing (DPF) loans given out to support certain government policies.

¹⁸⁹ To be found on the IDB website: <https://www.iadb.org/en/about-us/sector-policies-and-sector-framework-documents>.

Annex II: Detailed Summaries of Formal Avenues

1. Legal Procedures

Inter-American Commission (IACHR) and Inter-American Court of Human Rights (IACtHR)
Overview
<ul style="list-style-type: none"> • The Inter-American System of Human Rights is a two-tiered system for human rights protection (consisting of a commission and a court), which considers petitions by individuals and groups based on the American Convention on Human Rights (ACHR) • If a claim passes on to the IACtHR, it results in a formally binding judgment by the Court
Applicable Rules
<ul style="list-style-type: none"> • American Convention on Human Rights (ACHR) • American Declaration on the Rights and Duties of Man → See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • A precondition for using the system is the <u>exhaustion of local remedies</u> • <u>NGOs can file complaints on behalf of victims</u>, if they are legally recognised in one of the member states of the Organization of American States (OAS) • A <u>complaint can only be filed to the IACHR</u> (not the IACtHR directly), which, if the case is admitted, can decide to either issue a non-binding report or, in addition, refer the case to the IACtHR • Since the procedure is rather formalised and can result in “actual” court proceedings, costs are likely higher than in other mechanisms • Access to effective judicial remedy is hampered by the fact that the period in between the filing of a claim and a judgment by the Court often amounts to many years, sometimes decades – but the IACtHR can issue <u>provisional measures</u> in some cases
Expected Outcome
<ul style="list-style-type: none"> • The filing of a complaint with the IACHR can have <u>several effects</u>: <ul style="list-style-type: none"> ○ If the case is admitted, the IACHR can seek a friendly settlement ○ If no friendly settlement is reached, it drafts a (non-binding) legal report ○ The IACHR or the defendant state can then in addition refer the case to the IACtHR, which issues a binding judgment ○ The IACtHR can, prior to its judgment, issue binding provisional measures • Judgments by the IACtHR are formally binding, but previous judgments on indigenous rights have often been not or not fully complied with by states • A risk in using the procedure is the potential danger of backlash against the claimants in Brazil (given the pressure Brazilian civil society and human rights activists already face), or against the Inter-American Human Rights

System as a whole – The Brazilian government might want to use a controversial case that is brought against it as a reason to pull out of the system
Overall Assessment
<ul style="list-style-type: none"> • The Inter-American System is one of the few available legally binding mechanisms under international law and has a rather developed jurisdiction on indigenous rights, and has furthermore directly linked human rights to environmental protection • It can however take very long for the IACtHR to take a decision and there is a risk of creating backlash • Given the lack of enforcement mechanisms, it is questionable whether the current Brazilian government would comply with a judgment or with provisional measures • To attract international attention (outside of Latin America) to a case, other mechanisms are likely better suited

International Court of Justice (ICJ)
Overview
<ul style="list-style-type: none"> • The ICJ is the principal judicial organ of the United Nations • According to ICJ Statute, the Court is capable of making decisions on contentious cases and rendering advisory opinions (Article 65)
Applicable Rules
<ul style="list-style-type: none"> • The Court decides in accordance with <u>the entire body of international law</u> applicable to a case according to Article 38 of the ICJ Statute: <ul style="list-style-type: none"> ○ Conventions and treaties (which includes the many treaties and covenants discussed in Chapter 3) ○ Customary international law ○ General principles of law • Judicial decisions and academic writings as subsidiary means of determining the law
Access, Costs and Duration
<ul style="list-style-type: none"> • Article 34(1) of ICJ Statute: access to the Court is <u>limited to states</u> • Article 34(2): international organisations such as the UN may play a role in providing information; however, <u>individuals and NGOs cannot bring a case to the ICJ</u> • Individuals and NGOs may pressure States to initiate proceedings before the Court, however, it may be difficult to persuade states to incur the political costs to initiate proceedings • Further obstacle: the ICJ does not have compulsory jurisdiction – states must consent to the jurisdiction of the Court through: <ul style="list-style-type: none"> ○ a special agreement between the parties;

<ul style="list-style-type: none"> ○ declarations of States accepting the compulsory jurisdiction of the Court according to Article 36 of the Statute of the ICJ – Brazil has <u>not</u> made such a declaration, so this option does not apply ○ finding a clause in a treaty to accept the jurisdiction of the Court • Individuals and NGOs may also pressure states in the context of the UN to initiate a <u>request for an advisory opinion</u> on a legal question – this must be done by specific organisations according to Article 65 of the ICJ Statute and Article 96 of the UN Charter: <ul style="list-style-type: none"> ○ The General Assembly; ○ The Security Council; ○ Other organs and specialised agencies of the UN • In relation to <u>costs</u>: proceedings can be initiated by parties to the Statute of the ICJ who make financial contributions – if a state is not a party to the Statute, they may become a party to a case subject to a financial contribution according to Article 35(3) <ul style="list-style-type: none"> ○ <u>Proceedings may be very lengthy</u>, with judgments commonly being delivered years after the institution of proceedings, although provisional measures could be ordered
<p>Expected Outcome</p>
<ul style="list-style-type: none"> • Article 59 of the ICJ Statute: the judgments of the Court are binding on the parties to the dispute – Judgments are typically respected due to the Court’s design in needing the consent of States before making decisions as well as the inherent authority of the Court¹⁹⁰ • Advisory opinions are not binding on the requesting organs or States with disputes that may related to the opinion • Decisions from the ICJ have heavy legal significance • Due to the design of the Court, its history and its position in the UN system, it is likely that the decisions of the Court will be respected • However, it is very difficult for NGOs or individuals to influence what cases are to be heard before the Court. Furthermore, even if a State is persuaded by the arguments of individuals and NGOs to initiate proceedings against Brazil, the difficulty is that the Court does not have compulsory jurisdiction • Lastly, Brazil can choose not to appear in the Court – this would affect the quality and gravity of the judgment due to the fact that the Court has a very limited ability to make inquiries on its own¹⁹¹
<p>Overall Assessment</p>
<ul style="list-style-type: none"> • Decisions from the ICJ have heavy legal significance • Due to the design of the Court, its history and its position in the UN system, it is likely that the decisions of the Court will be respected • However, it is very difficult for NGOs or individuals to influence what cases are to be heard before the Court. Furthermore, even if a State is persuaded by

