

DIRTY BUSINESS: ACCOUNTABILITY FOR HARMFUL PESTICIDE USE IN BRAZIL

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I. INTRODUCTION

In 1946, the World Health Organization (“WHO”)’s Constitution was adopted, creating the first “international instrument to enshrine the enjoyment of the highest attainable standard of health as a fundamental right of every human being”—establishing the right to health.¹ In 1966, the right to health was again recognized as a human right by the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)—this right is pertinent to Brazil, which has further protected this right through domestic legislation, policies, and international declarations.² Furthermore, this universal right to health has been accepted by the international community as an inclusive right, extending beyond access to health care and hospitals to include safe drinking water and food, as well as healthy working and environmental conditions.³

As the economy has globalized, the agricultural sector has become increasingly industrialized. Industrial agriculture is generally characterized by large-scale monocultures, and the intensive use of chemical fertilizers and pesticides.⁴ Pesticides are used in agriculture to protect plants from pests, weeds or diseases⁵ and have helped to increase agricultural production with reduced labor.⁶ At present, six companies, commonly referred to as the “Big Six,” dominate the sale of agricultural chemicals—US companies Dow Chemical, DuPont, Monsanto, Swiss companies BASF and Bayer, and Syngenta, a German company.⁷ The increase in pesticide use, however, has brought

¹ *Health Topics – Human Rights*, WORLD HEALTH ORGANIZATION, https://www.who.int/topics/human_rights/en/ (last visited Feb. 4, 2019).

² See THE RIGHT TO HEALTH, FACT SHEET NO. 31 1, WORLD HEALTH ORGANIZATION (2008), available at <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

³ See *id.* at 3.

⁴ See *The Hidden Costs of Industrial Agriculture*, UNION OF CONCERNED SCIENTISTS (July 11, 2008), https://www.ucsusa.org/food_and_agriculture/our-failing-food-system/industrial-agriculture/hidden-costs-of-industrial.html#.XFjvfc9Kg0R.

⁵ Polyxeni Nicolopoulou-Stamati, et al., *Chemical Pesticides and Human Health: The Urgent Need for a New Concept in Agriculture*, 4 FRONT PUB. HEALTH 1 (2016).

⁶ REAGAN WASKOM ET AL., AGRICULTURAL PESTICIDE USE: BEST PRACTICES MANAGEMENT 4 (Colorado State University 2017), available at <https://extension.colostate.edu/docs/pubs/crops/xcm177.pdf>.

⁷ See James McDonald, *Mergers In Seeds and Agricultural Chemicals: What Happened?*, UNITED STATES DEP’T AGRIC. (Feb. 15, 2019), ers.usda.gov/amber-waves/2019/february/mergers-in-seeds-and-agricultural-chemicals-what-happened/.

immense human health and environmental consequences, as pesticides are harmful not just to targeted pests, but to non-targeted species, including humans.⁸

Agriculture has become industrialized in land-abundant countries all over the world.⁹ Specifically, in the 1980's, following the liberalization of markets and trade, land abundant countries in Latin America capitalized on a growing global demand for agricultural products, and increased their position in world markets for major products such as soybean, sugar, and meat.¹⁰ Brazil, a country rich in natural resources, is currently the world's second largest supplier of food, and is on track to take the number one spot as the biggest global exporter of agricultural products.¹¹ Brazil's vast increase in agricultural exports was directly tied with a massive growth in pesticide use.¹² Over the past several decades, pesticide use flourished in Brazil due to major government subsidies, low taxes on pesticide manufacturers, limited to nonexistent pesticide oversight, and insignificant fees for the registration of active chemical ingredients.¹³

Brazil has seen an approximately 298 percent increase in pesticide use from 1990 to the most recent data available from 2007-2012.¹⁴ Brazilian companies like Copersucar, the world's largest sugar trader and originator, sell sugar to multinational companies such as Nestlé and Coca Cola as part of Brazil's extensive agricultural export

⁸ See Wasim Aktar et al., *Impact of Pesticide Use In Agriculture: Their Benefits and Hazards*, INTERDISC. TOXICOLOGY (Mar. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2984095/>.

⁹ See Klaus Deininger & Derek Byerlee, *The Rise of Large-Scale Farms in Land Abundant Developing Countries: Does it have a future?*, WORLD BANK, available at http://siteresources.worldbank.org/DEC/Resources/84797-1288208580656/75080961288208619603/Deininger_Byerlee_Large_Farm_Small_Farm_Debate_P&S_PAPER.pdf ("many land-abundant countries are characterized by rising investment in large-scale farming based on a nonfamily corporate model, a trend that can but need not be accompanied by growing concentration of production and land ownership").

¹⁰ See *id.* at 2-3.

¹¹ See OECD-FAO AGRICULTURAL OUTLOOK 2015-2024 16 (OECD/Food and Agriculture Organization of the United Nations (2015), <http://www.fao.org/3/a-i4738e.pdf> at 2015).

¹² See Jenny Gonzales, *Brazil's Fundamental Pesticide Law Under Attack*, THE WIRE (Feb. 27, 2018), <https://thewire.in/agriculture/brazils-fundamental-pesticide-law-attack>.

¹³ See *id.*

¹⁴ See Aleszu Bajak, *The Developing World Is Awash In Pesticides. There May Be a Better Way*, VOX (July 3, 2016), <https://www.vox.com/2016/7/3/12085368/developing-world-pesticides>.

network.¹⁵ “In Brazil, agribusiness is considered one of the most important sectors in the country’s economy—it accounts for nearly one-third of the gross domestic product (“GDP”), employs 38% of the country’s labor and is responsible for 36% of Brazilian exports.”¹⁶

The human and environmental health consequences of pesticide use in Brazil is tremendous—in 2016, there were 4,208 cases of intoxication by exposure to pesticides.¹⁷ At the same time, large multinational agribusinesses have backed medium- and large-sized farmers in Brazil and encouraged them to produce exportable agricultural products.¹⁸ Brazil’s exports of agriculture and agro-processed products increased to almost \$87 billion USD in 2011, an eightfold increase over a 20-year period.¹⁹ Exacerbating these problems, on January 1, 2019, Jair Bolsonaro, a far-right politician who ran on an anti-environmental platform and who has vowed to exploit the Amazon’s resources and roll back protections for indigenous communities, was sworn in as Brazil’s president.²⁰ Prior to the election, Brazil’s powerful farm lobby, the Parliamentary Agricultural Front, or “ruralists” who represent Brazil’s agribusiness sector, endorsed Bolsonaro.²¹ Since

¹⁵ See generally Marcos Fava Neves et al., *Copersucar: A World Leader in Sugar and Ethanol*, INT’L FOOD AND AGRIBUSINESS MGMT. REV. (IFAMA) (2016), available at <https://ifama.org/resources/Documents/v19i2/1020150044.pdf>.

¹⁶ Elias Nasralla Neto et al., *Health surveillance and agribusiness: the impact of pesticides on health and the environment. Danger ahead!*, 19 CIÊNC. SAÚDE COLECTIVA (Dec. 2014), available at http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1413-81232014001204709&lng=en&nrm=iso&tlng=en

¹⁷ See Anna Stephanie Gross, *Brazil’s Pesticide Poisoning Problem Poses Global Dilemma, Say Critics*, MONGABAY (Aug. 27, 2018), <https://news.mongabay.com/2018/08/brazils-pesticide-poisoning-problem-poses-global-dilemma-say-critics/>.

¹⁸ See Carlos José Caetano Bacha & Leandro Vinícios de Carvalho, *What Explains the Intensification and Diversification of Brazil’s Agricultural Production and Exports from 1990 to 2012?*, 11 INT’L RES. INITIATIVE ON BRAZ. AND AFRICA, WORKING PAPER NO. 02 (Aug. 2014), http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP02_What_Explains_The_Intensification_and_diversification_of_Brazil’s_Agricultural_Production_and_Exports.pdf.

¹⁹ See *id.*

²⁰ See Scott Wallace, *Brazil’s New Leader Promised To Exploit The Amazon – But Can He?* NAT’L GEO. (Oct. 31, 2018), <https://www.nationalgeographic.com/environment/2018/10/brazil-president-jair-bolsonaro-promises-exploit-amazon-rain-forest/>.

²¹ See *Brazil’s Powerful Farm Lobby Endorses Far-Right Presidential Candidate Bolsonaro*, BUSINESS INSIDER (Oct. 2, 2018), <https://www.businessinsider.com/r-brazils-powerful-farm-lobby-endorses-far-right-presidential-candidate-bolsonaro-2018-10>.

Bolsonaro has taken office, Brazil has approved hundreds of new pesticide products, many of which contain active ingredients that are banned in the US and the UK.²²

While multinational corporations, such as Kraft Foods, Cargill, and Sara Lee, continue to rely on Brazil's agricultural outputs and hold central market positions in Brazil's food industry,²³ there lacks a formal mechanism to hold corporations accountable in upholding human rights and environmental standards to the producers, particularly when it comes to the use of pesticides. At present, international treaties and frameworks exist for states and multinational corporations under corporate responsibility standards, but of those that exist, they are soft-law and lack binding standards.

