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**The Complex Relationship between Competition Law and Initiatives
for Halting Deforestation in the Amazon***Juan David Gutiérrez & Sebastián Solarte-Caicedo**

This article examines whether and how national competition law facilitates (or impedes) initiatives that aim at dealing with deforestation in the Amazon. The article follows a case-study design, with in-depth analysis of the cases of five South American countries: Bolivia, Brazil, Colombia, Ecuador, and Peru. We investigated whether competition law has had and/or could have incidence (positive or negative) on public and/or private initiatives that aimed at tackling deforestation in the Amazon. We report that we did not find significant competition enforcement and non-enforcement activities that explicitly and meaningfully promoted this type of environmental initiatives in Bolivia, Brazil, Colombia, Ecuador, and Peru. In contrast, based on the current laws and recent case law, we conclude that there is a high risk that antitrust gets in the way of initiatives that aim at dealing with deforestation in the Amazon, particularly in Brazil. The research attempts to contribute to the field of competition law and sustainability. The main article's contributions are three-fold. First, we contribute to research on how competition law can negatively affect certain environmental initiatives: those that aim at tackling deforestation. Second, while most of the scholarship focuses on the legislations and case law from North America and Europe, this paper contributes to the literature by exploring jurisdictions from the Global South. Third, this study contributes to research on the relationship between competition law and informal markets and highlights the limits and risks of using competition law as a public policy instrument in so-called 'developmental' contexts.

1. INTRODUCTION

The Amazon basin hosts about 25% of global biodiversity, accounts for 40% of the world's tropical forest area, and it is a source of 20% of the planet's freshwater.¹ Amazonia is critical for stabilising the world's climate stability and currently can absorb the equivalent of '20 percent of the atmospheric carbon emitted by the burning of fossil

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¹ Melissa Ruiz-Vásquez and others, 'Effects of Amazon Basin Deforestation on Regional Atmospheric Circulation and Water Vapor Transport towards Tropical South America.' (2020) 54 *Climate Dynamics* 4169; DV Spracklen and L Garcia-Carreras, 'The Impact of Amazonian Deforestation on Amazon Basin Rainfall' (2015) 42 *Geophysical Research Letters* 9546; MA Tigre, 'Building a Regional Adaptation Strategy for Amazon Countries' (2019) 19 *International Environmental Agreements: Politics, Law and Economics* 411.

fuels'.² However, its ecosystems are threatened by global climate change and by rapid and continuous deforestation within the basin.

While protecting the Amazon is a global challenge that requires a multi-level governance approach, South American governments that share the basin are responsible for the national public policies that may address the problems that are specifically originated in its territory. At the national level, diverse environmental and climate policies have been proposed, formulated and/or implemented to curb deforestation in the Amazon and, in general, to mitigate climate change.

This article aims at contributing to the field of competition law and sustainability through an examination of the role of competition law as a policy instrument that can contribute (or hinder) the achievement of specific environmental objectives. While competition law is not usually part of environmental protection policy toolbox, it is being considered by governments in other regions of the World, particularly Europe, as a means for addressing environmental challenges. The main research question addressed by this article is whether and how national competition law and policies have had and/or could have incidence (positive or negative) on public and/or private initiatives that aimed at tackling deforestation in the Amazon.

Amazonia occupies around 40% of South America and its area, of approximately 5.3 million km², is shared by eight South American countries (Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela) and French Guyana (territory of France)³. Almost all these countries have competition laws: Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela. However, Guyana, Suriname and Venezuela scarcely enforce their competition laws.⁴

The article follows a case-study design, with in-depth analysis of the cases of five South American countries: Bolivia, Brazil, Colombia, Ecuador, and Peru. Three criteria were used to select the cases: (i) that the country shares part of the Amazon basin, (ii) that the country has a national competition law, and (iii) that the country actively enforces competition laws.⁵

Following Holmes⁶ and Nowag,⁷ the article examines whether the enforcement of competition law in Bolivia, Brazil, Colombia, Ecuador, and Peru could be used as a

² Tigre *ibid* 412.

³ Xiao-Peng Song and others, 'Annual Carbon Emissions from Deforestation in the Amazon Basin between 2000 and 2010' (2015) 10 PLOS ONE e0126754; Spracklen and Garcia-Carreras (n 1); Tigre (n 1).

⁴ Juan David Gutiérrez, 'Derecho de La Competencia En América Latina y El Caribe: Evolución y Principales Retos', *Anuario de Derecho de la Competencia* (La Ley 2021).

⁵ Bolivia, Colombia, Ecuador, and Peru are part of the Andean Community of Nations (CAN), that has its own supranational competition rule (Decision 608) and regional competition authority (*Secretaría General, SGCAN*). However, the enforcement activity of the CAN's competition rules is very scarce Juan David Gutiérrez, 'Chapter 28: South America', *Research Handbook on Cartels* (Edward Elgar Publishing 2023) <<https://www.elgaronline.com/view/book/9781839102875/book-part-9781839102875-39.xml>>.

⁶ Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 *Journal of Antitrust Enforcement* 354.

‘sword’ or a ‘shield’ for the conservation of the Amazon rainforest by preventing harmful conduct and shielding practices that address deforestation. Furthermore, the text explores whether competition laws could be an obstacle for attaining environmental purposes in the Amazon. The research embraces a ‘law on the books versus law in action’ approach, hence we explore in the selected cases how competition law is codified and how it is enforced in practice.

We addressed the main research question through positive analysis: studying whether competition law has promoted and/or hindered public and/or private initiatives that aimed at tackling deforestation. For that purpose, we examined case law associated with markets that are negatively associated with deforestation (such as livestock, agriculture, timber, mining, etc.). We report that we did not find significant competition enforcement and non-enforcement activities that explicitly and meaningfully promoted this type of environmental initiatives in Bolivia, Brazil, Colombia, Ecuador, and Peru. In contrast, based on the current laws and recent case law, we conclude that there is a high risk that antitrust gets in the way of initiatives that aim at dealing with deforestation in the Amazon, particularly in Brazil.

The main article’s contributions are three-fold. First, we contribute to research on how competition law can negatively affect certain climate action initiatives: those that aim at tackling deforestation. Second, while most of the scholarship on competition law and sustainability focuses on the legislations and case law of North America and Europe, this paper contributes to the literature by exploring jurisdictions from the Global South. Third, this study contributes to research on the competition law and informal markets and highlights the limits of competition law as a public policy instrument in so-called ‘developmental’ contexts.

The article is divided into five sections, including this introduction. The second section overviews the literature on the links of antitrust with environmental policies with the objective of identifying the location of this article within the scholarship. The third section explains why deforestation is a major environmental challenge in the Amazon, overviews the main market-drivers of deforestation, and describes the conservation policies formulated and implemented by Bolivia, Brazil, Colombia, Ecuador, and Peru. The fourth section analyses whether competition law in the selected cases, in theory and in practice, has fostered or hindered initiatives to address deforestation of the Amazon. The last section summarizes the main findings and discusses policy implications.

2. LITERATURE REVIEW: ANTITRUST AND ENVIRONMENTAL POLICIES

Due to the increasing awareness about environmental issues in policy circles as well as to the appearance of cases in which competition and environmental interests seemed to be in conflict, in recent years scholars started to question the nature and extent of the possible relationship between these two fields.

⁷ Julian Nowag, ‘Sustainability & Competition Law and Policy – Background Note’ (Organisation for Economic Co-operation and Development (OECD) 2020) <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En)>.

The debate has mainly focused, as said in the previous section, on topics like climate change. For example, according to Holmes,⁸ the relationship between competition policy and the climate crisis is complex: on one hand, competition is one of the essential market institutions that gave rise to global warming, but on the other, competition policy could also be part of the solution – even if its contribution is limited in comparison to other strategies. This complex relationship can be extended to other environmental issues due to the tension between human market dynamics and ecological systems.⁹

In this article, we address Holmes' second point to analyse if competition can be part of the solution. As noted by Schinkel and Treuren,¹⁰ economic literature seems to suggest that competitive pressure induces firms to act more sustainably.¹¹ Nonetheless, other scholars have noted that firms in competitive markets might not have enough incentives to reduce the environmental impact of their goods and services if consumers are not willing to pay the price increase this shift might create.¹² Therefore, cooperation among competitors can be a useful strategy to share costs and reduce the risks of the early adoption of sustainable practices.¹³

However, agreements among firms may create competition concerns, despite their intention to pursue a superior environmental goal – e.g., an agreement to promote sustainable production practices might lead to an increase in the price of goods and services offered to consumers or the exclusion of polluting suppliers or competitors.¹⁴ Such cases might pose a complicated challenge to competition authorities, who, despite their desire to promote environmental behaviours, must address them according to the legislation applicable to competition investigations.¹⁵ Thus, if the legal framework does not allow the attenuation of 'traditional' competition analysis to incorporate environmental considerations, agreements among firms to promote more sustainable practices might be dismantled.¹⁶

⁸ Holmes (n 6).

⁹ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Sixth, Foundation Press 2022).

¹⁰ Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (2020) 72 *Amsterdam Law School Research Paper* 27.

¹¹ The term 'sustainability' has an environmental, economic, and social, dimension Nowag (n 7). However when we use the term in this paper, we refer only to the component of environmental protection.