¹⁹⁰ Robert Kolb *The Elgar Companion to the International Court of Justice* (Edward Elgar, Cheltenham, 2013), at 186.

¹⁹¹ Kolb, at 186.

the arguments of individuals and NGOs to initiate proceedings against Brazil, the difficulty is that the Court does not have compulsory jurisdiction

- Lastly, Brazil can choose not to appear in the Court – this would affect the quality and gravity of the judgment due to the fact that the Court has a very limited ability to make inquiries on its own

International Criminal Court (ICC)
Overview
<ul style="list-style-type: none"> • Deals with individual crimes of serious concern to the community where national jurisdictions are unwilling or unable to, on the basis of the Rome Statute of the International Criminal Court • Brazil is a party to the Rome Statute, having ratified it in 2002, meaning its crimes in Brazil can be prosecuted in the ICC according to Article 12 of the Rome Statute
Applicable Rules
<ul style="list-style-type: none"> • The Statute of the International Criminal Court <ul style="list-style-type: none"> • See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • <u>Access to ICC is limited</u> and <u>proceedings may be initiated in three ways</u> according to Article 13 of the Rome Statute: <ul style="list-style-type: none"> ○ A crime is referred to the Prosecutor <u>by a State Party to the Rome Statute</u> according to Article 14; <ul style="list-style-type: none"> ▪ Individuals and NGOs could attempt to lobby States to make such a referral to the Prosecutor against Brazil ▪ This would be unlikely to be successful as States are generally reluctant unless their vital interests are at stake (one reason would be the fear of such proceedings being used in turn against themselves) – there is also a high political price to pay for any country to make such a referral against Brazil ○ A crime is referred to the Prosecutor <u>by the Security Council</u>; <ul style="list-style-type: none"> ▪ Individuals and NGOs could attempt to lobby Security Council members for such a referral to the Prosecutor against Brazil ▪ However, the requirement is for the Security Council to operate under Chapter VII of the UN Charter – this chapter addresses threats to peace and acts of aggression which is unlikely to extend to the situation in the Amazon ▪ China and the US are very likely to veto such a referral ○ <u>The Prosecutor initiates an investigation</u> according to Article 15; <ul style="list-style-type: none"> ▪ Individuals and NGOs could attempt to influence the Prosecutor to initiate a preliminary examination – NGOs

<p>occasionally send information regarding crimes to the Prosecutor and the Prosecutor relies on such information¹⁹²</p> <ul style="list-style-type: none"> ▪ It is unlikely for the Prosecutor to decide for an examination as it is unlikely that the situation in the Amazon could amount to an international crime (see the following section) ▪ Even if the Prosecutor decided to conduct an examination, the Pre-Trial Chamber must still authorize an investigation – this will include the standards of gravity and complementarity according to Article 17 <ul style="list-style-type: none"> • Gravity standard is unlikely to be met: the crimes must of most serious nature • Complementarity standard is unlikely to be met: this would mean that Brazil’s national justice system is unwilling or unable to genuinely proceed with the case • In terms of <u>costs</u>, Article 115 of the Statute lists two sources of funding: <ul style="list-style-type: none"> ○ Funds provided by the UN ○ Contributions made by State Parties to the Rome Statute <p>In terms of <u>duration</u>, the ICC takes years to reach a judgment from the date investigations begin</p>
<p>Expected Outcome</p>
<ul style="list-style-type: none"> • The decisions of the ICC are binding; those convicted typically serve imprisonment terms • The decisions of the ICC are commonly enforced • The ICC enjoys a high level of respect and its decisions are most commonly enforced • A decision from the ICC condemning a Brazilian official of an international crime would be a revolutionary development in international law • Even an investigation, or a preliminary examination into the events in the Amazon could create a significant backlash against the Brazilian government • It is very unlikely for the events in the Amazon to amount to an international crime for the purposes of the Rome Statute • It is very unlikely that such a crime would be prosecuted due to the prohibitive political costs of initiating a potential case by the Prosecutor
<p>Overall Assessment</p>
<ul style="list-style-type: none"> • The ICC enjoys a high level of respect and its decisions are most commonly enforced • A decision from the ICC condemning a Brazilian official of an international crime would be a revolutionary development in international law • Even an investigation, or a preliminary examination into the events in the Amazon could create a significant backlash against the Brazilian government • It is very unlikely for the events in the Amazon to amount to an international crime for the purposes of the Rome Statute • It is very unlikely that such a crime would be prosecuted due to the prohibitive political costs of initiating a potential case by the Prosecutor

¹⁹² Schabas, at 159-160.