While multinational corporations have increasingly become more diligent in guaranteeing that they are engaging in responsible business practices, regulatory gaps continue to allow harmful pesticides to continue to enter the supply chain.²⁴ Consequently, Brazil, as a major agricultural exporter, is currently in the midst of a public and environmental health crisis, stemming from the indiscriminate use of pesticides to meet agricultural demand, which has caused pesticide poisoning and environmental degradation, and leaving those affected without redress.²⁵ Holding multinational corporations responsible for their behavior down the supply chain is a critical way to ensure that human rights abuses are not occurring in developing, export-driven agricultural countries such as Brazil. The dilemma remains as to whether the corporation's home country (the site of incorporation) or the host country (where business activities take place) should regulate corporate behavior.²⁶ But the reality is that "home countries usually do not have the power to regulate multinational enterprises" due to

²² See Dom Phillips, *Hundreds Of New Pesticides Approved in Brazil Under Bolsonaro*, THE GUARDIAN (June 12, 2019), <https://www.theguardian.com/environment/2019/jun/12/hundreds-new-pesticides-approved-brazil-under-bolsonaro>.

²³ See Paulo F. Azevedo et. al., *The Food Industry in Brazil and the United States: The Effects of the FTAA on Trade and Investment*, INTER-AMERICAN DEVELOPMENT BANK 1, 58 (Mar. 2004), <https://publications.iadb.org/publications/english/document/The-Food-Industry-in-Brazil-and-the-United-States-The-Effects-of-the-FTAA-on-Trade-and-Investment.pdf>.

²⁴ See generally Michael J. Maloni & Michael E. Brown, *Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry*, 68 J. BUS. ETHICS 35, 52 (2006).

²⁵ See Sarah Di Lorenzo, *Human Rights Watch Urges Brazil To Regulate Pesticides More*, AP (July 20, 2018), <https://www.apnews.com/1ff5acf875674568819870bf498a4460>.

²⁶ Beth Stephens, *Corporate Liability: Enforcing Human Rights through Domestic Litigation*, 24 HASTINGS INT'L AND COMP. L. REV. 401, 402 (2001).

unequal bargaining power and carefully crafted corporate structures that insulate them from accountability.²⁷

Given these dynamics, it is essential that States come together to ratify the UN Draft Treaty on Business and Human Rights, which would require States to bind multinational corporations to a higher set of business standards, including specific environmental and human rights impact baselines, for their practices at every step of their supply chains. This Note proceeds in four parts. Part I discusses the current international and domestic environmental frameworks and regulatory gaps in Brazil for pesticide use. It also lays out the current international human rights and environmental frameworks that are in force and discusses the lack of coherency between the two. Part II examines the corporate social responsibility framework and analyzes their interaction with current international human rights frameworks. Part III supports a cohesive international corporate social responsibility treaty that incorporates human rights and environmental frameworks and the possible objections and hurdles such a law would face. Part IV concludes by summarizing the key points of this Note, specifically the necessity of a legally binding framework in addressing human rights violations throughout multinational corporation's supply chain practices.

II. BACKGROUND

A. *Pesticide Use in Brazil*

Since 1990, Brazil's pesticide use has increased by 298%, and its pesticides market is estimated to be at \$10 billion USD.²⁸ In 2008, Brazil took over as the world's largest consumer of pesticides.²⁹ Soybean uses the largest amount of pesticides in Brazil, accounting for 63 percent of the total, followed by corn (13%) and sugar cane (5%).³⁰ In 2018, Brazil surpassed the United States as the largest soy producer in the world, producing an estimated 117 tons of soybean in that year.³¹

²⁷ *Id.*

²⁸ Bajak, *supra* note 14; see also Paula Prada, *Fateful Harvest – Why Brazil Has a Big Appetite for Risky Pesticides*, REUTERS (Apr. 2, 2015, 2:50 PM GMT), <https://www.reuters.com/investigates/special-report/brazil-pesticides/>.

²⁹ Prada, *supra* note 28.

³⁰ Wanderlei Antonio Pignati et al., *Spatial distribution of pesticide use in Brazil: a strategy for Health Surveillance*, 22 CIÊNCIA & SAÚDE COLETIVA 3281, 3284 (2017).

³¹ Roberto Samora, *Brazil to Pass U.S. as World's Largest Soy Producer in 2018*, REUTERS (May 11, 2018), <https://www.reuters.com/article/us-brazil-soy-usa/brazil-to-pass-u-s-as-worlds-largest-soy-producer-in-2018-idUSKBN11C2IW>.

Soybean plants are grown on land that has been heavily deforested, many times illegally.³²

While the use of pesticides has proliferated in Brazil, over the past few decades, scientists now largely agree that agrochemical residues spread into the environment, “causing significant contamination of terrestrial ecosystems and poisoning human foods.”³³ Additionally, the introduction of large industrial farming to rural Brazil, in which pesticides are applied by ground spraying and from airplanes, has increased the incidence of pesticide drift, where pesticides blow off crops and spread onto other farms and into nearby rural communities, impacting those who live near these farming areas.³⁴ Further, when it comes to ground spraying in Brazil, there is no nationwide buffer zone that sets a designated no-spray area that is required to exist between certified production land and surrounding communities—this means that pesticides can legally be sprayed right up to a school wall.³⁵

Mato Grosso, which is the third largest state in Brazil and borders the southern regions of the Amazon, has high rates of pesticides poisoning.³⁶ As Mato Grosso is Brazil’s top producer of agricultural products, the state sits in the middle of a broader debate about the effects of economic development on environmental sustainability.³⁷ Land conflicts currently exist between agribusiness farmers that lack land titles due to irregular purchases or land grabbing, subsistence farmers with customary ownership of land, official land titles in agrarian reform projects, indigenous groups and various forms of protected land.³⁸ Furthermore, Mato Grosso is the largest consumer of pesticides

³² *Salmon on Soy Beans—Deforestation and Land Conflict in Brazil*, RAINFOREST FOUND. NORWAY 1, 18 (2018), <https://smooth-storage.apptoma.no/users/drj-dn-up-load/files/IFM/Salmon-on-soy-beans-deforestation-and-land-conflict-in-Brazil.pdf>.

³³ See Fernando P. Carvalho, *Pesticides, Environment, and Food Safety*, 6 FOOD & ENERGY SECURITY 48 (May 2017), <https://onlinelibrary.wiley.com/doi/full/10.1002/fes3.108>.

³⁴ See *Interview: Drowning in Pesticides*, HUMAN RIGHTS WATCH (July 20, 2018), <https://www.hrw.org/news/2018/07/20/interview-drowning-pesticides>.

³⁵ See *id.*

³⁶ See Maria Celina Piazza Recena et al., *Acute poisoning with pesticides in the state of Mato Grosso do Sul, Brazil*, 357 SCIENCE OF THE TOTAL ENVIR. 88 (Mar. 2006).

³⁷ See Alan M. Wright, *Sustainability and Agriculture in the State of Mato Grosso*, BRAZIL INST. WOODROW WILSON CENTER 1 (Mar. 2009), available at <https://www.wilsoncenter.org/sites/default/files/brazil.mato%20grosso.pdf>.

³⁸ See Antonio A. R. Ioris, *The Politics and Agribusiness of Sustainability*, 10 SUSTAINABILITY 1648 (May 20, 2018) (noting that the primary drivers of these conflicts are the pressure to expand crops and cattle production against the wishes of environmentalists, subsistence farmers, and indigenous communities).

in all of Brazil, and scientists have found associations in the state between parental pesticide exposure and congenital defects in their children.³⁹ Other studies in Mato Grosso have identified many municipalities in the region that employ high-yield, highly mechanized monocultures that employ large-scale pesticide use.⁴⁰

In 2018, the Brazilian government approved 450 new pesticides, some of which are banned or restricted in the US.⁴¹ At present, four of the ten most commonly used pesticides in Brazil are products that are banned in Europe.⁴² For example, one of the most common herbicides in Brazil is Monsanto's glyphosate, a controversial chemical which has been linked to a wealth of health problems.⁴³ Despite the herbicide's, among other harmful features, has an endocrine disrupting effect on human liver cells, in addition to other harmful features, its regulation remains moderate in Brazil, with application permitted at up to 500 milligrams per liter.⁴⁴

Another widely used chemical compound in Brazil is paraquat, which was branded as "highly poisonous" by U.S. regulators and already banned in 50 countries based on uncontroverted evidence of extreme toxicity.⁴⁵ Despite its toxicity, both Syngenta and Helm, two international agrochemical giants based out of Switzerland and Germany respectively, are licensed to sell paraquat in Brazil.⁴⁶ While Brazil banned paraquat in 2017, Brazil's powerful agribusiness lobby helped push a postponement on the ban until 2020.⁴⁷ Immediately following the decision, it was clear that Brazil's agricultural lobby was already gearing up for a fight to have the decision reversed. For

³⁹ See Marly Eliane Ueker et al., *Parenteral exposure to pesticides and occurrence of congenital malformations: hospital-based case-control study*, BMC PEDIATRICS (Aug. 12, 2016).