¹² Maurits Dolmans, 'Sustainability Agreements and Antitrust – Three Criteria to Distinguish Beneficial Cooperation from Greenwashing' [2021] *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=3920369>> accessed 24 January 2022.

¹³ *ibid*; OECD, 'Sustainability and Competition' (n 7) 52.

¹⁴ Annalies Outhuijse, 'The Relation Between Environment and Competition Policy: Trends in European and National Cases' [2019] *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=3582510>> accessed 24 January 2022.

¹⁵ Jr Kwoka and Diana L Moss, 'Competition Policy and the Transition to a Low-Carbon, Efficient Electricity Industry' (Social Science Research Network 2010) *SSRN Scholarly Paper* ID 1612811 <<https://papers.ssrn.com/abstract=1612811>> accessed 24 January 2022; Outhuijse *ibid*.

¹⁶ Eva Chaideftos, 'The Changing Climate for Competition Law'. (Thesis 2020).

For this reason, scholars and competition authorities have studied if and how environmental considerations could be included when assessing the impacts of potentially anti-competitive agreements.¹⁷ This analysis has also been extended to unilateral conducts,¹⁸ merger reviews,¹⁹ state-aid and publicly owned firms,²⁰ and competition advocacy.²¹ By doing so, researchers and practitioners expect to find ways in which competition policy can contribute to mitigating the climate crisis. This topic will be further discussed below.

But certain circumstances determine the likelihood of said contribution. For example, the practices under discussion are conducted by market actors as a way of supplementing environmental regulation – for example, failure of regulatory bodies to enact command-and-control mechanisms can motivate concerned downstream private agents to take voluntary action and limit purchases of certain agricultural products based on their unsustainable origin.²² Therefore, the existence of markets whose failures can be addressed by its agents is a prerequisite for even considering competition policy as a useful tool to tackle climate change. This explains why the European debate around competition and the environment has been the most prominent: European market agents can have increased levels of environmental awareness and act accordingly.²³ However, this does not mean that private engagement with pro-environmental attitudes should be discouraged due to its potential

¹⁷ A Claici and J Lutz, ‘Beyond the Policy Debate: How to Quantify Sustainability Benefits in Competition Cases’ (2021) 5 *European Competition and Regulatory Law Review* 200; Julian Nowag, ‘Competition Law’s Sustainability Gap? Tools for an Examination and a Brief Overview’ [2019] Lund University Legal Research Paper Series <<https://papers.ssrn.com/abstract=3484964>> accessed 24 January 2022; OECD, ‘Sustainability and Competition’ (n 7); Theon van Dijk, ‘A New Approach to Assess Certain Sustainability Agreements Under Competition Law’, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021); Cristina Volpin, ‘Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)’ (*Competition Policy International*, 2020) <<https://www.competitionpolicyinternational.com/sustainability-as-a-quality-dimension-of-competition-protecting-our-future-selves/>> accessed 24 January 2022.

¹⁸ Holmes (n 6); Marios C Iacovides and Christos Vrettos, ‘Falling through the Cracks No More? Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice’ (2020) 79 *Stockholm University Research Paper* <<https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnab010/6352604>> accessed 24 January 2022.

¹⁹ Holmes (n 6).

²⁰ ‘State Aid: Commission Endorses the New Guidelines on State Aid for Climate, Environmental Protection and Energy’ (*European Commission*, 21 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6982> accessed 24 January 2022.

²¹ Juan David Gutiérrez and Andrés Felipe Suárez, ‘Using Competition Law to Link Regulation and Development’ (2023) 16 145.

²² Suzanne Kingston, ‘Introduction to Competition Law, Climate Change and Environmental Sustainability’ (Social Science Research Network 2021) SSRN Scholarly Paper ID 3786078 <<https://papers.ssrn.com/abstract=3786078>> accessed 24 January 2022; OECD, ‘Sustainability and Competition’ (n 7).

²³ P Jansen, SJ Beeston and L Van Acker, ‘The Sustainability Guidelines of the Netherlands Authority for Consumers and Markets: An Impetus for a Modern EU Approach to Sustainability and Competition Policy Reflecting the Principle That the Polluter Pays?’ [2021] *European Competition Journal* 1; Outhuijse (n 14); Viktoria HSE Robertson, ‘The New Sustainability Exemption in Austrian Competition Law’ [2021] *Journal of European Competition Law & Practice* <<https://www.ssrn.com/abstract=3957551>> accessed 24 January 2022; Schinkel and Treuren (n 10); van Dijk (n 17).

anticompetitive impacts. On the contrary, private agents are increasingly being drawn by policymakers and civil society organizations to achieve national, regional, and global environmental goals and ambitious climate efforts, such as the European Green Deal, have markets and private actors at their core.²⁴ But in the absence of appropriate market institutions, the potential of competition policy to contribute to the environmental crisis should be questioned.

Since this is one of the big issues that antitrust would face, in the following section we discuss the causes, consequences, and potential solutions to the environmental crisis in the Amazon. Further analysis about this matter will clarify the role that competition policy might have in environmental discussions about the Amazon.

3. DEFORESTATION AS AN ENVIRONMENTAL AND POLICY CHALLENGE

This section first portrays deforestation of the Amazon as a policy challenge and discusses the main economic determinants of the public problem. Then, the section overviews the main policies implemented in Bolivia, Brazil, Peru, Colombia, and Ecuador to deal with the socio-ecological crisis in the Amazon. This section provides the context to examine later, in section 4 of the article, the complex relationship of competition law and policy with public and private interventions for halting deforestation in the Amazon.

3.1. Market-led drivers of deforestation in the Amazon

The Amazon basin is an essential part of climate-related debates due to its capacity to store carbon dioxide. Moreover, its biodiversity is also unique: 34% of the mammals, 20% of the birds, and 58% of the fish are endemic.²⁵ The interaction between tectonic plates, climate, topography, and the sea over millions of years explains its special geodiversity and biodiversity.²⁶

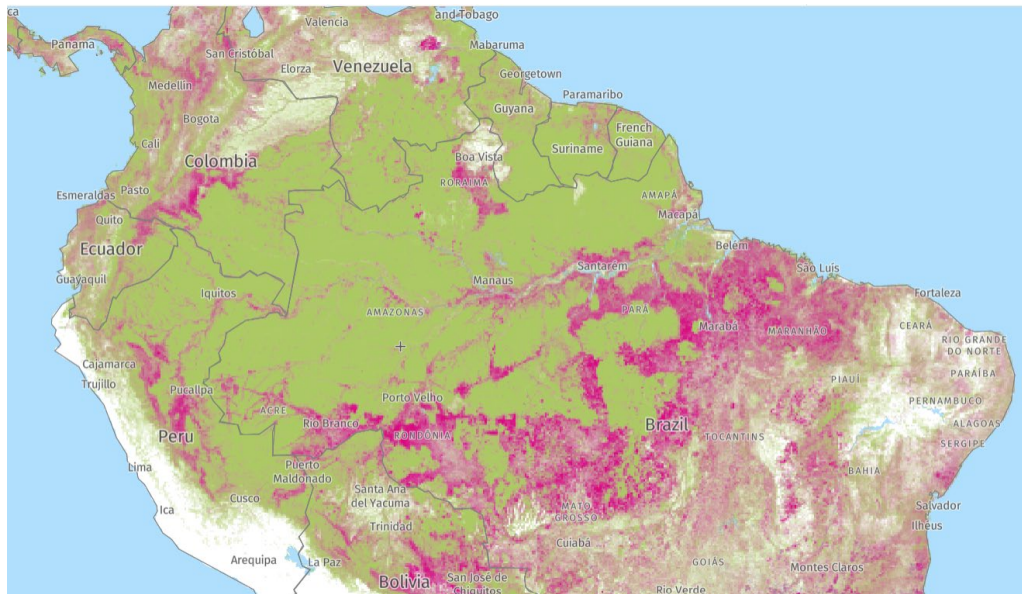
Unfortunately, according to the 2021 Amazon Assessment Report, the basin has experienced considerable socio-ecological transformations during the past two centuries and the causes and possible solutions surrounding this problem are complex and require the coordination of many stakeholders and ontologies. To illustrate these changes, the Figure 1 shows in green the tree cover in the countries under study and in purple the area of gross tree cover loss²⁷ between 2001 and 2021.

²⁴ Panagiotis N Fotis, 'Sustainable Development and Competition Policy' (2021) 1 Energy Research Letters <<https://erl.scholasticahq.com/article/18578-sustainable-development-and-competition-policy>> accessed 24 January 2022; Kingston (n 22).

²⁵ Science Panel for the Amazon, 'Amazon Assessment Report 2021' (United Nations Sustainable Development Solutions Network 2021) <<https://www.theamazonwewant.org/amazon-assessment-report-2021/>> accessed 25 January 2022.

²⁶ *ibid.*

²⁷ Tree cover loss is not equivalent to deforestation since the removal or mortality of trees can also be associated with other factors such as fire, diseases, and storm damages MC Hansen and others, 'High-Resolution Global Maps of 21st-Century Forest Cover Change' (2013) 342 Science 850.