2. Quasi-Judicial Procedures

Human Rights Committee
Overview
<ul style="list-style-type: none"> • The Human Rights Committee is established under Article 28 of ICCPR • There is the individual complaints procedure under the First Optional Protocol to ICCPR – Brazil ratified the Protocol in 2009 • Rights to self-determination and enjoyment of culture are directly linked to the rights of the indigenous people
Applicable Rules
<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights (ICCPR) → See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • Article 1 of the Optional Protocol: <u>individuals may bring complaints</u> – the individuals must claim to be a victim of a violation of a right under ICCPR, <u>NGOs cannot bring a complaint</u> • Article 2 of the Optional Protocol: <u>local remedies need to be exhausted</u> before a complaint is brought • Complaints are free of charge • The Committee has the ability to request the State to take <u>interim measures</u> in cases of urgent matters to avoid irreparable damage
Expected Outcome
<ul style="list-style-type: none"> • The Human Rights Committee issues views pursuant to Art. 5 of the Optional Protocol – these views are authoritative but <u>not legally binding</u> • Does not address systemic issues and only grants individual relief
Overall Assessment
<ul style="list-style-type: none"> • ICCPR is a widely respected treaty with 172 State parties since 1966 • This in turn means that the Human Rights Committee decisions have significant normative value • The requirement to exhaust local remedies is a significant obstacle • Although the suggestions and recommendations are powerful naming and shaming options, there is no enforcement power or avenues

Committee on the Elimination of Racial Discrimination
Overview
<ul style="list-style-type: none"> • Complaints procedure from individuals to the CERD Committee under Article 14 CERD • Provisions against discrimination are directly linked to the rights of indigenous peoples • Brazil accepted the individual complaints procedure under CERD in 2002
Applicable Rules
<ul style="list-style-type: none"> • Convention on the Elimination of All Forms of Racial Discrimination (CERD) → See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • Article 14 CERD: individuals and groups of individuals may bring complaints – they must demonstrate that they have been significantly affected • Article 14(5) CERD: local remedies need to have been exhausted before a complaint is brought • The procedure is free of cost • Complaints may be addressed swiftly as there is a possibility for “early warning measures and urgent procedures” <ul style="list-style-type: none"> ○ To address urgent problems to prevent or limit the scale of violations ○ <i>The exhaustion of local remedies is not necessary for this procedure</i>
Expected Outcome
<ul style="list-style-type: none"> • CERD makes suggestions and recommendations that it will forward to the State and the petitioner • CERD decisions are not legally binding • CERD Committee is a naming and shaming avenue • The recommendations are mostly limited to the specific case and do not address the larger system or policies of a State
Overall Assessment
<ul style="list-style-type: none"> • CERD is a widely respected treaty with 180 State parties since 1969 • This in turn means that CERD Committee decisions have significant normative value • The complaints procedures outside the early warning measures and urgent procedures may be very lengthy • There are complicated admissibility burdens; e.g. the requirement to exhaust local remedies • Although the suggestions and recommendations are powerful naming and shaming options, there is no enforcement power or avenues

Committee on the Rights of the Child
Overview
<ul style="list-style-type: none"> • Article 43 of CRC establishes the Committee on the Rights of the Child • Brazil ratified the Optional Protocol to CRC accepting the individual complaints procedure in 2017
Applicable Rules
<ul style="list-style-type: none"> • <u>Convention on the Rights of the Child (CRC)</u> → See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • Article 6 Optional Protocol: complaints may be submitted by or on behalf of <u>victims (individuals or groups)</u> of a potential violation • Article 7(e): requires local remedies to have been exhausted • Article 7(d): the same matter must not be under consideration in another procedure of international investigation or settlement • The complaint procedure is free of costs • Article 6: in cases of urgent consideration the Committee may provide for interim measures in exceptional circumstances to avoid irreparable damage to victims
Expected Outcome
<ul style="list-style-type: none"> • Article 10 Optional Protocol: The Committee provides views and recommendations that are not binding
Overall Assessment
<ul style="list-style-type: none"> • The CRC is the most universally ratified human rights treaty in the world, with 196 parties since 1989 • This in turn means that the Committee's views and recommendations have significant normative value • The requirement to exhaust local remedies is a significant obstacle – although exceptions may be argued for <p>Although the views and recommendations are powerful naming and shaming options, there is no enforcement power or avenues</p>

International Labour Organisation (ILO) Complaint Procedure
Overview
<ul style="list-style-type: none"> • The Complaint Procedure of the ILO is regulated by Article 24 and 25 of the ILO Constitution • ILO Convention 169 can be relevant to the rights of the indigenous people
Applicable Rules