⁴⁰ See *id.*

⁴¹ See Maria Laura Caninau, *Brazil's Dangerous Open Door for Toxic Pesticides*, HUMAN RIGHTS WATCH (July 26, 2019), <https://www.hrw.org/news/2019/07/26/brazils-dangerous-open-door-toxic-pesticides>.

⁴² See Daniel Schweimler, *Brazil: Many Alarmed Over Boost to Pesticide Use in Agriculture*, AL JAZEERA (July 20, 2018), <https://www.aljazeera.com/news/2018/07/brazil-alarmed-boost-pesticide-agriculture-180730164415602.html>.

⁴³ See Gonzales, *supra* note 12.

⁴⁴ See *id.*

⁴⁵ See Prada, *supra* note 28.

⁴⁶ See *Brazil Bans Paraquat and The Agribusiness Lobby is Gearing Up for Action*, PRIVATE EYE (Oct. 23, 2017), <https://www.privateeye.ch/en/news/detail/brazil-bans-paraquat-and-the-agribusiness-lobby-is-gearing-up-for-action/>.

⁴⁷ See *id.*

example, the Front for Agriculture, which protects the interests of agribusiness in parliament, played a critical role in pushing ANVISA, Brazil's regulatory health agency, to scale down its standards for the paraquat ban.⁴⁸ It also spearheaded a bill seeking to remove a provision from the regulation that prevents approvals from being granted for carcinogenic pesticides, and to limit ANVISA's authority to place pesticides on the market, shifting authority to the Ministry of Agriculture, which was then headed by the controversial billionaire soybean businessman, Blairo Maggi.⁴⁹ While the ban also dealt a blow to Syngenta, which makes more than half its paraquat sales in Brazil, they are working, in concert with the agricultural lobby in Brazil, to get the government to change their decision.⁵⁰

In 2014, ANVISA completed an analysis of pesticide residue in Brazilian foods and of 1,665 samples collected, on products including rice, apples, and peppers, 29 percent showed residues that either exceeded permitted levels or contained illegal pesticides.⁵¹ According to the Ministry of Health, in 2017 there were 4,003 cases of agricultural pesticide poisoning in Brazil, which calculates to nearly 11 every single day, and one hundred and forty-eight people died from pesticide poisoning.⁵² Brazil's National Toxic-Pharmacological Information System ("SINITOX"), which collects and analyzes all cases of acute intoxication and poisoning each year, showed that from 1999 to 2013, 78,623 Brazilians suffered from acute pesticide-related poisoning, from which 2,524 people died.⁵³

1. Health Impacts

Because of the range in different pesticides that all have varying toxicities, the health effects of acute pesticide poisoning, meaning single exposures or multiples exposures over a very short period of time, vary significantly.⁵⁴ Common symptoms can be "sweating, elevated

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See Prada, supra note 28.*

⁵² *See "You Don't Want To Breathe Poison Anymore": The Failing Response To Pesticide Drift In Brazil's Rural Communities*, HUMAN RIGHTS WATCH (July 20, 2018), <https://www.hrw.org/report/2018/07/20/you-dont-want-breathe-poison-anymore/failing-response-pesticide-drift-brazils>.

⁵³ *See Sergio Akira Uyemura et al., A Perspective Discussion on Rising Pesticide Levels and Colon Cancer Burden in Brazil*, 5 FRONT PUB. HEALTH 273 (Oct. 16, 2017).

⁵⁴ *See "You Don't Want to Breathe Poison Anymore," supra note 52.*

heart rate, and vomiting, as well as nausea, headaches, and dizziness.”⁵⁵ Chronic exposure—meaning repeated exposure to low doses over an extended period—has been associated with infertility, impacts on fetal development, cancer, and other serious health problems.⁵⁶ There is also research that shows that family farmers in Brazil are experiencing respiratory problems due to their exposure to pesticides, and that the exposure is not always directly related to spraying activities.⁵⁷ Brazil’s national cancer institute, Instituto Nacional de Câncer (“INCA”), a governmental agency, has already taken a public position against current pesticide policies in Brazil.⁵⁸ There have been reports of poisoning in schools, rural communities and cities in major grain-producing regions in the country.⁵⁹ Furthermore, research conducted in Mato Grosso has demonstrated an increase in cases of cancer in soy-producing regions.⁶⁰

And while Brazilian research on the health impacts of pesticide use has recently increased, it is still considered insufficient to understand the extent of the occupational exposure, and the health damages.⁶¹ This can be attributed to a lack of information on the true consumption of pesticides, as well as insufficient data on their toxicity—these issues are only exacerbated given the sheer number and diversity of parties involved: “agricultural workers, public health . . . pest control companies, pesticide industries and the transportation and trade of agricultural products.”⁶²

2. Environmental Impacts

Significantly, “many of the banned and severely restricted pesticides exported from the United States return as residues on imported

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Rafael J. Buralli et al., *Respiratory Conditions of Family Farmers Exposed to Pesticides in the State of Rio de Janeiro, Brazil*, 15 INT’L. J. ENVTL. RES. & PUB. HEALTH 1203 (June 2018).

⁵⁸ See “*You Don’t Want to Breathe Poison Anymore*,” *supra* note 52.

⁵⁹ See *Salmon on Soy Beans*, *supra* note 32, at 13.

⁶⁰ See *id.* at 14.

⁶¹ See Niece Muller Xavier Faria et al., *Pesticides poisoning in Brazil: the official notification system and challenges to conducting epidemiological studies*, 12 CIÊNCIA & SAÚDE COLETIVA (Mar. 2007), http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1413-81232007000100008.

⁶² *Id.* Please note the text quoted is a translation from the original, which is in Portuguese.

fruit.”⁶³ This has been termed the “circle of poison”—even though banned in many industrialized countries, persistent pesticides end up returning to the exporting countries in contaminated foodstuffs or ending up in ecosystems distant from the original contamination source.⁶⁴ Another huge environmental problem has emerged as the result of pesticide disposal—from production to disposal, “the impacts of pesticides go beyond their application to crops and exposure through food and water.”⁶⁵ Pesticides become obsolete if their use is banned while the product is stored or if a product has deteriorated due to poor storage, and frequently, stocks are not stored correctly, causing environmental contamination and human health problems.⁶⁶ Obsolete pesticides stocks that have built up in developing countries across the globe are substantial; for example, in Latin America alone there are estimated to be at least 30,000 tons.⁶⁷ Pesticide clean-up is a huge burden, especially for low-income countries, and can cost anywhere from \$2,000 to \$5,000 per ton.⁶⁸ While there is no legal mechanism requiring pesticide companies to take responsibility for managing their obsolete stocks, there is a growing public consensus that companies must live up to their claims of ‘cradle-to-grave’ product stewardship and assist with clean-up and disposal.⁶⁹

B. Pesticide Regulation in Brazil

While pesticides were first imported to Brazil in the 1960s, it was not until 1975, with the creation of the National Development Plan

⁶³ James Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J.L. & POL. 167, 181 (1995).

⁶⁴ See generally Marcelo Firpo Porto et al., *Double Standards and the International Trade of Pesticides: The Brazilian Case*, INT’L. J. OCCUPATIONAL AND ENVTL. HEALTH 24, 25 (2010).

⁶⁵ Human Rights Council, Report of the Special Rapporteur on the right to food, para. 81, U.N. Doc. A/HRC/34/48 (Jan. 24, 2017), available at <https://www.pan-uk.org/site/wp-content/uploads/United-Nations-Report-of-the-Special-Rapporteur-on-the-right-to-food.pdf>.

⁶⁶ See Peter Riggs & Megan Waples, *Accountability in the Pesticide Industry*, THE ROCKEFELLER BROTHERS FUND, at 16 (2002), available at <https://www.rbf.org/sites/default/files/attachments/pesticides.pdf>.

⁶⁷ See Dr. Abdelaziz Lagnaoul et al., *Reducing the Human and Environmental Risks of Obsolete Pesticides*, INT’L. BANK FOR RECONSTRUCTION AND DEV. at 7 (2010).

⁶⁸ See Riggs & Waples, *supra* note 66, at 16.

⁶⁹ See *id.* at 17.