Figure 1

Source: Hansen/UMD/Google/USGS/NASA, accessed through Global Forest Watch²⁸

Historically, land transformation has been identified as one of the main ways in which humans have altered Earth ecosystems.²⁹ In the case of the Amazon basin, aggressive and unprecedented transformations have been taking place due to the exploitation of raw materials like rubber since the nineteenth century.³⁰ Moreover, since the 1970s Latin American countries adopted an export-oriented, market-friendly model, which reinforced the transformations of the Amazon landscape: Through extended human intervention, raw materials such as soy, beef, coca, timber, and fossil fuels, among others, started to be heavily extracted to be sold abroad.³¹

The land transformation associated with these economic activities causes several types of socio-environmental degradation and biodiversity loss and threatens indigenous peoples' livelihoods.³² But the negative effects can transcend the local landscape and affect the planet in a massive scale. According to research about climate tipping points conducted by Lenton et al.,³³ the loss of the Amazon rainforest is one of the critical planetary thresholds in which a small change can produce a large-scale alteration in the Earth climate system. Even if the first estimations set the tipping point for the Amazon at 40% of deforestation, recent studies consider that the tipping point could be reached

²⁸ The data accessed through Global Forest Watch (www.globalforestwatch.org) is based on data set published by Hansen et al. *ibid.*, which has been updated until 2021 (version 1.9).

²⁹ Peter Vitousek and others, 'Human Domination of Earth's Ecosystems' (1997) 277 *Science*.

³⁰ Science Panel for the Amazon (n 25).

³¹ *ibid.*

³² *ibid.*

³³ Timothy M Lenton and others, 'Tipping Elements in the Earth's Climate System' (2008) 105 *Proceedings of the National Academy of Sciences* 1786.

with 20%-25% of deforestation.³⁴ This is critic given that approximately 17% of the rainforest has already been lost since 1970³⁵ and the droughts experienced during the past two decades are believed to be the first demonstration of this tipping point.³⁶

The way how governments and capitalists managed natural resource extraction activities in the Amazon basin, including the lack of transparency and accountability, explains some of the dynamics that are seen today. In fact, the roots of the constant migration in search for new opportunities, the absence of strong institutions, the possibility to grab lands and speculate, and the rise of environmental activism to protect the local communities and the forests can be traced back to these initial dynamics.³⁷ And if the equation is complemented with the natural characteristics of the Amazon rainforest, where only recent technological developments have allowed governments to monitor the activities that are taking place in its own territory, it can be understood why this landscape is an ideal place to undertake economic activities under irregular conditions.

For this reason, Amazonia experiences a combination of illegal markets – such as coca – with other markets whose supply chains are permeated with illegal activities – such as cattle, timber, fur, gold, or soy originating in deforested lands – but whose final products are commercialized in legal markets.

A case in point are cattle and beef markets. According to Harvard University's Atlas of Economic Complexity, Brazil ranked first in frozen beef exports, accounting for 20.31% of global exports. Interestingly, in 1995 Brazil's share was roughly over 2%. Deforestation, triggered by a set of policies and regulation to promote economic activities in the Brazilian Amazonia, is at the origin of this change. This phenomenon was driven by the international demand for cattle-related products, as well as a series of local social, environmental, legal, and economic circumstances – including the fragility of governmental and market institutions, such as property rights, as well as the possibility of successful land-grabbing, speculating, clearing, and ranching practices.³⁸

To promote these markets, capitalized farmers, landgrabbers, squatters, or ranchers hire local workers – some of which are migrant laborers assembled by intermediaries – to clear the land and later burn the remaining vegetation to introduce cattle or crops.³⁹

³⁴ Thomas E Lovejoy and Carlos Nobre, 'Amazon Tipping Point' (2018) 4 Science Advances <<https://www.science.org/doi/abs/10.1126/sciadv.aat2340>> accessed 25 January 2022.

³⁵ Timothy M Lenton and others, 'Climate Tipping Points — Too Risky to Bet Against' (2019) 575 Nature 592.

³⁶ Lovejoy and Nobre (n 34).

³⁷ For a chronicle on how markets in the Colombian Amazon (e. g., fur and rubber) were monopolized in the 1970s through violence in the mid-twentieth century, see Caicedo *Perdido En El Amazonas* (3rd edn, Planeta 2001).

³⁸ Francisco Luis Lima Filho, Arthur Braganca and Juliano J Assuncao, 'The Economics of Cattle Ranching in the Amazon: Land Grabbing or Pushing the Agricultural Frontier?' (*Climate Policy Initiative*, 2021) <<https://www.climatepolicyinitiative.org/publication/the-economics-of-cattle-ranching-in-the-amazon-land-grabbing-or-pushing-the-agricultural-frontier/>> accessed 27 June 2022.

³⁹ Philip M. Fearnside, 'The Roles and Movements of Actors in the Deforestation of Brazilian Amazonia' (2008) 13(1) Ecology and Society 23.

Resources for these activities can come from external legal and illegal sources, as well as governmental subsidies.

Different activities take place in these newly created ranches, being the most important ones the fattening ranches. They purchase the animals and sell them to traders, who slaughter and sell them again to businesses and stores – e.g., supermarkets or restaurants. Finally, consumers acquire beef products from these businesses and stores. In this process, several international actors, including auditors, financiers, importers, and supermarkets, are from Europe, United Kingdom, or United States.⁴⁰

In the case of cattle, illegal activities take place in the initial stages of the production process, but once the animals are slaughtered and sold, the dynamics of the beef market could be indifferent to the origin of the product. But with increasing awareness about the situation of the Amazon rainforest, consumers and other relevant stakeholders are changing this perspective.

The case of Brazilian beef traders illustrates this change. In 2009, Greenpeace published ‘Slaughtering the Amazon’, a landmark report in which they presented evidence on how the cattle sector was the largest driver of deforestation and the connection of the Brazilian government with this sector. The report also traced the products around the world and found that ‘Amazon-contaminated supply chain’ included companies in China, Europe, and the United States – beyond the beef sector.

As a result, the four largest beef traders – JBS, Bertin, Minerva, and Marfif – signed a ‘zero-deforestation agreement’ in October 2009. This was not the only agreement: since July 2009, several states have signed legally binding Terms of Adjustment of Conduct with other traders to dismiss potential legal claims associated with deforestation. As explained by Gibbs et al.,⁴¹ the main purpose of these accords was to block sales from ranches in which deforestation occurred after the date of their signature – leaving a gap for previous deforestation.

Interestingly, among their findings, Gibbs et al.⁴² concluded that traders reduced purchases from recently deforested ranches. Also, ranches behaved differently knowing that their beef might not be purchased if they kept deforestation patterns as they were before 2009.

Despite these findings, in 2019 a letter signed by 50 organizations addressed to Global Witness and Greenpeace warned potential financiers of the risk of investing in JBS and Marfrig. They highlighted that these traders, specially JBS, were not complying with the 2009 zero-deforestation agreement. Afterwards, audits conducted in 2020 and 2021 confirmed that JBS continued to purchase beef from sources linked to deforestation – mainly through the fattening ranches, who are the ones that purchase cattle from deforested ranches and then sell the animals to traders that do not verify the source of

⁴⁰ Moye, ‘Cash Cow’ (*Global Witness*, 2022) <<https://en/campaigns/forests/cash-cow/>> accessed 27 June 2022.

⁴¹ Holly K Gibbs and others, ‘Did Ranchers and Slaughterhouses Respond to Zero-Deforestation Agreements in the Brazilian Amazon?’ (2016) 9 *Conservation Letters* 32.

⁴² *ibid.*

the purchased animals. In section 4.3 of the paper we will return to the issue of ‘zero-deforestation agreements’ to discuss why competition law enforcement may get in the way of these type of private initiatives.

3.2. Conservation policies implemented in the Amazon

The Amazon countries have put different strategies in place during the past decades to counter this situation. Even though the basin is shared by several countries, the socio-ecological dimensions of the crisis are often local. Thus, governments are forced to balance between the pressure to protect an ecosystem of global relevance with the need to assess local circumstances to understand and tackle the root causes of deforestation.

One of proposed set of solutions, given the Amazon basin’s relevance in climate policy and the increased political attention to the matter, is associated with the global efforts to address global warming. These countries are parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, which makes them a part of the global pledge to maintain warming below 2°C – if possible, to 1.5°C – relative to pre-industrial levels.⁴³

Under Article 4 of the Paris Agreement, countries are expected to submit Nationally Determined Contributions (NDCs), which should ‘reflect [a country’s] highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances’.⁴⁴ Parties are also expected to update their NDCs every five years to include new information about the causes, consequences, and actions towards climate change at the national level.⁴⁵

The NDCs are particularly important for reaching the 1.5°C climate goal. According to Keohane and Oppenheimer,⁴⁶ the Paris Agreement is characterised by a pledge and review process. This means that the Paris Agreement sets the pathway for effective climate action, but its success depends on each countries’ willingness to adopt ambitious commitments and update them periodically. If ambitions are low, the global mean temperature increase will not be contained within the desired limits – as currently anticipated by the United Nations and non-governmental organizations.⁴⁷

If the loss of rainforest is considered a climate tipping point, the NDCs of the countries under analysis should be revised to assess if they contain valuable information about

⁴³ United Nations, ‘Paris Agreement’ (*United Nations Treaty Collection*, 2015) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 25 January 2022.