<ul style="list-style-type: none"> • ILO Convention 169 • ILO Constitution ➔ see Chapter 3
<p>Access, Costs and Duration</p>
<ul style="list-style-type: none"> • <u>Only an industrial association of employers/workers can submit so called representations</u> in accordance with Article 24 of the ILO Constitution – thus, indigenous people cannot go directly to the ILO, but have to seek help from another party • The limitation of not having a direct access as indigenous people might be remedied to some degree by the fact that the representation can be made by any industry association as there are <u>no further conditions as to size/nationality</u> in the Constitution • The costs of the proceedings are borne by the “organisation” (Brazil in this case) against which the complaint has been filed, regardless of the outcome of the case; the complainant will bear her own costs, including lawyer’s fees, but these may be fully/partly reimbursed by the defendant if the Tribunal considers this to be appropriate • It is not compulsory to be represented by a lawyer • Time limits: in order to be receivable a complaint must be filed within 90 days following the notification of the challenged decision (and <u>not</u> three months) – this time limit is established by Article VII of the ILO Statute and cannot be extended • A comparable case successfully brought against Brazil took 3 years and a half to be decided
<p>Expected Outcome</p>
<ul style="list-style-type: none"> • If the representation is considered to be receivable by the Governing Body of the ILO, then it sets up a committee to consider the issue (the committee will be composed by members of States, employers and workers); the committee then formulates a report to be submitted to the Governing Body – this report contains recommendations for the Governing Body’s decision (the State concerned has a right to have a representative in that body) • The Governing Body has to accept or reject the report and can then decide to publish the representation • The report of the committee is not legally binding, and the report adopted by the Governing Body is <u>not legally binding</u> either, as is clear from the Standing Orders of the ILO – generally, most recommendations by the committee constitute <u>general and future-oriented relief (for example, addressing what the State should do to involve indigenous communities better, rather than aiming at the specific indigenous people alone)</u>, addressing the general policy problem in the State and making recommendations thereupon • However, the Standing Order also states that in formulating its recommendations as to the decision to be taken by the Governing Body, the committee may take into account the interest that the association making the representation has in taking action with regard to the situation motivating the representation – such interest might exist if the representation emanates from international workers’ or employers’ associations when the representation concerns matters directly affecting their affiliated organizations

Overall Assessment
<ul style="list-style-type: none"> • It does not allow direct access for either indigenous peoples or NGOs, but it does allow great discretion for industry association representative • Although the report of the Committee is not legally binding, it is usually adopted by the government concerned with remedial technical aid offered • The fact that the procedure is actively used with 20 precedents including successfully invoked Brazil Case makes a strong case the potential of the procedure

Paris Agreement Non-Compliance Mechanism
Overview
<ul style="list-style-type: none"> • Paris Agreement is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC) dealing with greenhouse gas emissions mitigation, adaptation and finance; Brazilian government ratified it in 2016 • Compliance with Paris Agreement is included in the new trade agreement between EU and Mercosur that has not yet ratified
Applicable Rules
<ul style="list-style-type: none"> • Paris Agreement • Intended Nationally Determined Contribution (iNDC) of Brazil (NDC interim registry) • United Nations Framework Convention on Climate Change (UNFCCC) • (when ratified) The New EU-Mercosur Trade Agreement: agreement in principle (note that legal text is being drafted) → see Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • The non-compliance mechanism of the Paris Agreement provides little in terms of how the mechanism would work; it indicates the mechanism consists of committee of expert-based and facilitative in nature but leaves the operation modalities to be adopted by the Conference of the Parties • Given that the Conference serves as the meeting of the Parties to the Agreement and that only Parties are allowed to participate, the accessibility for any other actors including NGOs is very low • Also, given that the non-compliance Committee is not yet set up, the expected duration is not short for the mechanism to play leverage • If we want to use the trade agreement leverage through the EU-Mercosur deal, the access for complaints will be allowed only for the EU countries.

Expected Outcome
<ul style="list-style-type: none"> • Since the Committee for non-compliance is expected to be facilitative in nature and to function in a non-punitive manner, it is hard to say it has strong enforceability • However, considering that climate change is more and more becoming a central issue of the international community, the Committee's move can play great influence • Even when we use the EU-Mercosur trade agreement to play leverage, the enforceability for the sustainable development chapter that includes Paris Agreement is weak offering merely 'recommendations' of Panel.
Overall Assessment
<ul style="list-style-type: none"> • Paris Agreement has potential to be a useful influential tool as the climate change issue is becoming a growing concern of the world • However, the non-compliance mechanism of Paris Agreement provides little enforceability and potentially using trade agreement, as well, would not bring more than mere recommendations

3. Non-State Mechanisms

National Contact Points (NCPs) for the OECD Guidelines for Multinational Enterprises
Overview
<ul style="list-style-type: none"> To submit a complaint to one of the NCPs of the OECD Guidelines is an option frequently pursued due to its easy accessibility and it being one of the few possibilities to directly confront multinational corporations with their actions abroad
Applicable Rules
<ul style="list-style-type: none"> OECD Guidelines for Multinational Enterprises -> see Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> NCPs exist in many European countries, the US, and Brazil (as well as a number of other countries) Complaints can be submitted by individuals as well as NGOs Precondition for accessing an NCP is that the company addressed is either operating in the country or has its headquarters there Depending on the NCP, the processing of a complaint typically takes around a year, while the case itself can take several years A relatively high number of cases is rejected at the initial assessment stage due to a high standard of proof at many NCPs No fees are charged by the NCPs themselves, but other costs can occur in the process For more details on access requirements, see the website of the NGO OECD Watch, which is specialised in NCP complaints
Expected Outcome
<ul style="list-style-type: none"> The procedure of the NCPs is mediative in nature and seeks to reach an agreement between the complainant and the defendant company Recommendations issued by the respective NCP are not binding on the company The procedure can however create pressure on the company to change its behaviour or policies 6% of the complaint submitted under the 2011 version of the Guidelines resulted in agreement between complainant and company, a total of 18% resulted in a statement by the NCP The impact of a case will also depend on how professionally the respective NCP operates – many European NCPs, including the Swiss one, have admitted a relatively high number of complaints, whereas the Brazilian NCP has only admitted very few cases, only one of which led to an agreement It would likely be most effective to challenge companies based outside of Brazil, not only because this gives access to National Contact Points (NCPs) which may be more independent and professional than the