("PND") that commercialization grew considerably.⁷⁰ Under the PND, farmers were under an obligation to buy pesticides in order to obtain rural credit, and "[c]onsumption gained momentum in the first decade of the 21st century, when the *bancada ruralista*, Brazil's powerful agribusiness lobby, significantly increased the number of seats it held in Congress, which led to subsidies and tax breaks favorable to pesticide makers."⁷¹ In 1989, Brazil's Congress approved Law 7802, known as the Pesticides Law, which succeeded Decree-Law 24114, issued in 1934.⁷² The law was written during a time when there was "the spread of State laws, a number of lawsuits and the growing worldwide movement on environmental and health agendas."⁷³

Another crucial factor at the time was the end of the military dictatorship in 1985, and the establishment of a new Federal Constitution in 1988.⁷⁴ The Constitution was issued after more than 20 years of a military dictatorship, and as a result, the context for constitutional reform was very favorable to an environmental protection agenda, which gained a subdivision of its own for the first time in history.⁷⁵ The bill was signed into law in 1989 and set more stringent rules to control pesticides—previously, only toxic chemicals used for agriculture and household pest control were controlled.⁷⁶ The law also included affirmative steps to protect human health and the environment and involved the ability to challenge or cancel a product's registration at the request of civil society organizations, thus allowing for democratic participation in the control of pesticides.⁷⁷

The law set up a tripartite structure to regulate pesticides, with power split up among the federal agencies in charge of health, the environment, and agriculture—in order for a pesticide to be registered, it has to be authorized by all three.⁷⁸ The Ministry of Agriculture and Livestock ("Mapa") is responsible for evaluating each product's agronomic effectiveness and need; the Ministry of Health ("MS") and the

⁷⁰ See Caroline Da Rocha Franco & Victor Pelaez, *(De)Constructing The Political Agenda Of Control Over Pesticides In Brazil*, 19 AMBIENTE & SOCIEDADE 213, 217 (2016).

⁷¹ Gonzales, *supra* note 12.

⁷² See Victor Pelaez et al., *Regulation of pesticides: A comparative analysis*, 40 SCI. AND PUB. POL'Y 644, 649 (Oct. 2013).

⁷³ Franco & Pelaez, *supra* note 70, at 217.

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.* at 219.

⁷⁷ *See id.*

⁷⁸ *See id.*

National Health Surveillance Agency (“ANVISA”) “verify toxicological testing of impacts on human health;” and the Ministry of the Environment (“MMA”), through its Brazilian Institute for the Environment and Renewable Natural Resources (“IBAMA”) evaluates a pesticide’s environmental impacts.⁷⁹

While the law set strict rules for research, production, marketing and use of pesticides, “public oversight agencies have not been provided with the material, human and financial resources they need to register pesticides and monitor their use.”⁸⁰ In contrast to the U.S. Environmental Protection Agency (“EPA”)’s approximately 850 staff responsible for pesticide assessment and registration, there are approximately only 50 public servants in Brazil’s three regulatory agencies responsible for the very same activities.⁸¹ This is noteworthy as Brazil spends \$10 billion USD on pesticides, herbicides, fungicides, and bactericides every year, and is the largest pesticide market in the world.⁸² As a result, the regulatory agencies in Brazil face a backlog of 1,100 applications to be processed, with only an average of 300 applications per year filed for the years 2010 and 2011.⁸³

Significantly, “no law in Brazil has imposed requirements for financial assurances by companies that register pesticides, in case their products cause harm to the environment, public health or agricultural production.”⁸⁴ These gaping enforcement problems have left agribusiness free to utilize potentially toxic chemicals, often ones that are banned in other parts of the world, with major effects on human health and the environment, particularly in low-income, rural areas.⁸⁵

The use of these chemicals in Brazil exemplifies the “double standard” in the transport and trade of hazardous products—the U.S. and the EU export hazardous chemicals or transfer production from “core countries to peripheral ones,” further exacerbating health and environmental risks in importing countries such as Brazil.⁸⁶ The U.S. and the EU’s pesticide legislation (the U.S. Federal Insecticide,

⁷⁹ *See id.*

⁸⁰ Pelaez et al., *supra* note 72, at 650.

⁸¹ *See id.* at 650.

⁸² *See* Gustavo Ribeiro, *Pesticides: Brazilian Agro’s Uncomfortable Ally*, THE BRAZILIAN REPORT (June 26, 2018), <https://brazilian.report/money/2018/06/26/pesticides-brazilian-agro/>.

⁸³ Pelaez et al., *supra* note 72, at 650.

⁸⁴ *See id.*

⁸⁵ *See* Prada, *supra* note 28.

⁸⁶ *See* Marcelo Firpo Porto et al., *Double Standards and the International Trade: The Brazilian Case*, 16 INT’L J. OF OCCUPATIONAL & ENVTL. HEALTH 24, 25 (2010).

Fungicide, and Rodenticide ACT and EU Regulation EC304/2003) both allow their companies to produce and export banned or restricted pesticides for domestic use to other countries.⁸⁷ The EPA does not have a mandate to collect complete data on pesticide exports, nor can they access corporate export declarations—the most recent data is two decades old.⁸⁸ In a study from 2003, researchers found that the U.S. exported 28 million pounds of banned, severely restricted or unregistered pesticides to foreign countries—nearly 13 tons per day.⁸⁹

Further, the standards for hazardous materials in developing countries are often less rigorous because of flaws in legislation and inspection, difficulties in reading and understanding safety labels by farmworkers, and an absence of technical training in handling hazardous products and information about the numerous health risks they pose.⁹⁰ As a result, human rights violations in the agricultural industry regularly go unchecked.

III. HUMAN RIGHTS STANDARDS IN BRAZIL

A. *International Treaties*

Brazil is a signatory to the Universal Declaration of Human Rights, which recognizes the dignity, freedom, and justice of all human beings, which includes Article 25, proclaiming that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care”⁹¹ The right to health was again recognized in 1966 in the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), to which Brazil is a party to.⁹² In light of the

⁸⁷ *See id.*

⁸⁸ *See* Elisabeth McLaughlin, *Export Of Banned US Pesticides Creates A Deadly Circle Of Poison*, TRUTHOUT (May 28, 2019), <https://truthout.org/articles/export-of-banned-us-pesticides-creates-a-deadly-circle-of-poison/>.

⁸⁹ *See generally* Carl Smith et al., *Pesticide Exports from U.S. Ports, 2001-2003*, 14 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 176 (2008).

⁹⁰ *See* Porto et al., *supra* note 86, at 25.

⁹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁹² International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16 1966, 993 U.N.T.S. 3. (explicitly requiring State Parties to realize progressively and “to the maximum available resources” the “highest attainable standard of health,” including “the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”; “the improvement of all aspects of environmental and industrial hygiene”; and “the prevention, treatment and control of epidemic, endemic, occupational and other diseases.”).

myriad of negative health impacts that are indisputably associated with pesticide use, certain pesticide practices clash with the right to health.

Brazil is also a party to the American Convention on Human Rights. Created in 1969 by the Organization of American States (“OAS”), a regional organization for cooperation between the states of the Americas, the Convention created a legally binding obligation for State Parties to respect and ensure a comprehensive range of civil and political rights.⁹³ OAS also created the Inter-American Commission on Human Rights (the “Commission”) by resolution in 1959, which addresses human rights violations in the 35 OAS member states.⁹⁴ The seven-member Commission has the authority request information from member states, make country visits and recommendations, and publish observations in reports.⁹⁵ The Commission establishes rapporteurships, which allow the Commission to monitor human rights conditions on topics of particular concern, particularly those that are tailored to the protection and promotion of rights of vulnerable communities.⁹⁶ The Commission can review petitions from one State Party alleging breach of the Convention by another State Party, but only when both parties have recognized the Commission’s competence pursuant to Article 45.⁹⁷ The Commission can also review complaints (“petitions”) from individuals, groups of individuals, and non-governmental organizations alleging breach of the Convention.⁹⁸

The judicial organ of the American human rights system is the Inter-American Court of Human Rights (the “Court”), which exercises both advisory and contentious jurisdiction. Pursuant to its advisory role, the Court may issue opinions concerning the interpretation of the Inter-American instruments at the request of an OAS organ or member state.⁹⁹ While the advisory jurisdiction is not limited to interpreting the

⁹³ S. Treaty Doc. No. 95-21; 1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

⁹⁴ See Inter-American Human Rights System, INTERNATIONAL JUSTICE RESOURCE CENTER, available at https://ijrcenter.org/regional/inter-american-system/#Inter-American_Instruments.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*; see also Diego Rodriguez-Pinzon, *The Victim Requirement, the Fourth Instance Formula and the Notion of Person in the Individual Complaint Procedure of the Inter-American Human Rights System*, 7 ILSA J. INT’L & COMP. L. 370, 383 (2001) (the individual complaint system “is gaining in importance in the inter-American system of promotion and protection of human rights.”)

⁹⁹ See INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 94.