⁴⁴ *ibid.*

⁴⁵ United Nations, ‘Report of the Conference of the Parties on Its 21st Session, Held in Paris from 30 November to 13 December 2015’: (2016) <<https://digitallibrary.un.org/record/831052?ln=en>> accessed 25 January 2022.

⁴⁶ Robert O Keohane and Michael Oppenheimer, ‘Paris: Beyond the Climate Dead End through Pledge and Review?’ (2016) 4 *Politics and Governance* 142.

⁴⁷ The Climate Action Tracker, ‘The CAT Thermometer’ (2022) <<https://climateactiontracker.org/global/cat-thermometer/>> accessed 25 January 2022; United Nations, ‘NDC Synthesis Report’ <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs/ndc-synthesis-report>> accessed 25 January 2022.

their national commitments to protect the Amazon. Especially, since the Agriculture, Forestry, and other Land Use (AFOLU) sector represents the main source of greenhouse gas emissions in the region, according to Climate Watch.⁴⁸ As of 2016, this sector represented 58.16% of the greenhouse gas emissions in the Amazon countries. Besides AFOLU, transport (13.47%) and electricity and heat (7.59%) are the sectors with the largest emissions in the five countries under analysis. Hence, if the Amazon countries want to address climate change, focusing on the causes of AFOLU-related emissions – mainly, deforestation and agricultural activities – is imperative.

However, the level of policy ambition in the Amazon basin might not be as high as desired. Brazil, who is responsible for 69.5% of the AFOLU-related emissions in the countries under analysis, recently submitted an updated version of its NDC.⁴⁹ This document, enacted during the presidential term of Jair Bolsonaro, has been criticised because it does not include specific mitigation strategies, falls short in targeting specific sectors and, most importantly, undermines its initial commitment and opens a door for increasing emissions in the coming years.⁵⁰ Even if during the past decade the country prioritised actions to foster low-carbon agriculture systems, control deforestation, and forest fires,⁵¹ climate institutions have weakened since 2011 due to a lack of resources and political commitment, and, more recently, the adoption of a partisan discourse surrounding climate change.⁵² Thus, private agreements like the soy and beef moratoria have gained increased attention to stop deforestation and promote sustainable agricultural practices.⁵³ This is particularly critical given that Brazil is the fourth largest historical emitter after the United States, China, and Russia due to its AFOLU-related emissions.⁵⁴

For this reason, even if the other countries' NDCs present mitigation targets and strategies associated with deforestation and agricultural practices, the situation in Brazil represents a considerable obstacle for transformative environmental action in the Amazon basin.

⁴⁸ Climate Watch, 'Climate Data for Action' (2022) <<https://www.climatewatchdata.org/>> accessed 25 January 2022.

⁴⁹ Federative Republic of Brazil, 'Brazil Updated NDC' <[https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/Brazil%20First%20NDC%20\(Updated%20submission\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/Brazil%20First%20NDC%20(Updated%20submission).pdf)>.

⁵⁰ The Climate Action Tracker, 'Brazil - Target Update' (2020) <<https://climateactiontracker.org/climate-target-update-tracker/brazil/2020-12-09/>> accessed 25 January 2022.

⁵¹ Federative Republic of Brazil, 'Fourth Biennial Update Report of Brazil to the UNFCCC' <<https://unfccc.int/sites/default/files/resource/BUR4.Brazil.pdf>>.

⁵² Kathryn Hochstetler, 'Climate Institutions in Brazil: Three Decades of Building and Dismantling Climate Capacity' (2021) 30 *Environmental Politics* 49.

⁵³ HK Gibbs and others, 'Brazil's Soy Moratorium' (2015) 347 *Science* 377; Gibbs and others (n 42); Joao Shimada and Daniel Nepstad, 'Beef in the Brazilian Amazon' (*Innovation for Action for Forests* 2018) <https://www.profor.info/sites/profor.info/files/Beef_Case%20study_LEAVES_2018.pdf>; Mariana Vedoveto, 'The Potential of Deforestation-Free Agreements to Decrease Deforestation and Promote Sustainable Supply Chains: The Case of the Soy Moratorium in Brazil' (2016) 35 *Tropical Resources* 51.

⁵⁴ Carbon Brief, 'Which Countries Are Historically Responsible for Climate Change?' (*Carbon Brief*, 2021) <<https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change>> accessed 25 January 2022.

National efforts go beyond climate discussions, and the Amazon countries have policies to tackle deforestation and promote sustainable forest use. In Colombia, for example, the National Council of Social and Economic Policy adopted the CONPES Document 4021, which contains the National Policy for Deforestation Control and Sustainable Forest Management. This policy document proposes a fourfold approach: (i) promote sustainable forest use to improve local livelihood of communities, (ii) articulate trans-sectoral actions to improve forest management and conflict-resolution efforts, (iii) increase prevention and control strategies to reduce illegal activities, and (iv) strengthen information management to improve decision making. Through these actions, set in 2020, the Government had the purpose of reducing deforestation by 30% in 2022 and achieving zero deforestation in 2030. Similar efforts can be found in Peru, Bolivia, and Ecuador, who have attempted to adopt ambitious policies and set institutional programs to achieve Amazonia-related targets.

Unfortunately, the implementation of these policies has not been entirely successful and deforestation challenges remain. Colombia, for example, prioritized a militarized approach to addressing this problem. On one hand, the national government launched in 2019 the *Artemisa Operation*, a ‘permanent campaign’ led by the Military Forces and the National Police.⁵⁵ On other hand, the Law 2111 of 2021 introduced a series of environmental felonies, including deforestation and appropriation of public rural lands. Since then, the Government has announced several captures and land interventions. Nonetheless, critics have pointed out that this scheme has erroneously targeted subsistence *campesinos* instead of the actual criminal organizations and individuals who are promoting deforestation. Militarization was not only chosen by Colombia. Brazil’s approach in recent years has been similar – only that Brazil has also weakened its environmental regulation and defunded its agencies.

Another approach to the deforestation challenge is through supranational collective arrangements. For instance, the Glasgow Leaders’ Declaration on Forests and Land Use, adopted during the United Nations Climate Change Conference of 2021, contains the commitment of more than 140 countries to work ‘collectively to halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation’. The Declaration aims to foster conservation, adaptation, and financial and investment initiatives, which would vary depending on the role of each country.

This approach leads us to discuss if the failure to protect the Amazon rainforest is an example of Garrett Hardin’s ‘tragedy of the commons’⁵⁶ and whether the basin should

⁵⁵ Presidencia de Colombia, ‘Con la puesta en marcha de la Campaña ‘Artemisa’, buscamos parar la hemorragia deforestadora que se ha visto en los últimos años en el país: Presidente Duque’ (*Presidencia de la República de Colombia*, 28 April 2019) <<https://id.presidencia.gov.co:443/Paginas/prensa/2019/190428-puesta-marcha-Campana-Artemisa-buscamos-parar-hemorragia-deforestadora-ha-visto-ultimos-anios-pais-Duque.aspx>> accessed 26 June 2022.

⁵⁶ Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243; Paul Stern, ‘Design Principles for Global Commons: Natural Resources and Emerging Technologies’ (2011) 5 *International Journal of the Commons* 213.

be framed as a large-scale global common to be protected through collective action⁵⁷ – even though some climate researchers are questioning this theory as an appropriate framework to solving some environmental issues.⁵⁸ This would be an interesting approach to the subject, given that Amazon-related discussions should include biodiversity and local indigenous peoples, who tend to fall outside of the scope of climate discussions.

A final strategy relies on the importance of subnational authorities and communities, given that the causes of deforestation are often found at a local level. In recent decades, efforts have emerged to build bridges between international cooperation and local actors – sometimes, through national governments – to promote decentralized governance. An example of this approach is the Governor’s Climate & Forest Task Force, a group of 39 subnational entities – 19 of which are in Colombia, Peru, and Brazil – who collaborate, from a bottom-up philosophy, to protect forests.

From a governance perspective, tackling deforestation requires multi-level strategies. But this analysis is even more complex given that the raw materials associated with land transformation are often exchanged in irregular markets.⁵⁹ For example, some of these goods, like gold, coca, and timber, are exchanged in clandestine economies. Other goods, such as beef, are used to launder illegal money. Due to these irregularities, most of the social and environmental costs associated with extractive activities are invisible to decision-makers.

Given these circumstances, it is unclear how competition law could directly contribute to address the environmental puzzle in the Amazon: to protect the forests and avoid any further change in land use, countries should understand that the answer cannot rely on competitive markets due to the social-ecological complexities of this landscape. Thus, only in very specific circumstances will markets and firms – the ones that are subject of oversight by competition authorities – play a role in tackling environmental issues in the Amazon. We will discuss how antitrust could potentially contribute to support initiatives that deal with deforestation in section 4.2 of the paper.

4. COMPETITION LAW AND AMAZONIA: FRIENDS OR FOES?

4.1. Overview of the antitrust systems

The antitrust systems of Bolivia, Brazil, Colombia, Ecuador, and Peru share two key features. First, public enforcement of competition law, through administrative proceedings, prevails over private enforcement. Second, their national competition agencies (Table 1) are empowered to prosecute and impose penalties to undertakings

⁵⁷ Mairon G Bastos Lima and others, ‘Large-Scale Collective Action to Avoid an Amazon Tipping Point - Key Actors and Interventions’ (2021) 3 *Current Research in Environmental Sustainability* 100048.