Brazilian one, but also because foreign (especially European) companies might be more responsive to claims raised against them
Overall Assessment
<ul style="list-style-type: none"> • The OECD Guidelines are a very easily accessible procedure that can have influence on company behaviour • Its usefulness will largely depend on the available facts on a company's or financier's involvement in deforestation or indigenous rights violations • Given the current difficult situation of Brazilian civil society, the likely politicised nature of the Brazilian NCP, and the dependence of the Brazilian economy on foreign investments, it seems a lot more sensible to address the behaviour of large foreign companies, than that of Brazilian ones

Export Credit Agencies (ECAs) Complaints Mechanisms
Overview
<ul style="list-style-type: none"> • Many (in particular “Western”) states run state-funded ECAs that provide companies as well as financial institutions which export or invest in developing countries with loans and insurances to support exports and foreign investments • This support is usually subject to the compliance with international standards such as the IFC Performance Standards or the OECD Guidelines
Applicable Rules
<ul style="list-style-type: none"> • <i>OECD Common Approaches for Officially Supported Export Credits</i> – this document references as applicable standards: <ul style="list-style-type: none"> ○ <i>World Bank Safeguard Policies</i> (see separate overview), or ○ <i>IFC Performance Standards</i> (see separate overview), or “relevant aspects of the standards of a Major Multilateral Financial Institution”, where such an institution is supporting the project
Access, Costs and Duration
<ul style="list-style-type: none"> • The Swiss Export Risk Insurance (SERV) has an independent mediator to which complaints can apparently be addressed by anyone • Similar mechanisms are in place for the Norwegian Export Credit, the Swedish EKN, UK Export Finance, the US Ex-Im Bank, and the Spanish CESCE • An alternative is to file a complaint against an ECA before the OECD Guidelines National Contact Point of the respective country • Information about financing that violates international standards can also be used in political campaigns
Expected Outcome
<ul style="list-style-type: none"> • Nothing is known about potential precedents in the context of the Swiss mediation mechanisms – however, any relevant case involving an application of the above-mentioned applicable standards (particularly the

<p>World Bank Safeguards and the IFC Performance Standards) could serve as reference point</p> <ul style="list-style-type: none"> • Nothing is known about the exact procedure and effectiveness of the Swiss mediation mechanism • For prospects of a complaint before an OECD Guidelines National Contact Point, see the overviews on the OECD Guidelines • Political pressure on ECAs supporting projects with critical human rights records has led to the discontinuance of such support
Overall Assessment
<ul style="list-style-type: none"> • Since ECAs mainly secure exports and investments with a significant value and a certain financial risks, they often apply to major infrastructure projects • ECAs are backed by public money, which makes them likely more responsive to complaints or public pressure • The SERV does not seem to have financed any critical project in Brazil lately

International Finance Corporation (IFC) Compliance Advisor/Ombudsman (CAO)
Overview
<ul style="list-style-type: none"> • The International Finance Corporation (IFC) is the private sector arm of the World Bank Group, and thus gives out loans to the private sector in developing countries • It has an internal complaint mechanism, the so-called “Compliance Advisor/Ombudsman” (CAO)
Applicable Rules
<ul style="list-style-type: none"> • IFC Performance Standards → see Chapter 3
Accessibility
<ul style="list-style-type: none"> • The CAO accessible for both individuals and NGOs • However, to access the mechanism, <u>specific affectedness</u> by a project of the IFC or the Multilateral Investment Guarantee Agency (MIGA) has to be shown (an entity can also bring a complaint if it is not personally affected, but needs to clearly identify the people for which it is bringing the claim) • The CAO decides on the admissibility of a case within 15 days, but the case then can take several years • The CAO has typically admitted around 50% of the cases submitted to it during past years
Expected Outcome
<ul style="list-style-type: none"> • Upon receipt of a complaint, the CAO decides in dialogue with the parties to either <ul style="list-style-type: none"> ○ Pursue a dispute resolution process

<ul style="list-style-type: none"> ○ Conduct a compliance review on the basis of the IFC Performance Standards, which includes broad investigatory powers for the CAO and results in a statement of compliance or non-compliance of the IFC with the Performance Standards • No data has been found on the percentage of compliance reviews that result in finding non-compliance, but a finding of non-compliance appears to be rather frequent if the claim submitted is substantiated • There have been some reports of CAO findings remaining largely inconsequential for affected local communities
Overall Assessment
<ul style="list-style-type: none"> • The IFC Performance Standards, although no official “legal” document, contain relatively strong provisions on indigenous rights as well as environmental protection • The CAO procedure can result in a rather rigorous investigation of a case, although the exact consequences of a finding of non-compliance remain uncertain