American Convention, the Court's contentious jurisdiction is more limited.¹⁰⁰ The Court may only decide cases brought against the OAS Member States that have explicitly accepted the Court's contentious jurisdiction—Brazil is one of the 20 states that have done so.¹⁰¹ Additionally, only States parties and the Commission may refer contentious cases to the Court.¹⁰²

In recent years, the Commission has expanded protections beyond the enumerated rights of the Convention to provide indigenous peoples with the right to their communal lands, territories, and natural resources.¹⁰³ In November 2017, the Court issued an advisory decision at Colombia's request regarding questions of environmental protection in the American Convention of Human Rights, and the rights to life (Article 4) and personal integrity (Article 5).¹⁰⁴ The Court found that there is an "irrefutable relationship" between the environment and the ability to effectively enjoy all other recognized human rights, but that the "autonomous" right to a healthy environment under the Article 26 of the Convention (progressive development) "should not be considered a mere conduit for the protection of other substantive human rights."¹⁰⁵ Additionally, the Court found that a State is responsible for human rights violations with respect to environmental damage suffered outside of its territory if there is a "causal connection" between the State's activities and the impact outside of its borders – thus, States must "regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment."¹⁰⁶ The ability to hold the U.S. accountable for its corporation's pesticide exports under the Convention is limited—the US has not ratified the American Convention, nor has it accepted the jurisdiction of the Court.¹⁰⁷ As a result, any petitions against the U.S. could only be

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See* THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, *THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS* 27 OX. UNIV. PRESS (2017).

¹⁰⁴ *UN Human Rights Committee Recognizes Environmental Harm as Rights Violation*, IJRC (Aug. 22, 2019), <https://ijrcenter.org/2019/08/22/un-human-rights-committee-recognizes-environmental-harm-as-rights-violation/>.

¹⁰⁵ *UN Human Rights Committee Recognizes Environmental Harm As Rights Violation*, INTERNATIONAL JUSTICE RESOURCE CENTER (Aug. 22, 2019), <https://ijr-center.org/2019/08/22/un-human-rights-committee-recognizes-environmental-harm-as-rights-violation/>.

¹⁰⁶ *Id.*

¹⁰⁷ *See* Megan Chapman, *Climate Change and the Regional Human Rights Systems*, 10 *SUS. DEV. L. & POL'Y* 37, 38 (2010).

brought in the Commission, which can enter recommendations, but not binding judgments.¹⁰⁸ Furthermore, Brazil, along with other Member States, have expressed discontent with the Commission's progressive approach to human rights—Commission decisions are supported “when they are aligned with governmental agendas and attacked and discredited when the Commission's actions are perceived as inconvenient.”¹⁰⁹ As the Commission has expanded its jurisdiction to collective environmental rights, Brazil has loudly voiced its discontent. In 2011, the Commission issued precautionary measures in favor of the indigenous communities of the Xingu River in Brazil, and ordered the government to stop the construction of the Belo Monto hydroelectric dam project.¹¹⁰ In protest, Brazil kept its OAS ambassador grounded in Brasilia, recalled its candidate to the Commission, and suspended payment of its annual dues to the organization.¹¹¹

B. Indigenous Rights Framework

Brazil has a history of systemic violations of the rights of its indigenous communities, marked by numerous human rights violations, including, but not limited to, the dispossession of indigenous land.¹¹² Brazil is obligated by law to protect the rights of its indigenous communities, an obligation articulated in the numerous provisions of Article 231 and 232 of its 1988 Federal Constitution, including the right to “ownership of traditionally occupied lands, the competence of the Union to demarcate lands, and protect and ensure that due regard is given to their properties and to the relations of indigenous communities, including the preservation of their languages, habits, customs, beliefs and traditions.”¹¹³ Article 232 also gives indigenous communities standing to sue to enforce their rights.¹¹⁴ Examples of current human

¹⁰⁸ *See id.*

¹⁰⁹ Manuela Picq, *Is The Inter-American Commission of Human Rights Too Progressive?* AL JAZEERA (June 9, 2012), <https://www.aljazeera.com/indepth/opinion/2012/06/2012658344220937.html>.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² Thaís Franceschini, *The Guarani And Kaiowá Peoples' Human Right to Adequate Food and Nutrition*, FIAN BRAZIL, <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Health/FIAN.pdf> at 11.

¹¹³ *Id.* at 31.

¹¹⁴ Constitute Project, *Brazil's Constitution of 1988 with Amendments through 2014*, 154, (Aug. 12, 2019, 18:47), https://www.constituteproject.org/constitution/Brazil_2014.pdf.

rights violations against indigenous communities in Brazil are illustrated Guarani and Kaiowá tribes, two indigenous groups in Mato Grosso do Sul. At present, they occupy land within their traditional territory that is dominated by monocultures and high pesticide use, threatening their access to clean food and water.¹¹⁵

C. Environmental Treaties

International environmental law is another avenue to enforce a shift away from the use of hazardous pesticides. Brazil is a signatory to the Rotterdam Convention, which is a multilateral treaty that establishes a system through which governments can exchange information about dangerous chemicals.¹¹⁶ The Convention established the Prior Informed Consent (“PIC”) procedure, which stands on the notion that importers of chemicals—particularly those in developing countries—should have “complete information about hazardous chemicals, including details of any bans or severe restrictions of such chemicals, prior to importing them.”¹¹⁷ Additionally, Brazil is a signatory to the Stockholm Convention on Persistent Organic Pollutants (“POPs”), which was signed in 2001 and went into force in 2004.¹¹⁸ POPs are toxic chemicals that adversely affect human health and the environment, and have far-reaching effects because they can travel by wind and water.¹¹⁹ A number of pesticides fall under the POP designation. POPs may persist in the environment for long periods of time and can be accumulated from one species to the next in the food chain.¹²⁰

While the Convention is intended to be binding, there are weaknesses that limit its effectiveness, including the consensus-based decision-making process, which allows just one country to block the listing of a harmful pesticide on the list.¹²¹ States also have the freedom

¹¹⁵ See Thaís Franceschini, *supra* note 112, at 20.

¹¹⁶ *Status of Ratifications*, ROTTERDAM CONVENTION, <http://www.pic.int/Countries/Statusofratifications/tabid/1072/language/en-US/Default.aspx>.

¹¹⁷ See Riggs & Waples, *supra* note 66 at 14.

¹¹⁸ See BARRY S. LEVY & VICTOR W. SIDEL, SOCIAL INJUSTICE AND PUBLIC HEALTH 395 (Barry S. Levy & Victor W. Sidel, eds., 2nd ed. 2013).

¹¹⁹ EPA, *Persistent Organic Pollutants*, (last updated Dec. 2009), <https://www.epa.gov/international-cooperation/persistent-organic-pollutants-global-issue-global-response>.

¹²⁰ See *id.*

¹²¹ See Special Rapporteur, *Special Rapporteur on the right to food*, U.N. Doc. A/HRC/34/48 (Jan. 24, 2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/017/85/PDF/G1701785.pdf?OpenElement>, at 14.

to accept or reject a global ban on a pesticide through an opt-in and opt-out provision.¹²² Finally, because of the difficulty of adding a chemical to the listing under Annex III, thousands of chemicals are missing from the Convention's list.¹²³ Another overarching concern is the "differential capacities" of countries to assess and manage the risks of hazardous pesticides.¹²⁴ While the Convention is grounded in the notion that transparency is a key aspect of global pesticide regulation, scholars "no longer assume a priori that the mechanism of transparency necessarily leads to accountable, legitimate, inclusive, and effective governance."¹²⁵ For one, access to information does not necessarily change power relations or "improve the position of developing countries."¹²⁶ Additionally, the success of the Convention is reliant on the diligence of importing countries. Unfortunately, the effectiveness of the PIC procedure can easily be overridden by governmental indifference to environmental and consumer protection.¹²⁷ Further, in countries like Brazil that are largely dependent on export crops grown in monocultures, which are more vulnerable to pests and "thus more prone to the use of chemical pesticides[,] pesticides play a critical role in the economy."¹²⁸ The Convention does not regulate even the most basic activities of industry itself, leaving it up to the State Parties to enact and enforce legislation which ensures that testing requirements relation to substances sold domestically, are the same as to those that are exported.¹²⁹ These issues highlight the limitations of the Convention's approach.

For these reasons, the existing binding human rights, indigenous rights, and environmental frameworks are wholly insufficient in

¹²² *See id.*

¹²³ Annex III Chemicals; Rotterdam Convention (<http://www.pic.int/TheConvention/Chemicals/AnnexIIIChemicals>). (At present, there are 35 pesticides (including 3 severely hazardous pesticide formulations) out of a total of 52 chemicals, listed in Annex III.); World Health Organization, *WHO Training Package for the Health Sector*, 9 (July 2008), <https://www.who.int/ceh/capacity/Pesticides.pdf>. (There are hundreds of different active principles or main ingredients of pesticide groups – approximately 900 in the US.)

¹²⁴ JANSEN & DUBOIS, *TRANSPARENCY IN GLOBAL ENVIRONMENTAL GOVERNANCE: CRITICAL PERSPECTIVES* 107 (Aarti Gupta & Michael Mason, 1st ed. 2014).