⁵⁸ Michaël Aklin and Matto Mildenberger, ‘Prisoners of the Wrong Dilemma: Why Distributive Conflict, Not Collective Action, Characterizes the Politics of Climate Change’ (2020) 20 *Global Environmental Politics* 4; Edward A (Ted) Parson, ‘Focus Less on Collective Action, More on Delayed Benefits and Concentrated Opponents’ (*Centre for International Governance Innovation*, 2015) <<https://www.cigionline.org/publications/focus-less-collective-action-more-delayed-benefits-and-concentrated-opponents/>> accessed 25 January 2022.

⁵⁹ Science Panel for the Amazon (n 25).

that incur in anticompetitive practices, conduct merger control, and carryout competition advocacy activities.⁶⁰

Table 1

Antitrust agencies	Specialized antitrust agencies
1. <i>Autoridad de Fiscalización y Control Social de Empresas – AEMP (Bolivia).</i>	1. <i>Organismo Supervisor de Inversión Privada en Telecomunicaciones – OSIPTEL (Peru), specialised in telecommunications’ markets.</i>
2. <i>Conselho Administrativo de Defesa Econômica – CADE (Brazil).</i>	2. <i>Secretaria de Promoção da Produtividade e Advocacia da Concorrência – Seprac, formerly SEAE (Brazil), specialised exclusively in competition advocacy.</i>
3. <i>Defensa de la Competencia y de la Protección de la Propiedad Intelectual – Indecopi (Peru).</i>	
4. <i>Superintendencia de Control del Poder de Mercado – SCPM (Ecuador).</i>	
5. <i>Superintendencia de Industria y Comercio – SIC (Colombia).</i>	

However, there is a significant asymmetry among the five jurisdictions in terms of agencies’ resources, staff, built-in capacity to analyse markets, investigative tools (legal and technical), and years of experience implementing competition law and policy. The asymmetry is reflected in the number of cases handled by each agency per year and in their capacity to effectively prosecute and fine undertakings that infringe the law, as well as conducting competition advocacy activities.⁶¹ For example, between the period 2000 and 2020, the number of cartels sanctioned in Brazil, Colombia and Peru amounted to 160, 72, and 38, respectively, while Bolivia and Ecuador only fined two and five, respectively.⁶²

⁶⁰ Gutiérrez, ‘Derecho de La Competencia En América Latina y El Caribe: Evolución y Principales Retos’ (n 4); Gutiérrez and Suárez (n 21). However, merger control in Bolivia is limited to the electric sector.

⁶¹ Gutiérrez, ‘Derecho de La Competencia En América Latina y El Caribe: Evolución y Principales Retos’ (n 5); Martha Martínez and others, ‘Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean’ (The World Bank 2021) 161436 <<https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/148021625810668365/fixing-markets-not-prices-policy-options-to-tackle-economic-cartels-in-latin-america-and-the-caribbean>>.

⁶² Juan David Gutiérrez, ‘Chapter 28: South America’ in Peter Whelan (ed), *Research Handbook on Cartels* (Edward Elgar Publishing 2023).

4.2. Using antitrust as a “sword”: The enforcement of antitrust and its potential contributions to the fight against deforestation and limitations

In this subsection we assess whether antitrust enforcement could be used as a “sword” that contributes to advance public and private initiatives in the fight against deforestation in the Amazon. Competition laws can deter private business practices that negatively contribute to the Amazon’s deforestation or that hinder reforestation programmes. With respect to the latter objective, for example, since competition laws of the selected cases explicitly prohibit bid-rigging, these statutes may prevent anticompetitive conducts that could affect the delivery of state-led reforestation and conservation projects.⁶³ With regards to the former objective, competition agencies could aim at preventing horizontal agreements that limit the commercialization of goods that are ‘free from deforestation impact’, thereby limiting the quality of goods available for consumers.⁶⁴ In the same vein, agencies could target anticompetitive practices (both unilateral conducts and cartels) aimed at obstructing the development of innovations that could significantly prevent or reduce deforestation.

More indirectly, for example, the protection and promotion of competition dynamics in the timber value chains could induce a decreased use of wood in the production processes, the increased use of reclaimed or recycled wood, or to purchase timber from geographic areas in which ecosystems are not vulnerable (such as the Amazon) coupled with reforestation practices. The same argument could be made about other sectors that use inputs that could be source from the Amazon, such as soy, beef, gold, among others. In this sense, as it was argued by Schinkel and Treuren⁶⁵ and Nowag,⁶⁶ competition law could induce firms to act more sustainably.

Even though antitrust enforcement in the studied jurisdictions has focused on primary markets,⁶⁷ very few cases deal with markets linked with products sourced from the Amazon. We did not find observable evidence that supports the claim that antitrust in Bolivia, Brazil, Colombia, Ecuador, and Peru directly advances environmental purposes. We did not identify cases that explicitly illustrate how the application of competition law in the studied cases contributed to advance environmental objectives in the Amazon.

⁶³ A recent case in which the Colombian competition agency sanctioned 51 undertakings and 19 persons illustrates how traditional antitrust enforcement against bid-rigging can promote environmental objectives. The agency concluded that the sanctioned companies and individuals had colluded in 259 public procurement processes that were associated with the cleaning and maintenance of canals, streams, and other hydrographic basins in the department of Bolivar. Resolution 64389 of September 19, 2022, by the Superintendency of Industry and Commerce. Available at: http://normograma.info/sic/docs/r_syc_64389_2022.htm

⁶⁴ See Nowag (n 7). for a discussion on sustainability as a ‘quality element’.

⁶⁵ Schinkel and Treuren (n 10).

⁶⁶ Nowag (n 7) 8. argues that ‘improvements in productions processes that lead to the use of less virgin raw material or improve the efficient usage of recycled material’ exemplifies how dynamic efficiency can contribute to sustainability.

⁶⁷ Gutiérrez, ‘Chapter 28: South America’ (n 62).

We argue that two main reasons contribute to explain the lack of significant cases in which antitrust is used a ‘sword’ to fight against deforestation in the Amazon. First, the level of competition does not seem to be a problem in the early stages of the supply chain of the timber, agriculture (e.g. soy), livestock, and mining (e.g. gold) markets. In fact, it appears to be the opposite: in the first stages of the supply chain of this type of commodities in Latin America, there are hundreds or thousands of producers.⁶⁸ Moreover, the high and increasing demand of domestic and foreign markets for inputs sourced from the Amazon, coupled with the construction of new roads into the Amazon, contributes to incentivise the enlargement of incumbent producers and the entrance of new agents. In other words, deforestation appears to be associated with efforts of upstream agents to increase output, not the opposite.

A second reason why competition law enforcement may not be an effective policy instrument against deforestation in the Amazon is that the markets that are negatively associated with deforestation in Bolivia, Brazil, Colombia, Ecuador, and Peru are dominated by informal undertakings⁶⁹ and by criminal organizations – particularly in the case of coca plantation and gold extraction – and have weak or inexistent institutions. The threat of fines or judicial damages and/or reputational impacts would not have the capacity of influencing the incentives of the undertakings that are directly deforesting the Amazon. The characterization of the markets that operate in the Amazon and are associated with deforestation is pertinent because the degree of informality or illegality of the market will affect how and whether antitrust authorities may address these issues through law enforcement activities.⁷⁰

While the economic agents that participate in these primary markets tend to be informal, the companies that use inputs from that are sourced from the Amazon operate in formal markets (e.g. supermarkets, restaurants, construction, furniture, jewels etc.). In the timber value chain, for example, there are other undertakings that participate in downstream activities, such as construction companies and producers and suppliers of wooden furniture, which operate in formal markets and could be more influenced by the law. However, we did not find direct or observable evidence that competition law has influenced the conducts of such undertakings with regards to their

⁶⁸ Juan David Gutiérrez, ‘Agricultural Exceptions to Competition Law’ [2010] *Revista de Derecho de la Competencia* 173; Juan David Gutiérrez, ‘Competition Law Goals in Agricultural Markets: A Latin American Perspective’ in Daniel Zimmer (ed), *The goals of competition law* (Edward Elgar 2012); Juan David Gutiérrez, ‘Protección de La Competencia En Las Cadenas de Valor Agropecuarias En Colombia, 1994-2015’ in Carlos Gustavo Cano and others (eds), *El desarrollo equitativo, competitivo y sostenible del sector agropecuario en Colombia* (Banco de la República y CAF - Banco de Desarrollo de América Latina 2016) <http://babel.banrepublical.org/cdm/singleitem/collection/p17054coll18/id/277?lipi=urn%3Ali%3Apage%3Ad_flagship3_profile_view_base%3B%2FLMFwIxOSIOTolOWIDrHtg%3D%3D>.

⁶⁹ While there is no consensus on the definition of informal economies, for the purposes of this paper we refer to informal economy as ‘all economic activities which are hidden from official authorities for monetary, regulatory and institutional reasons’ OECD, ‘The Informal Economy in Latin America and the Caribbean: Implications for Competition Policy – Background Note by the Secretariat’ (Organisation for Economic Co-operation and Development (OECD) 2019) DAF/COMP/LACF(2018)4 6 <[https://one.oecd.org/document/DAF/COMP/LACF\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2018)4/en/pdf)>..