World Bank Inspection Panel
Overview
<ul style="list-style-type: none"> • Complaints on an alleged violation of either the Operational Policies or the ESF can be brought before the largely independent <u>World Bank Inspection Panel</u>
Applicable Rules
<ul style="list-style-type: none"> • For projects launched before October 2018: Operational Policies • For projects launched after October 2018: Environmental and Social Framework (ESF) ➔ See Chapter 3
Accessibility
<ul style="list-style-type: none"> • Access is restricted to <u>groups of people (not individuals) from the country in which a project is located</u> • <u>Specific affectedness</u> must be shown • A complaint can only be submitted once prior attempts of solving the issue with the bank management (e.g. by writing a letter) were unsuccessful • The Panel usually registers complaints within few weeks, but the cases can then take several years
Expected Outcome
<ul style="list-style-type: none"> • When a case is concluded, the Inspection Panel sends its final report to the Executive Directors • The Bank Management then makes recommendations, on which the Executive Directors decide (the Inspection Panel itself cannot make recommendations)

<ul style="list-style-type: none"> • Outcomes of complaints to the Inspection Panel have been reviewed rather positively, but there is no guarantee for effective implementation • No data on the likeliness of a complaint to be successful was found • A major factor causing insecurity in terms of the outcome of the procedure is the recent introduction of the ESF and the unclarity to what extent it can serve as a basis for Inspection Panel investigations, since in the new system countries will often be able to apply their own safeguards system instead of the ESF
Overall Assessment
<ul style="list-style-type: none"> • The Inspection Panel process can be an effective procedure if a relevant case of World Bank financing can be identified, but is currently rendered a more uncertain option due to the recent introduction of the ESF – which strengthen certain standards but could lead to a weakening of the Inspection Panel itself • The ESF and other World Bank standards, due to their prestige and wide influence, can also be important documents of reference in other contexts

Inter-American Development Bank (IDB) Group
Overview
<ul style="list-style-type: none"> • Major multilateral development bank operating in the whole of Latin America and the Caribbean • Financed projects of (such as major infrastructure projects) can be challenged by affected people through an internal complaints mechanism
Applicable Rules
<ul style="list-style-type: none"> • For projects financed until 2021 (approx.): IDB Operational Policies • For projects financed from 2021 (approx.): newly developed Environmental and Social Policy Framework (ESPF) <p>➔ See Chapter 3</p>
Accessibility
<ul style="list-style-type: none"> • A complaint can be filed by two or more persons on the basis of the Operational Policies to the bank’s Independent Consultation and Investigation Mechanisms (MICI), which reports directly to the bank’s Board of Executive Directors • MICI can deal with projects both of the government-lending and private sector arm (IDB Invest) of the bank • Specific affectedness must be shown – if the specifically affected individuals are represented by someone else (e.g. an NGO), this requires authorization by those individuals • Complainants are expected to have informally complained to IDB management (and documented this complaint) prior to submitting a formal letter under the MICI (unless reprisals are feared) • Topics on which active legal proceedings are taking place may be excluded from MICI process

<ul style="list-style-type: none"> Complaints can aim for either a non-adversary <i>consultation</i> process or to a <i>compliance review</i> by MICI, resulting in a public report presented to the Board of Executive Directors <ul style="list-style-type: none"> But: the compliance review is subject to approval by the Board of Executive Directors! No financial costs involved in filing a complaint The decision on the eligibility of a complaint is taken within 42 to 80 business days The length of the consultation/investigation process depends on the state to which the complaint passes: complaints passing to the compliance review phase usually take 2-4 years The MICI website provides rather detailed information for complainants, including a model complaint letter
Expected Outcome
<ul style="list-style-type: none"> A successful complaint does usually not lead to the halt of a project, compensation is not awarded Very few complaints make it to the compliance review phase and thus result in a public report, but even without such a report, a complaint can effectuate important changes both for the respective projects and for internal processes in the bank The steps taken in response to a successful complaint are entirely subject to the discretion of the Board of Executive Directors
Overall Assessment
<ul style="list-style-type: none"> The MICI mechanism is easily accessible and can be a useful mechanism for persons affected by a project financed through the IDB, but also potentially to promote change in the IDB itself The actual outcome for the complainants are however somewhat unpredictable

Office of the Extractive Sector Corporate Social Responsibility Counsellor
Overview
<ul style="list-style-type: none"> Better known as the Mining Counsellor – this Canadian government office was set up in 2009 Its roles are advisory and dispute resolution The dispute resolution is to resolve disputes between Canadian companies and communities outside Canada This avenue is relevant in light of the activities of Canadian mining companies in Brazil

Applicable Rules
<ul style="list-style-type: none"> • <u>Dispute</u> to be connected to performance standards endorsed by Canada (see Chapter 3): <ul style="list-style-type: none"> ○ International Finance Corporation Performance Standards ○ Voluntary Principles on Security and Human Rights ○ Global Reporting Initiative ○ OECD Guidelines for Multinational Enterprises • The Counsellor does not deal with violations of national or international laws → See Chapter 3
Access, Costs and Duration
<ul style="list-style-type: none"> • Access is only available for communities outside Canada that have a dispute with a Canadian mining company – this clearly includes Brazilian indigenous communities affected by Canadian companies • According to the rules of procedure: requests to the counsellor must be brought by those affected by the mining activities – although an NGO brought the case against McEwen Mining • The person bringing the case must have engaged the company directly before approaching the Counsellor – this includes local judicial remedies
Expected Outcome
<ul style="list-style-type: none"> • The Mining Counsellor’s findings are limited to fact finding, mediation, or trust building functions • The decisions are not legally binding • The decisions will be limited to the specific requests brought and not general mining practices • Additionally, the procedure will only proceed so long as both parties agree • Initiating proceedings may also be accessible to NGOs • There is no requirement of no other international mechanism not being pursued • However, the applicable rules are only soft law instruments and standards – an indication of the low legal gravity • The Counsellor is not well known and is unlikely to generate media interest • The decisions are not binding • Any potential of the procedure can only be used if the company being complained against does not opt out of the procedure