¹²⁵ *Id.* at 108.

¹²⁶ *Id.*

¹²⁷ Paula Barrios, *The Rotterdam Convention of Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?*, 16 *GEO. INT'L ENVTL. L. REV.* 679, 739 (2004).

¹²⁸ *Id.* at 740.

¹²⁹ *Id.*

addressing the environmental and public health crisis facing Brazil from the proliferation of pesticide use.

IV. RELEVANT NON-BINDING FRAMEWORKS

A. *FAO International Code of Conduct on Pesticide Management*

The Joint FAO/WHO Meeting on Pesticide Residues (“JMPR”) is an international expert scientific group that meets regularly to review the effects of pesticides through direct exposure and residue on foods.¹³⁰ The JMPR estimates maximum residue levels, reviews toxicological data and estimate acceptable daily intakes (“ADIs”) for humans of the reviewed pesticides.¹³¹ The JMPR established the International Code of Conduct on Pesticide Management, which “is the framework on pesticide management for all public and private entities engaged in, or associated with, production, regulation and management of pesticides.”¹³² The Code, as the only global instrument for pesticide management that includes explicit obligations for corporations, sets the standards of conduct for comprehensive and safe pesticide life cycle practices for states and the pesticide industry itself.¹³³ However, the Code contains numerous shortcomings, in particular, monitoring procedures that are wholly insufficient.¹³⁴ Many non-governmental organizations have complained that the monitoring procedures do not actually enforce compliance with the Code, and thus are not actually a useful tool.¹³⁵ Furthermore, the Code is a voluntary framework that doesn’t deal with the public health aspects of hazardous pesticides. Studies have also indicated that due to the low

¹³⁰ WORLD HEALTH ORGANIZATION, *Pesticide Residues in Food*, WHO (Feb. 19, 2018), <https://www.who.int/en/news-room/fact-sheets/detail/pesticide-residues-in-food>.

¹³¹ See *Joint FAO/WHO Meeting on Pesticide Residues (JMPR)*, WORLD HEALTH ORGANIZATION, https://www.who.int/foodsafety/areas_work/chemical-risks/jmpr/en/.

¹³² See *The International Code of Conduct on Pest Management*, WORLD HEALTH ORG. AND FOOD AND AG. ORG. OF THE U.N., 1 (2014), http://www.fao.org/fileadmin/templates/agphome/documents/Pests_Pesticides/Code/Code_ENG_2017updated.pdf.

¹³³ See *id.*

¹³⁴ See generally Henk van den Berg et al., *Setting International Standards for the Management of Public Health Pesticides*, 1, 12 PLOS MED. (2015), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001824>.

¹³⁵ See *Open Letter on FAO/WHO Monitoring Procedures*, EURO. CENTER FOR CONSTIT. AND HUMAN RIGHTS (2017), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Open_Letter_FAO_WHO_Monitoring_Report_Punjab_20171120.pdf.

compliance of pesticide companies and governments, the Code is inadequate and clearly violates the rights of individuals.¹³⁶ Progress has been hindered “by government reluctance, at a national or international level, to hamper industry and free trade, further encouraged by international trends in liberalization and reduced regulation.”¹³⁷ This lack of compliance, recognized as “a complex web of factors,” was also attributed to the fact that low-income farmers are often not able to afford proper pesticide storage facilities, personal protective equipment, and/or live in areas with high rates of illiteracy, causing incomplete understanding of pesticide labels.¹³⁸ In many rural areas, there is also low farmer and farmworker awareness about the Code’s provisions and lack of technical training on and inability to implement Integrated Pest Management (“IPM”) techniques, which stand as non-chemical approaches to pest management, except where NGOs stepped in and took an active role in training and assistance.¹³⁹

The spraying of pesticides in Brazil have created long-term health problems beyond the farmworkers that handle pesticides, particularly indigenous groups, traditional Afro-Brazilian communities called *quilombos*, and rural residents, that all live in agricultural regions.¹⁴⁰ Moreover, there are studies indicating that family farmers in Brazil, typically with “low educational level and family income, and lack of orientation or technical support for using chemical products” are especially prone to pesticide poisoning, pointing to social vulnerability that leads to low awareness about the risks of pesticide use, and higher human exposure.¹⁴¹ Corporations and governments alike fall back on these factors in order to escape liability.

This exposure to pesticides has had the major impacts on the enjoyment of human rights, including the rights to health, adequate food, safe drinking water, and a healthy environment.¹⁴² As a nation, Brazil is required to protect its citizens from human rights abuses, including those related to and in connection with business activity.¹⁴³ As there

¹³⁶ Fadya A. Orozco et al., *Monitoring Adherence to the International Code of Conduct - Highly Hazardous Pesticides in Central Andean Agriculture and Farmers’ Rights to Health*, 15 INT. J. OCCUP. ENVIRON HEALTH 255, 263 (2009).

¹³⁷ Barbara Dinham, *The Success of a Voluntary Code in Reducing Pesticide Hazards in Developing Countries*, GREEN GLOBE YEARBOOK 29, 34 (1996).

¹³⁸ See Fadya A. Orozco et al., *supra* note 136, at 263.

¹³⁹ See generally *id.* at 263.

¹⁴⁰ See “*You don’t want to breathe poison anymore*,” *supra* note 52.

¹⁴¹ See Buralli et al., *supra* note 57.

¹⁴² See “*You don’t want to breathe poison anymore*” *supra* note 52.

¹⁴³ See “*You don’t want to breathe poison anymore*” *supra* note 52.

exist many hurdles in the regulation of pesticide use within Brazil, human rights frameworks have the potential to address the adverse human rights and environmental impacts of pesticides from the standpoint of corporate responsibility.

B. The United Nations Guiding Principle on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (“UNGPs”), also known as the Ruggie Principles, named after UN Special Representative John Ruggie who developed the framework, represents the non-binding global standards for what is expected of all States and businesses regarding business practices and human rights.¹⁴⁴ The UNPGs are built on a three-pillared framework of “Protect, Respect, and Remedy,” and consist of thirty-one guiding principles.¹⁴⁵ The “Protect” focuses on the State’s duty to protect against human rights abuses for individuals within their territory.¹⁴⁶ The “Respect” addresses a business enterprise’s responsibility to respect human rights standards and to address any adverse human rights impacts they are involved in, a standard existing independently of a State’s obligation.¹⁴⁷ The “Remedy” pillar sets forth a State’s duty to ensure that appropriate remedies exist to remedy business-related human rights abuses within their territories, whether it be “through judicial, administrative, legislative or other appropriate means.”¹⁴⁸ While these foundational principles were a huge step forward, there has also been criticism that because there is no binding compliance mechanism, the UNPGs “cannot actually require companies to do anything at all”—companies can simply “reject the principles altogether without consequence—or publicly embrace them while doing absolutely nothing to put them into practice.”¹⁴⁹ As a result, these principles lack the teeth necessary to ensure that multinational corporations are adhering to practices that don’t violate basic human rights standards.

¹⁴⁴ See *The Corporate Responsibility to Respect Human Rights Interpretive Guide*, UNITED NATIONS HUMAN RIGHTS (2012), at 1.

¹⁴⁵ See *id.* at 2.

¹⁴⁶ See *id.* at 3.

¹⁴⁷ See *id.* at 13.

¹⁴⁸ See *id.* at 27.

¹⁴⁹ Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Responsibility*, HUMAN RIGHTS WATCH, https://www.hrw.org/sites/default/files/related_material/business.pdf, at 4.

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C. OECD Guidelines

The OECD Guidelines for Multinational Enterprises, established in 1976, is another international framework that provides recommendations and standards for multinational corporations on responsible business practices operating in or from countries adhering to the Guidelines.¹⁵⁰ Each adhering country sets up a National Contact Points (“NCP”), which are entities that can hear complaints regarding the extra-territorial activities of companies.¹⁵¹ However, these NCPs are generally considered “quite weak and strictly non-adjudicatory.”¹⁵²

Building off of these guidelines, in 2016 the OECD, together with the Food and Agricultural Organization (“FAO”), launched the Guidance for Responsible Agricultural Supply Chains, which set forth a framework and benchmark for responsible business practices in agricultural supply chains, and in 2018 created an implementation pilot program with over 30 companies voluntarily participating in the initiative.¹⁵³ Many of these companies are “multinational enterprises with a global reach and participants include entities active in both food and non-food commodity chains” and implemented a five-step framework for risk-based due diligence.¹⁵⁴ However, it remains to be seen how widespread the adoption of these standards will be—at present, it is fully voluntary.

D. International Labour Organization Principles

The International Labour Organization (“ILO”), is a U.N. agency consisting of governments, employers and workers of 187 member States, develops labor standards, policies and programs that promote decent work for all women and men. The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“MNE Declaration”) is an ILO instrument that “provides direct guidance to enterprises on social policy and inclusive, responsible and

¹⁵⁰ See *The OECD Guidelines for Multinational Corporations*, OECD (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>, at 3.