⁷⁰ In this article, regardless of the degree to which the economic activity contravenes the law, we understand illegal markets as informal markets (Grossman, 2021).

supplying practices nor whether the law has promoted or hindered conducts that reduce deforestation. Similar situations occur in other value chains (e.g. livestock, agriculture, minerals) that source their raw inputs from the Amazon. We will discuss these downstream markets in the next section of the paper, because in at least one market (soy) economic agents that participate upstream have attempted to use antitrust to oppose horizontal collaborations among large retailers.

4.3. Is a “shield” needed to prevent that antitrust gets in the way of initiatives that aim at tackling deforestation?

While we did not find explicit and significant competition enforcement and non-enforcement activities that explicitly promoted initiatives that aim at tackling deforestation in Bolivia, Brazil, Colombia, Ecuador, and Peru, in this section we explain three factors that suggest that antitrust could get in the way of initiatives that aim at dealing with deforestation in the Amazon: (i) the inflexibilities of competition laws in the studied jurisdictions; (ii) the potential weaponization of antitrust against ‘zero-deforestation agreements’ in Brazil; and, (iii) recent case law that suggests that antitrust agencies are reluctant to acknowledge environmental issues as pertinent grounds for deciding merger control and abuse of dominance cases. Due to these three factors, we argue that it would be pertinent for the studied jurisdictions to evaluate the need for shielding certain practices – that aim at tackling deforestation – from competition law prohibitions.

4.3.1. Inflexibilities of the competition laws

The competition laws of Bolivia, Brazil, Colombia, Ecuador, and Peru do not include explicit clauses that exempt conducts due to environmental concerns nor clauses that oblige the competition agency to include environmental considerations in their decisions. In the studied jurisdictions, there is no ‘green exemption’ for horizontal conducts such as the recently approved Austrian competition law reform;⁷¹ or an explicit inclusion of ‘protection of the environment’ as one of the elements that can be proved to claim an exemption from the anticompetitive agreements prohibition such as the one established in the Hungarian Competition Act (article 17, Act LVII of 1996); nor a clause that explicitly allows decisionmakers to take into account criteria such as ‘protection of the environment’ as in Spain’s merger control proceedings (article 10 (4), Law 15 of 2007).

Colombia’s and Ecuador’s competition laws include general antitrust exemptions for horizontal agreements, while the legislations of the rest of studied jurisdictions lack such provisions. In Colombia the competition law establishes a broad exception for agreements that ‘have the purpose of defending the stability of a basic sector of the production of goods or services of interest to the general economy’ (article 1, Law 155 of 1959). In theory, this provision could be invoked by Colombia’s competition agency and/or practitioners to justify a horizontal agreement that fosters environmental

⁷¹ Viktoria HSE Robertson, ‘Sustainability: A World-First Green Exemption in Austrian Competition Law’ [2022] *Journal of European Competition Law & Practice* lpab092.

objectives but that could be deemed anticompetitive otherwise. However, the so called 'block exception' has been scarcely used since 1959.⁷²

Additionally, Colombia's competition law explicitly states that three types of conducts are not contrary to freedom of competition in Colombia: (i) research & development cooperation; (ii) agreements about compliance with law and non-mandatory standards, provided that the agreements do not limit market entry; and (iii) 'procedures, methods, systems and forms of use of common facilities.'⁷³ The second type of conduct - that involves setting standards related to technical, safety or quality requirements and certifying such standards - is pertinent since, as it occurs in other jurisdictions, it could allow 'companies to engage in actions promoting sustainability without being subject to competition law prohibitions'.⁷⁴ However, so far, the so-called 'efficiency exception' has not been invoked in Colombia to justify conducts that promote environmental objectives.

The Ecuadorian competition law contains two clauses that include socio-political objectives that could be a legal basis for the incorporation of environmental considerations in the competition agency's decisions: a) one of the objectives of the law is the 'establishment of a social, supportive and sustainable economic system' (article 1, Organic Law for the Regulation and Control of Market Power, 2011); and, b) one of the guidelines for the enforcement of the law is the 'development of mechanisms that guarantee that individuals, peoples and nationalities achieve self-sufficiency of healthy food through the redistribution of resources on land and water' (article 4-10, *ibid.*).

Moreover, article 12 of the Ecuadorian competition law establishes an exemption for agreements that contribute to 'improve the production' or 'promote technical or economic progress'. This clause establishes requirements that are analogous to the one listed in Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). However, up to now, the Ecuadorian exemption has not been effectively applied.

In contrast, the Brazilian, Peruvian, and Bolivian antitrust law do not include antitrust exceptions such as the ones described in the Colombian case nor exemptions such as the one enshrined in the Ecuadorian law. However, in exceptional situations Latin American jurisdictions have used comfort letters, formal and informal guidance, and other means for enforcement discretion to circumvent the inflexibility of their competition laws. For example, the Brazilian competition agency, CADE, recently authorized at least two collaboration agreements among competitors that aimed at mitigating the effects of the COVID-19 crisis.⁷⁵

⁷² Gutiérrez, 'Agricultural Exceptions to Competition Law' (n 68); Gutiérrez, 'Protección de La Competencia En Las Cadenas de Valor Agropecuarias En Colombia, 1994-2015' (n 68); Gutiérrez, 'Competition Law Goals in Agricultural Markets: A Latin American Perspective' (n 68).

⁷³ Article 49 of Decree 2,153, 1992.

⁷⁴ Nowag (n 7) 16.

⁷⁵ Gutiérrez, 'Chapter 28: South America' (n 62); Juan David Gutiérrez, 'Introducción - El Derecho de La Competencia Pandémico En América Latina y El Caribe' in Juan David Gutiérrez (ed), *Retos del COVID-19 para el derecho y la política de la competencia en América Latina y el Caribe* (Capítulo América Latina de la Académica

In sum, the competition laws of the studied cases tend to be inflexible, and the specific exemptions and exceptions enshrined in the laws of Colombia and Ecuador have barely been operative. Such inflexibility may deter economic agents from implementing sustainability activities due to the fear of competition law implications. This risk is not merely hypothetical, the next subsection of the paper offers a ‘cautionary tale’ about ‘zero-deforestation agreements’ in Brazil.

4.3.2. Potential weaponization of antitrust against zero-deforestation agreements

A recent case related with the soy moratorium in Brazil illustrates why certain interest groups can attempt to use antitrust as spear against initiatives that seek to reduce deforestation in the Amazon. In 2006, the biggest soy traders of Brazil signed the ‘the first voluntary zero-deforestation agreement implemented in the tropics’, which included the obligation – among others – of not purchasing ‘soy grown on lands deforested after July 2006 in the Brazilian Amazon’.⁷⁶ According to Gibbs et al. (2015), after the moratorium started the expansion of soy cultivation through deforestation in the Amazon fell from 30% in 2006 to only 1% by 2014.

However, in November 2019, the main association that represents thousands of soy growers in Brazil (Aprosoja), publicly questioned the ‘burdens’ imposed by the moratorium and claimed that they were studying legal actions to be presented before CADE.⁷⁷ A few days later, Aprosoja’s representatives declared that the federal government supported their concern and reiterated that they were considering filing a complaint before CADE against soybean exporting companies.⁷⁸ European stakeholders reacted and raised their voice against the termination of the moratorium. They manifested that if the soy moratorium was suspended, they might close the market due to environmental concerns.⁷⁹

Society for Competition Law (ASCOLA) 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3663905>. Moreover, the constitutions of the countries under study set up comprehensive systems to protect the environment and market activities may be constitutionally, legally, or judicially constrained by the pursuit of public interests such as environmental protections. For this reason, authorities and practitioners could have recourse to these legal frameworks to justify a nuanced approach to competition cases based on environmental considerations. And even if these arguments are considered insufficient, they could also justify the inclusion of environmental considerations in competition discussions considering the effects that the crisis will have on human life, dignity, health, security, and equality, among others – which are also superior constitutional goals.

⁷⁶ Gibbs and others (n 53) 377.

⁷⁷ Brasilagro, ‘Aprosoja Vai Ao Cade Contra Moratória de Soja Na Amazônia’ (*Brasilagro*, 8 November 2019) <<https://www.brasilagro.com.br/conteudo/aprosoja-vai-ao-cade-contramoratoria-de-soja-na-amazonia.html>> accessed 27 June 2022.

⁷⁸ Aprosoja MT, ‘Governo alega ameaça à soberania nacional e apoia fim da moratória da soja - Notícias - Comunicação - - APROSOJA/MT’ (13 November 2019) <<http://www.aprosoja.com.br/comunicacao/noticia/governo-alega-ameaca-a-soberania-nacional-e-apoia-fim-da-moratoria-da-soja>> accessed 27 June 2022.

⁷⁹ Nowag (n 7); Roberto Samora, ‘Europe Says Brazil’s Move to End Soy Moratorium Threatens \$5-Billion Market’ *Reuters* (25 November 2019) <<https://www.reuters.com/article/us-brazil-soybeans-environment-idUSKBN1XZ1CV>> accessed 27 June 2022.