Overall Assessment

- The procedure is interesting as it provides a forum to raise specific forums by Brazilian indigenous peoples against Canadian mining companies
 - Initiating proceedings may also be accessible to NGOs
 - There is no requirement of no other international mechanism not being pursued
 - The fact finding functions as well as providing a forum for mediation may be useful
 - However, the applicable rules are only soft law instruments and standards – an indication of the low legal gravity
 - The Counsellor is not well known and is unlikely to generate media interest
 - The decisions are not binding
- Any potential of the procedure can only be used if the company being complained against does not opt out of the procedure

4. Communications and Reports

Universal Periodic Review (UPR)
Overview
<ul style="list-style-type: none"> • The UPR is a UN Human-Rights-Council driven human rights review process in which every member state of the UN is questioned every 5 years by other member states on its human rights record • The basis for the review are several reports – among others, one prepared on the basis of NGO submissions. As a result of the review, the concerned state is provided with a list of recommendation, to which it needs to react
Applicable Rules
<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights (ICCPR) • International Covenant on Economic, Social and Cultural Rights (ICESCR) • International Convention on the Elimination of All Forms of Racial Discrimination (CERD) • Convention on the Rights of the Child (CRC) • ILO Convention 169 • UN Declaration on the Rights of Indigenous Peoples (UNDRIP) • American Convention on Human Rights (ACHR) → See Chapter 3 • Any other human rights treaties or voluntary human rights commitments of Brazil • However, the exact right that is supposedly breached by the state is often not even explicitly mentioned in the states and NGO reports
Accessibility
<ul style="list-style-type: none"> • The next review of Brazil in <u>March 2022</u>, the deadline for the submission of NGO reports is <u>8 months earlier</u> • There are different ways in which international NGOs can influence the procedure, with different respective “costs”: <ul style="list-style-type: none"> ○ <u>Sending a report on</u> (some aspects of) the human rights situation in the country, which can then enter the summary of civil society reports ○ <u>Lobbying other states</u> before the adoption review session, in order to point them to specific human rights aspects which they can then address during the review ○ <u>Taking the floor at the Human Rights Council</u> when the final report for the country is adopted (for this, ECOWAS accreditation is needed) ○ <u>Monitoring the implementation</u> of the recommendations by the state, e.g. by submitting an informal “<u>midterm report</u>” halfway through the review cycle, which is published on the OHCHR website (in the case of Brazil this would be around <u>November 2019</u>) – more information on this option can be found in a report drafted by UPR Info • There is a number of formal requirements for these avenues of NGO intervention; for more details see the excellent UPR Info website

Expected Outcome
<ul style="list-style-type: none"> • The UPR has rather weak follow-up and monitoring mechanisms – the submittal of a midterm report can contribute to at least some form of monitoring of implementation • The process does, however, direct attention of a variety of international actors, including states and UN agencies, to the human right situation in a country • Studies on the influence of NGOs through the UPR process have shown mixed results (but this influence is also very difficult to measure)
Overall Assessment
<ul style="list-style-type: none"> • The UPR has rather weak follow-up and monitoring mechanisms, but the submittal of a midterm report can contribute to at least some form of monitoring of implementation • The process does direct attention of a variety of international actors, including states and UN agencies, to the human right situation in a country

UNESCO Human Rights Complaints Procedure (Procedure 104)
Overview
<ul style="list-style-type: none"> • The UN Educational, Scientific and Cultural Organization (UNESCO) provides for a little-known, confidential complaints procedure for alleged violations of human rights following within its sphere of competence
Applicable Rules
<ul style="list-style-type: none"> • E.g. right to participate in cultural life (as stated, inter alia, in Art. 15 ICESCR) → See Chapter 3 • The mechanism is not treaty-based: the invocation of the violation of a human right does not depend on whether the country ratified a treaty in which the respective right is affirmed
Accessibility
<ul style="list-style-type: none"> • Any member states of UNESCO can be addressed • Accessible to individuals, groups and NGOs • No specific affectedness needs to be shown, knowledge of a particular violation is enough <ul style="list-style-type: none"> ○ But: knowledge must go beyond what is disseminated through the mass media • Communication must indicate any attempts made to exhaust local remedies • Communication must be submitted within reasonable timeframe after facts at issue become known

Expected Outcome
<ul style="list-style-type: none"> • A complaint results in confidential dialogue between UNESCO and the concerned government, sometimes carried out by the UNESCO Director-General him- or herself • Aim is not to “condemn” or “penalize” concerned governments, but to find a solution with the government to improve the situation for victims • The procedure has thus far apparently mainly been accessed by individual intellectuals, such as researches, students, artists and journalists, for whom the UNESCO interventions have in many cases led to the betterment of the situation • No information is available on minorities or indigenous communities making use of the procedure, and of the outcomes of such attempts
Overall Assessment
<ul style="list-style-type: none"> • With focus being on individual cases, this procedure can be seen as complementary to the communications system of the Human Rights Council, which exclusively deals with patterns of gross and wide-spread human rights violations • Appears to be mainly meant to address individually affected intellectuals, but its scope theoretically also encompasses the cultural rights held by indigenous peoples • Given a recent initiative by UNECISO to revive the mechanism, to use it might, depending on the case, be worth a try