¹⁵¹ See Albin-Lackey, *supra* note 149, at 10.

¹⁵² See *id.*

¹⁵³ *Pilot Project on the Implementation of the OECD-FAO Guidance for Responsible Agricultural Supply Chains*, OECD-FAO (2018), available at <https://mneguidelines.oecd.org/Baseline-Report-on-OECD-FAO-Guidance-For-Responsible-Agricultural-Supply-Chains.pdf>.

¹⁵⁴ *Id.*

sustainable workplace practices.”¹⁵⁵ The MNE Declaration makes recommendations to domestic and multinational corporations (“MNEs”), governments of home and host countries, and employers’ and workers’ organizations to further social progress and decent work.¹⁵⁶ It is a voluntary tool “that provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices” —as a voluntary instrument, however, its recommendations are non-binding on governments or corporations.¹⁵⁷ Importantly, the ILO itself has recently begun to focus on labor in global supply chains during its annual International Labor Conference.¹⁵⁸

V. ANALYSIS

A. *Limitations of Existing Regulatory Instruments*

Given the continuing pesticide poisonings that are occurring in Brazil, it is clear that the current environmental and human rights frameworks that exist are insufficient to address what is happening on the ground. This can be attributed to numerous factors, including a lack of standardized policies on production, distribution, and acceptable levels of pesticide usage, and insufficient abilities to enforce current regulations.¹⁵⁹ These shortcomings continue to affect agricultural workers, children, the poor, and other vulnerable communities, particularly in countries that have weaker regulatory and enforcement systems such as Brazil.¹⁶⁰ Furthermore, because maximum residue levels are not globally uniform, food products banned in one country may still be allowed entry into countries that allow for higher residue levels.¹⁶¹ For example, in the U.S., while pesticide use is regulated by a

¹⁵⁵ *What is the ILO MNE Declaration?* INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang-en/index.htm.

¹⁵⁶ See *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Fifth Edition, International Labour Organization, (Mar. 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf, at 2.

¹⁵⁷ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, International Labour Organization, Mar. 17, 2017, https://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm.

¹⁵⁸ See *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, HUMAN RIGHTS WATCH (May 30, 2016), <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence>.

¹⁵⁹ See Special Rapporteur, *supra* note 121, at 16.

¹⁶⁰ See *id.* at 16.

¹⁶¹ See *id.*

variety of guidelines under United States law, upon leaving the U.S., the pesticides are no longer subject to American regulations—the pesticides, regardless of the environmental or health risks, can be shipped to any country for any use.¹⁶² Beyond that, while some of these initiatives have been impactful, the voluntary nature of any soft law instruments limits their effectiveness.¹⁶³ Existing regulatory instruments have especially been ineffective in addressing the global character of the pesticide market, demonstrated by the widespread and often legally permitted practices of exporting banned highly hazardous pesticides to developing countries.¹⁶⁴ Many believe that these gaps and shortfalls should be addressed from a human rights standpoint.¹⁶⁵

At its core, there is a lack of harmony between the environmental and human rights frameworks. International environmental law has integrated human rights frameworks and acknowledged the nexus between environmental protection and human health and well-being.¹⁶⁶ However, most of the human rights found in environmental treaties are procedural rights—such as access to information and the right to public participation.¹⁶⁷ While the incorporation of certain features of human rights law is a positive step in the right direction, environmental law has failed to incorporate substantive human rights, which affects the type of redress victims can seek.¹⁶⁸

B. *The Rise of Soft Law and Its Shortcomings*

The obligation of a state to protect individuals in the state's territory against human rights abuses is an obligation that also extends to the protection of non-state actors (such as corporations).¹⁶⁹ Organizations like Human Rights Watch have consistently found that governments have failed to properly oversee and regulate the extraterritorial human rights practices of companies incorporated in their country.¹⁷⁰

¹⁶² See Colopy, *supra* note 63.

¹⁶³ See *id.* at 15.

¹⁶⁴ See *id.* at 21.

¹⁶⁵ See *id.*

¹⁶⁶ See S. De Los Reyes, *The Extraterritorial Application of Human Rights in Cases of Transboundary Environmental Harm*, at 3-4, (taking into account the Stockholm Convention's integration between environmental preservation and human beings).

¹⁶⁷ See *id.* at 4.

¹⁶⁸ See *id.* at 5.

¹⁶⁹ See Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385, 387 (2009).

¹⁷⁰ See Albin-Lackey, *supra* note 149, at 6.

States have increasingly placed “normative statements in non-binding political instruments such as declarations, resolutions, and programs of action, and has signaled that compliance is expected with the norms that these texts contain.”¹⁷¹ As states increasingly rely on voluntary commitments, advocates argue that soft law norms are sufficient because they may also become hard law through adoption in domestic law, or by incorporation in private binding agreements.¹⁷² However, critics point out that soft law can give the appearance that states are responding to a problem where public pressure has been exerted, while in fact the voluntary nature and contents of the instrument adopted are designed to “create little in the way of obligation.”¹⁷³ Furthermore, some argue that the Ruggie principles, which target corporate behavior within the human rights framework, do not adequately consider whether human rights obligations extend to the extraterritorial activities of its own state and non-state actors.¹⁷⁴

Conversely, the majority of human rights treaties “do not establish environmental rights provisions because they were designed before the emergence of environmental law as a common concern.”¹⁷⁵ Some academics argue that domestic efforts to regulate corporate behavior is currently the most practical way to ensure that corporations are engaging in business practices that meet human rights standards.¹⁷⁶ For negligence claims, the particular allegations must fall within a recognized claim for negligence in that particular jurisdiction and the defendants must be subject to the jurisdiction of that court.¹⁷⁷ As most common law systems will apply the choice of law where the claim took place, if local laws were designed to shield oppressive governments, it will be exceedingly difficult to pursue cases based on violations of human rights law.¹⁷⁸

The Alien Tort Statute (“ATS”) is a unique mechanism to bring human rights claims in United States federal courts, providing that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations

¹⁷¹ DINAH L. SHELTON, *Soft Law* in HANDBOOK OF INTERNATIONAL LAW 1 (Routledge Press, 2008) https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2048&context=faculty_publications.

¹⁷² *See id.* at 13.

¹⁷³ *Id.* at 19.

¹⁷⁴ *See* McCorquodale, *supra* note 169.

¹⁷⁵ *See* S. De Los Reyes, *supra* note 166, at 6.

¹⁷⁶ *See generally* Stephens, *supra* note 26 at 402-403.

¹⁷⁷ *See id.* at 403-404.

¹⁷⁸ *Id.*

or a treaty of the United States.”¹⁷⁹ The 1980 Second Circuit decision *Filartiga v. Pena-Irala* was the first case in which this statute was utilized and announced the right of federal courts to hear civil suits by aliens for torts committed in violation of customary international law, even if the claims involve acts perpetrated in another country by a non-U.S. citizen.¹⁸⁰ The ATS was long a promising avenue to hold multinational corporations legally accountable for human rights abuses and environmental destruction that has occurred outside of the United States, and as an avenue of redress for victims.¹⁸¹ Recent decisions, including the 2018 Supreme Court decision of *Jesner v. Arab Bank, PLC*, which held that foreign corporations may not be defendants in suits brought under the ATS, have vastly narrowed the scope of the statute and its ability to provide redress in United States courts for human rights and environmental abuses by foreign companies.¹⁸²

Additionally, critics of tackling these abuses domestically rightfully argue that governments bend to the will of corporate interests rather than the interests of their citizens, and that multinational corporations are adept at shielding their practices through complex corporate structures.¹⁸³

VI. PROPOSAL

A. *Binding International Framework for Corporate Responsibility*

While the many harms to human health and the environment caused by pesticides have become well-known and are indisputable, the pesticide industry has failed to hold themselves accountable for their actions.¹⁸⁴ At the same time, the market has increasingly been geared toward organic foods—in the US, organic sales totaled \$49.4 billion in 2017, up 6.4% from the previous year, according to the Organic Trade Association. Similarly in Brazil, the organic industry has seen huge growth over the past few decades, although the Brazilian market makes it much more difficult to enter as an organic vegetable

¹⁷⁹ 28 U.S.C. § 1350.

¹⁸⁰ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁸¹ See generally Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Act*, 40 VA. J. INT’L L. 545 (1999); Kathleen Jawger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 519 (2010).

¹⁸² See generally Stephen P. Mulligan, *The Rise and Decline of the Alien Tort Statute*, CONGRESSIONAL RESEARCH SERVICE (June 6, 2018), available at <https://fas.org/sgp/crs/misc/LSB10147.pdf>.

¹⁸³ See Stephens *supra* note 26, at 403.