We consulted CADE's Electronic Information System (SEI) and did not find that, up to date, Aprosoja or the farmers affected by the soy moratorium have filed complaint against the soybean exporting companies. However, the soy exporters' 'zero-deforestation agreement' illustrates how antitrust is pertinent for analysing the feasibility of undertaking-led initiatives that aim at promoting environmental objectives.

Although competition law has not prevented, up to date, the creation of these schemes, the position voiced by the soybean producers against moratorium raises questions whether this will change in the future. The case of Aprosoja not only elevates the legal risks -or at least the perception of such risks- for the soy exporters that are part of the 'zero-deforestation agreement' but also for companies that currently implement them or that are considering doing it in the future. For example, will the blocked ranchers challenge the 2009 zero-deforestation agreement – also known as beef moratorium – before an antitrust agency as the soy growers have threatened? Will other industries (e.g. palm oil) refrain from implementing 'zero-deforestation agreements' due to its potential competition law implications? There are similar cases in other jurisdictions that makes more credible the 'weaponization' of antitrust against sustainability activities. This was the case of the introduction of a standard for oil palm that aimed at reducing deforestation and that was challenged by the Indonesian competition agency.⁸⁰

4.3.3. Reluctance to consider environmental arguments in competition law processes

As it will be explained in the following paragraphs, recent case law from Brazil and Colombia illustrates how antitrust agencies are reluctant to acknowledge environmental issues as pertinent arguments for deciding merger control and abuse of dominance cases.⁸¹

Brazil's CADE decided the only case that is directly associated with markets associated with deforestation and in which environmental concerns were raised to dispute the legality of a conduct. The *BBF – Biopalma* merger case involved two companies that operated in the Amazon and participated in the markets of palm oil. Marborges, a competitor who was interested in the transaction, questioned the value of transaction due to alleged legal liabilities related to environmental and land issues of the target company. Moreover, the third party included in its submission a court injunction that prohibited business transactions with respect to the land in which the target company's plantations were located.

The CADE dismissed the third party's arguments:

'with regard to Marborges submitting information on a judicial liability related to environmental and land issues, held by Biopalma, it should be noted that such issues are outside the scope of this Authority's legal competence, and must be analysed in its own forum and evaluated in their possible effects, being

⁸⁰ Nowag (n 7).

⁸¹ Gutiérrez and Suárez (n 21). found that the Colombian competition agency did address environmental and sustainability issues in its competition advocacy reports, but such issues were raised by the agency to explain the context of the studied regulatory projects rather than to justify its recommendations.

unnecessary, therefore, for the competitive analysis of the Transaction presented, and they do not prevent or limit, therefore, the exercise of the competence legally conferred on this Board'.⁸²

After the agency authorized the transaction without conditions the same third party appealed the decision reiterating, among others, that the parties of transaction had 68,272 hectares of planted area and that CADE should investigate whether the legal contingencies associated with the land of one of the parties would influence the price of the transaction. Moreover, Marborges argued that the injunction that affected the target's land could 'directly influence the present concentration act, since they may result in changes in the company's current situation regarding the areas it currently owns for its palm plantations'.⁸³

The appeal was dismissed once again by the antitrust agency:

'these issues are beyond the scope of CADE's attribution. They are, therefore, dispensable to carry out the competitive analysis of the transaction presented, and do not prevent or limit the exercise of the authority legally conferred on this Agency'.⁸⁴

The Brazilian merger case is an example of how a competition agency addresses environmental concerns to assess the legality of a conduct and why arguments solely based on such types of matters may be dismissed due to the limited scope of the procedure. However, the case offers limited insights for this article's research question because the environmental concerns aimed at debating the value of the transaction and did not question whether the merger would have negative environmental impact.

The Colombian case is one of the few cases in which environmental objectives, including fighting climate change, were explicitly raised by a defendant to justify its conduct. The *Water Case* involved the *Water and Sewage Company of Bogota* (EAAB), a state-owned company who was accused of abusing its dominant position. The unilateral conduct investigated by Colombia's competition agency consisted of EAAB's refusal to supply water in bulk to a third-party company that distributed water to end users in the north of Bogota city.

The mayor of Bogota city, who presided EAAB's board of directors, publicly claimed that the decision was justified on environmental grounds. The decision of Colombia's competition agency even cited the city mayor:

'Not selling water in bulk in the Savannah has a fundamental objective... to take care of our water, to be able to govern the scarce water in Bogota's Savannah ... The first achievement ... to face climate change was the suspension of the sale of water in bulk to private builders in the Bogota's Savannah... The inhabitants of

⁸² *Parer N° 315/2020/CGAA5/SGA1/SG (BBF - Biopalma)* [2020] Conselho Administrativo de Defesa Econômica - CADE Processo N° 08700.004428/2020-06.

⁸³ *Voto do Relator (BBF - Biopalma)* [2020] Conselho Administrativo de Defesa Econômica - CADE Processo N° 08700.004428/2020-06.

⁸⁴ *ibid.*

the municipalities of the Bogota's Savannah applaud the district officials because they know that the measure not only preserves the environment, but also preserves their traditional municipalities'.⁸⁵

However, the competition agency dismissed these arguments and fined EAAB. The agency argued that state-owned companies cannot infringe antitrust law with the argument that local public policy 'deems appropriate to pursue the general interest'. Moreover, the competition agency stated:

'that the corporate policy of a state-owned company, aimed at eliminating the sale of water in bulk and the consequent purpose of directly providing the aqueduct service, responded to a public policy of the Mayor's Office of Bogotá or was structured under the parameters of the Development Plan of the Capital District, does not mean that such initiatives are exempt from the application of the regime of free economic competition, especially when free economic competition is a collective constitutional right, which prevails over any corporate policy or even local rule or provision.'⁸⁶

In sum, the cases described in subsection 4.3 of the paper illustrate how antitrust can potentially hinder or impede private initiatives that aim at reducing deforestation in the Amazon and, more broadly, the potential tensions between environmental objectives and competition law enforcement in the studied jurisdictions.

5. CONCLUSIONS

Deforestation in Amazonia has several causes, and its circumstances are explained by regional, national, and local socio-ecological, political, cultural, historical, and economic dimensions. For this reason, finding a unique explanation on the market dynamics that contribute to land transformation and tree cover loss in Amazonia would be a futile, misleading, and mistaken task. Nonetheless, this paper focused on the market-led drivers of deforestation in the Amazon basin with the purpose of examining how competition law facilitates (or impedes) initiatives that aim at dealing with such problem in Bolivia, Brazil, Colombia, Ecuador, and Peru. In this final section we summarize our main findings, discuss our contribution to the debate about environmental protection and competition policy in the Global South and offer reflections on the policy implications of the research.

5.1. Main findings

This article aimed at contributing to the growing literature on competition law and sustainability. One of the novel contributions of this research is that the existing scholarship focuses on climate change and energy markets, while this article focuses on a specific environmental policy challenge: Deforestation. The paper has global policy

⁸⁵ Resolution 14305 of February 28, 2018, issued by the Superintendency of Industry and Commerce. Available at: http://normograma.info/sic/docs/r_siyc_14305_2018.htm

⁸⁶ Resolution 14305 of February 28, 2018, issued by the Superintendency of Industry and Commerce. Available at: http://normograma.info/sic/docs/r_siyc_14305_2018.htm

relevance, since governments around the World are experimenting different policy instruments to tackle deforestation and, in general, climate change.

In this article we explained that deforestation in the Amazon is one of the biggest policy challenges that Bolivia, Brazil, Colombia, Ecuador, and Peru currently face. Moreover, the demand for raw products sourced from the Amazon and the operation of myriad informal undertakings –and even criminal organizations– is one of the main factors that drives deforestation in the biome. While informal economies predominate in the early stages of the value chains of timber, minerals, agriculture, and livestock, downstream markets are more connected to the formal economy (including foreign markets) and are sensitive to governments where goods are exported.

While we identified different instances in which competition law enforcement could directly and indirectly promote initiatives that aim at addressing deforestation in the Amazon, we did not find significant case law in which competition law was explicitly used in Bolivia, Brazil, Colombia, Ecuador, or Peru as a ‘sword’ to promote environmental objectives. We also did not find that undertakings or organizations have effectively used the exemptions and exceptions enshrined in the antitrust legislations of Colombia and Ecuador.

We argue that there are two main factors that may explain why antitrust is not actively used to promote the initiatives that aim at fighting deforestation in the studied jurisdictions. First, the markets that are driving deforestation in the Amazon – particularly in the first stages of the supply chain– do not appear to have low levels of competition or problems associated with artificial restraints to trade. In fact, the opposite seems to be the case: there is a growing domestic and global demand for inputs that can be sourced from the Amazon that contributes to drive the enlargement of incumbent producers but also by the entrance of new agents in the first stages of the supply chains.