United Nations Human Rights Council (HRC) Complaints Submission
Overview
<ul style="list-style-type: none"> • The adoption of the resolution 5/1 of 18 June 2007 allowed HRC to address “consistent patterns of gross and reliably attested violations” of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances, through a complaint procedure • HRC is one of the “highest levels” of the United Nations human rights machinery, and this complaint procedure is the only universal complaint procedure covering all human rights and all fundamental freedoms in all States Members of the UN • The procedure is confidential with a view to enhance cooperation with the State concerned
Applicable Rules
<ul style="list-style-type: none"> • A complaint can be submitted against any State Member of the UN irrespective of whether the country has ratified any particular treaty or not • Example instrument that can be invoked include UN Declaration on the Rights of Indigenous Peoples (UNDRIP), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All

Forms of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC)
Access, Costs and Duration
<ul style="list-style-type: none"> • Any <u>individual, group of individuals or NGO</u> can submit a complaint against any State Member of the UN • <u>Admissibility criteria</u>: description of the relevant facts that does not exceed 15 pages; non-political motivation; not exclusively mass media based information; not being already dealt with by a special procedure, a treaty body or other UN/similar regional complaint procedure in the field of human rights (principle of non-duplication); domestic remedies having been exhausted unless such remedies would be ineffective/unreasonably prolonged; not aimed at remedies/compensation • No financial cost
Expected Outcome
<ul style="list-style-type: none"> • Once the complaint meets the admissibility criteria, the Working Group on Communications meets twice a year to assess the merits of the allegation; at this stage, the Working Group on Communications may request further information within a reasonable time • The Working Group on Situations then meets twice a year and presents a report to the Council, on the basis of, but not bound by, the information and recommendations provided by the Working Group on Communications • The Council then examines the report of the Working Group on Situations in a confidential manner and may take one of the following decisions: <ul style="list-style-type: none"> ○ Discontinue considering the situation when further consideration/action is not warranted; ○ Keep the situation under review and request the State concerned to provide further information within a reasonable period of time; Keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council; ○ <u>Discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same (naming and shaming)</u>; ○ <u>Recommend to OHCHR to provide technical cooperation, capacity building assistance or advisory services to the State concerned</u>
Overall Assessment
<ul style="list-style-type: none"> • It is an advantage that a complaint can be submitted irrespective of whether the country has ratified any particular treaty or not • However, evidence of “consistent patterns of gross and reliably attested violations” of human rights could be challenging to find • Also, exhaustion of domestic procedure as well as the principle of non-duplication are obstacles to use the avenue

Communications to UN Special Rapporteurs
Overview
<ul style="list-style-type: none"> • There are a number of UN Special Rapporteurs that could be contacted regarding the recent developments in the Amazon – The Special Rapporteurs are independent human rights experts who report and advise on human rights issues according to themes and countries¹⁹³ • There are a number of thematically relevant Special Rapporteurs: <ul style="list-style-type: none"> ○ Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment ○ Special Rapporteur on the situation of human rights defenders ○ Special Rapporteur on extreme poverty and human rights ○ Special Rapporteur on the rights of indigenous peoples ○ Special Rapporteur on the human rights of internally displaced persons ○ Special Rapporteur in the field of cultural rights
Applicable Rules
<ul style="list-style-type: none"> • A range of international human rights instruments may be relied upon by the Special Rapporteurs. Example instrument that can be invoked include UN Declaration on the Rights of Indigenous Peoples (UNDRIP), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC). These instruments are discussed in detail in Chapter 3 of this report.
Access, Costs and Duration
<ul style="list-style-type: none"> • Only a select few Special Rapporteurs – with thematically relevant mandates mentioned above – offer the possibility of communications from individuals to raise violations of human rights • The Special Rapporteurs include: <ul style="list-style-type: none"> ○ Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment ○ Special Rapporteur on the situation of human rights defenders ○ Special Rapporteur on extreme poverty and human rights ○ Special Rapporteur on the rights of indigenous peoples • Individuals, groups, civil society actors or national human rights bodies can submit information – they may be victims (directly or indirectly) or have direct knowledge of alleged violations • <i>Local remedies do not need to be exhausted</i> • Such communications do not impose any financial costs

¹⁹³ For more information on UN Special Rapporteurs visit www.ohchr.org.

Expected Outcome
<ul style="list-style-type: none"> • Special Rapporteurs possess four key mandates: <ul style="list-style-type: none"> ○ Identifying obstacles and challenges to the fulfilment of human rights ○ Building dialogue and cooperation between various actors (states and civil societies for instance) ○ Conducting country visits and preparing subsequent reports ○ Addressing communications by seeking clarification from stakeholders on the alleged violations, action to mitigate violations including remedies for victims
Overall Assessment
<ul style="list-style-type: none"> • The Special Rapporteurs command respect due to their own reputation and expertise as well as the reputation and wide acceptance of the underlying human rights instruments to their activities • It is very easy to bring communication to those Rapporteurs who have the mandate – there are no fees or requirement for the exhaustion of local remedies – all possible stakeholders could initiate a communication • The Communications to Special Rapporteurs do not result in an investigative or judicial process – therefore the ability to affect change through Special Rapporteurs is limited