The second reason why competition law enforcement may not play a predominant role with regards to fighting against deforestation in the Amazon is related to the characteristics of the markets and undertakings that operate in the biome. More specifically, the informality of these economies and the presence of illegal organizations may reduce the deterrence capacity of an administrative fine imposed by an antitrust agency. The remoteness of the Amazon with respect to state and market institutions makes a great difference for law enforcement. The economic agents that operate in the periphery are less influenced by legal institutions enforced from the centre. In this paper we are not advocating for increased levels of formality due to the inherent complexities of economic activities in Amazonia. In fact, certain types of economic activities cannot be formalized because the law explicitly prohibits that they take place in protected environmental areas like Amazon. For example, this is the case of medium and large-scale gold mining. However, it is important to note that due to said informality the potential of any top-down, centralized approach through institutions such as competition policy is likely to lack the effective power to deter undesired behaviour by clandestine agents operating in Amazonia.

The paper also reports that there are at least three factors that could generate tensions between competition law and private initiatives that aim at preventing or mitigation deforestation in the Amazon. First, the competition laws of Brazil, Bolivia and Peru are inflexible, their provisions do not include exemptions or exceptions that could ‘shield’ collaboration agreements among competitors or practices such as exchange of information, which could be required to increase the transparency and traceability of supply chains that could be ‘contaminated’ with commodities sourced from deforested areas. Moreover, in the case of Colombia and Ecuador, although their competition legislations include provisions that could offer a legal basis for collaboration agreements, in practice these exemptions and exceptions have barely been implemented in practice in the last two decades. Second, ‘zero deforestation agreements’ in Brazil have been challenged by certain market actors, which have menaced to use antitrust as a ‘spear’ against such environmental initiatives. While such threats have not collapsed the existing ‘zero deforestation agreements’, they offer cautionary tale for new initiatives in other markets and in the other studied jurisdictions.

Third, the Colombian and Brazilian competition agencies have explicitly disregarded environmental arguments in merger control and unilateral conduct cases. The Brazilian case dealt with a merger case that affected the oil palm market. The parties of the transaction operated in the Amazon and, due to the nature of their activities, deforestation could have been a concern. However, the agency dismissed the arguments of supposed ‘environmental contingencies’ that were raised by a third party that opposed the merger. Colombia’s example is not directly linked with deforestation in the Amazon, but it is worth mentioning the case because the agency dismissed the environmental arguments claimed by the defendant in an abuse of a dominant position case.

5.2. Contribution

The findings mentioned in the previous section highlight the limits and risks of using competition law as a public policy instrument in the Global South. On one hand, there may be cases of overdeterrence due to the inflexibility of the studied competition laws coupled with the manifested intention of certain economic agents to use antitrust actions against certain environmental initiatives, such as the ‘zero deforestation agreements’. On the other hand, there may also be instance of underdeterrence since, in practice, informal markets and companies that exist in low and middle-income countries are out of the scope of competition law, as it occurs with environmental, tax, and labour law, among others. This conclusion is particularly true in situations in which states often do not have total of control of certain areas of their territory and other non-state actors fill in the vacuum of power left (or never claimed) by the state. When the state lacks control of the territory, non-state groups may benefit from the extraction of natural resource rents, negatively affecting ecosystems, as it currently occurs with the forests of the Amazon. Thus, this article also contributes to the emerging literature on the interface between the informal economies and competition law.⁸⁷

⁸⁷ Mor Bakhoun, ‘The Informal Economy and Its Interface with Competition Law and Policy’ in Michal Gal and others (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*

5.3. Policy implications

The findings of this research inform policy implications regarding the relationship between competition law and environmental sustainability that we discuss henceforth. While these implications are particularly pertinent for the studied jurisdictions, they may be relevant for other jurisdictions, particularly those situated in the Global South.

First, governments should be cautious when studying, through their competition agencies, certain conducts that arise due to its own incapability to timely adopt environmental regulation. According to neoclassic economic theory, government intervention is caused by and limited to market failures. For instance, environmental economics advocates for command-and-control instruments and economic instruments to correct environmental externalities and asymmetries of information. But what happens if governments do not act timely? Private agents might have incentives to act autonomously and address market failures – for instance, the pressures created by international markets on the Brazilian beef sector to adopt better environmental standards and avoid blockages.

These private initiatives to address market inefficiencies – and promote policy objectives – might eventually clash with other public institutions, such as antitrust. Continuing with the example, if CADE finds that a given agreement within the Brazilian beef sector to increase transparency, accountability, and sustainability in the supply chain restricts competition, the country would be left in a situation in which neither public nor private efforts are willing or able to pursue environmental goals.

What should be done to prevent such situations? One way out could be that legislators enshrined a sustainability exemption, such as the one introduced by Austria in 2021, that allows competitors to carry out horizontal agreements that improve the production and distribution of goods and services when ‘those benefits contribute substantially to an ecologically sustainable or climate-neutral economy’ (§ 2 paragraph 1 of the Austrian Cartel Act). Nowag,⁸⁸ lists other potential legal means by which sustainability can be a ‘shield’ against antitrust liability, such as sectoral regulations, *de minimis* considerations, public interest clauses in competition laws (such as the ones included in South Africa’s law), priority setting and antitrust discretion, formal and informal guidance (such as the guidelines published by the Dutch and United Kingdom’s agencies), antitrust sandboxes (such as the one setup by the Greek competition agency), among others.

Second, regardless of the ‘shields’ provided by regulation or by competition laws, competition agencies that are interested in considering sustainability in their enforcement actions need to invest in their capacity of assessing evidence of markets in which significant negative externalities can be produced (in the form of environmental harms) and in their capacity to assess competition issues in informal markets. This

(Edward Elgar Publishing 2015) <https://EconPapers.repec.org/RePEc:elg:eechap:15622_7>; OECD, ‘Roundtable on Competition Policy and the Informal Economy’ (2010) DAF/COMP/GF(2009)10 <<https://www.oecd.org/daf/competition/44547855.pdf>>; OECD, ‘The Informal Economy in Latin America and the Caribbean: Implications for Competition Policy – Background Note by the Secretariat’ (n 69).

⁸⁸ Nowag (n 7).

reflection is close to Nowag,⁸⁹ who argued that agencies ‘might need to strengthen and broaden their capacities, given that sustainability is a broad -maybe all encompassing- field covering matters of environmental protection, economics, and the social dimension.’

For example, agencies should aim at understanding the dynamics between formal and informal economic activities and actors, a relationship of special importance in developing jurisdictions.⁹⁰ The OECD has highlighted the relevance of understanding how competition law can be applied in informal markets due to their economic significance.⁹¹ In the case of deforestation, for example, informal ranchers might not have enough bargaining power to counter the moratorium and might even be excluded from the market due to this decision. From an antitrust perspective, practice could be considered a horizontal agreement which generates vertical restraints. But, on the other hand, the decision appears to have a solid environmental justification (controlling the quality of the supply chain to avoid sourcing from deforested areas), it may not necessarily reduce output since the companies may source from areas that are not environmentally fragile, and the protection of forests may cause national and even global environmental benefits.

Furthermore, relying solely on solutions driven by private initiatives may be sub-optimal for the type of value chains that use inputs sourced from the Amazon. First, private agreements that aim at creating rules that aim at organizing the value chain to ensure its sustainability requires that different types of undertakings coordinate collective actions with competitors and/or vertically-related economic actors, such as local retailers, exporters, and foreign purchasers. Second, there is a risk that the close interaction among these economic agents to monitor and enforce the agreement results in incentives for reaching other type of agreements that are anticompetitive and have no environmental justification (e.g. pricing arrangements). Third, companies that refrain from joining the agreement may obtain a competitive edge: sourcing from suppliers that offer less expensive inputs (e.g. wood, beef).

Instead, governments could consider additional means for ensuring that value chains do not contain inputs from deforested lands. For example, establishing regulations aimed at the undertakings that operate downstream, such as strict prohibitions from acquiring such inputs or establishing disclosure obligations about the origin of the products or the inputs used in the production processes. There might be other policy instruments that are more effective, equitable and/or efficient for addressing deforestation challenges with regards to the value chains that are permeated by informal and illegal economies. Moreover, in the presence of incipient or weak market and state institutions, it seems unlikely that competition policy can contribute to countering the Amazon environmental crisis. Moreover, with regards to formal companies that operate in downstream markets, regulations that establish disclosure rules about the

⁸⁹ *ibid* 23–24.

⁹⁰ Bakhom (n 87).

⁹¹ OECD, ‘The Informal Economy in Latin America and the Caribbean: Implications for Competition Policy – Background Note by the Secretariat’ (n 69).

sources used in production processes would be more effective to increase the transparency and traceability of the goods that are offered to consumers.

The findings reported in this paper illustrate how the discussion taking place in global scenarios, such as the OECD and UNCTAD, about the role of competition law with regards to environmental objectives could be enriched by considering how certain economic activities that negatively affect ecosystems are out of reach of antitrust agencies in developmental contexts. The findings also highlight the gap between the capacity of the biggest CO₂ producers and the countries that drive the global demand for wood and other natural resources to implement environmental protection and climate change policies in comparison with the countries of the Global South.

Finally, the discussions about the role that competition law might play to comply with environmental targets, as currently held in Europe and the United States of America, should be carefully reproduced by scholars, practitioners, and authorities in the Global South. Enforcing competition law in such contexts requires facing a series of obstacles that industrialized and formal economies are not considering in the narrative of sustainability and antitrust. Thus, the challenges of finding adequate means to align competition law with environmental goals in these contexts as well as designing and implementing effective policies to address the Amazonian socio-ecological issues remain.