¹⁸⁴ See Riggs & Waples *supra* note 66, at 5.

grower, as it is a competitive and exclusive market “does not protect smallholders from potential hold-up situations exerted by powerful downstream partners.”¹⁸⁵

Despite the growth of and support for the organic industry, pesticides sales continue to make companies billions of dollars every year—Syngenta, for example, had a revenue of \$12.65 billion in 2017.¹⁸⁶ Because the pesticide industry deals with products toxic to health, the sale and use of pesticides are governed by both binding and non-binding state and international standards—however, companies comply with these conventions in varying degrees, and the “extent to which companies observe or neglect these standards is a powerful indicator of management quality.”¹⁸⁷ As existing instruments have been insufficient in changing the behavior of transnational agrochemical companies, reputational risk is an important territory to bring about change, not for the chemical companies themselves, but for the consumer products whose reputations can be publicly impacted.¹⁸⁸ Reputational risk is the loss from the damage of a company’s reputation, which in turn can affect a corporation’s market share, damage investor relations, and hamper its ability to move into new business markets and attract employees.¹⁸⁹

While pesticide companies may not be particularly vulnerable to consumer pressures, their downstream customers certainly are.¹⁹⁰ Consumer goods companies are driven by their reputation, and increasingly, younger generations of consumers prefer to spend their money on brands with positive social messages, sustainable manufacturing methods and ethical business models.¹⁹¹ Big-name, consumer-based brands have a responsibility to their whole supply chain, related to their influence over their suppliers. Holding these companies

¹⁸⁵ Julien Blanc & Paul Kledal, *The Brazilian Organic Sector: Prospects and Constraints of Facilitating the Inclusion of Smallholders*, 28 J. OF RURAL STUDIES 1, 142, 142 (2013)

¹⁸⁶ *Syngenta 2017 Full Year Results*, Syngenta AG, (archived from the original (PDF) on Apr. 12, 2016, retrieved Feb. 15, 2018.) available at <https://www.syngenta.com/sites/syngenta/files/company/bond-investors/financial-results/fyr-2017-pr-english.pdf>.

¹⁸⁷ See Riggs & Waples *supra* note 66, at 13.

¹⁸⁸ See *supra* at 18.

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 28.

¹⁹¹ See Sarah Landrum, *Millennials Driving Brands To Practice Socially Responsible Marketing*, FORBES (Mar. 17, 2017), <https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/#611208014990>.

accountable for human rights abuses within their supply chain has the potential to change their behavior when it comes to the choice of and manner in which pesticides are being used throughout the production of their products.

There lacks an integral and harmonized model between environmental protection and human rights law—the “developments within these two fields regarding environmental protection are not inclusive.”¹⁹² It has been argued that the current framework of international law does not effectively ensure human rights standards for the individuals affected by transboundary environmental harm.¹⁹³ Approaching this issue from a corporate responsibility standpoint, which incorporates both a human rights and environmental protection framework, is at present the best approach to limiting the production, sale, use, and disposal of pesticides.

Countries that are members of the G20 must work together to establish an international, legally binding standard that compels governments to require agribusinesses to conduct human rights due diligence across their global supply chains. This will require concerted, joint action between governments and their corporations—governments must “address governance gaps with regard to global business operations that allow human and environmental tragedies to occur and create an uneven playing field between responsible and irresponsible businesses.”¹⁹⁴ This standard must require that states monitor corporations to ensure that they are properly labeling their chemical products with safety information and training standards, and that strict liability is placed on pesticide producers for human and environmental impacts, container return, and for unused and obsolete stocks.

In 2014, the UN Human Rights Council established the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) pursuant to Human Rights Council Resolution 26/9 (A/HRC/26/9).¹⁹⁵ The OEIGWG’s mandate is to “elaborate on an

¹⁹² See S. De Los, Reyes *supra* note 166, at 2.

¹⁹³ See *id.* at 32.

¹⁹⁴ Organisation for Economic Co-operation and Development (OECD), *Promoting Sustainable Global Supply Chains: International Standards, Due Diligence, and Grievance Mechanisms*, presented at the 2nd Meeting of the G20 Employment Working Group (Feb. 15-17, 2017, https://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_559146.pdf at 6.

¹⁹⁵ See Daniel Uribe Terán, *The Core Elements of a Legally Binding Instrument: Highlights of the Revised Draft of the Legally Binding Instrument on Business and Human Rights*, SOUTH CENTRE (Oct. 2019), https://www.southcentre.int/wp-content/uploads/2019/10/PB68_The-Core-Elements-of-a-Legally-Binding-Instrument-

international legally binding instrument on transnational corporation and other business enterprises with respect to human rights.”¹⁹⁶ The preamble explicitly refers to the UNPGs, emphasizing the complementary nature of the UNPGs with the treaty process.¹⁹⁷ In 2019 the OEIWG released a revised draft of a legally binding instrument on business activities and human rights.¹⁹⁸ The most recent draft encompasses all business enterprises, not just transnational companies.¹⁹⁹ Its provisions require State Parties to “regulate effectively the activities of business enterprises within their territory or jurisdiction” to ensure that they “respect human rights and prevent human rights violations or abuses.”²⁰⁰ The draft requires business enterprises to make public all policies and measures adopted to achieve the prevention of human rights violations, including those relating to their contractual relationships.²⁰¹ Additionally, the draft provides: remedies for victims of human rights abuses caused by the activities of all business enterprises; the requirement that State Parties ensure that their domestic law provides for an adequate system of legal liability for human rights violations or abuses in the context of business activities; and measures that

Highlights-of-the-Revised-Draft-of-the-Legally-Binding-Instrument-on-Business-and-Human-Rights_EN.pdf.

¹⁹⁶ *Open-ended intergovernmental working group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. Council, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>.

¹⁹⁷ Maysa Zorob, *The Lengthy Journey Towards a Treaty on Business and Human Rights*, OPEN GLOBAL RTS. (Oct. 11 2019), <https://www.openglobalrights.org/the-lengthy-journey-towards-treaty-on-business-and-human-rights/>.

¹⁹⁸ See OEIWG CHAIRMANSHIP REVISED DRAFT 16.7.2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

¹⁹⁹ See Carlos Lopez, *The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects*, INV. TREATY NEWS (Oct. 2 2019) https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/#_ftn4.

²⁰⁰ See Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, revised July 7, 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (Article 5(1)).

²⁰¹ Art. 1.4 defines a contractual relationship as “any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.” *Id.*

businesses must undertake to ensure that they are not causing human rights abuses.²⁰² It provides the most promising model to date in holding national agribusinesses accountable for human rights abuses stemming from their business practices domestically and abroad.

The revised draft also successfully contemplates the difficulties that victims may have in accessing justice. For one, the draft treaty provides victims choice of jurisdiction in determining where to bring their claims, which can be the place where (1) the human rights violations occurred; (2) where the victims are domiciled; or (3) where the natural or legal person or association of natural or legal persons are domiciled.²⁰³ The latter is characterized as the place where it has its (a) incorporation; or (b) statutory seat; or (c) central administration; or (d) substantial business interests.²⁰⁴ Article 10 also contains provisions regarding the mutual legal assistance State Parties must provide one another to achieve the goals of the instrument.²⁰⁵

The draft relies on state-level implementation as a mechanism for remedies, without providing an international remedial mechanism. This approach is not without its critiques. Many scholars have concluded that the legal duty of states to regulate the human rights impacts of their transnational corporations “already exists as a matter of human rights law.”²⁰⁶ Furthermore, given the current state of global business, corporations “may have as much or more power over individuals as

²⁰² *Id.* at Art. 5(1).

²⁰³ *Id.* at Art. 7(1).

²⁰⁴ *Id.*

²⁰⁵ *Oeigwg Chairmanship Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (see article 10).

²⁰⁶ Claire Methven O’Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 *BUS. L.J.* 47, 73 (2018) (summarizing the arguments in favor of a home state duty to regulate TNC’s abroad are that “(i) public international law raises no objection to extraterritorial regulation of TNCs, especially where its aim is to promote respect for human rights; (ii) human rights treaties in fact oblige states to undertake such regulation, a consequence flowing from: (iii) two implied rules arising under human rights treaties: first, that the state’s duty to protect extends to preventing abuses, through regulation, by non-state actors at home, and second, that the same duty applies to any extraterritorial scenarios where states may have influence.”). See also Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights Violations*, 5 *MELB. J. INT’L L.* 13, 36 (2004) (asserting that the state’s obligations apply not just to civil and political rights, but also economic, social and cultural rights).

governments.”²⁰⁷ States like Brazil often welcome foreign investment and may lack the capacity or willingness to control transnational corporations and their employees operating within their state.²⁰⁸ Despite these concerns, other international instruments have already successfully relied on state responsibility to hold private parties accountable. The European Court of Justice, Inter-American Court of Human Rights, and other human rights bodies have found private actors liable for human rights abuses most often “through the paradigm of state responsibility.”²⁰⁹ These bodies have found state’s liable by asserting that the “state’s tolerance of a private human rights abuse actually violates the state’s duty to protect the right through legislation, preventive measures, or provision of a remedy (or, in other cases) that the private actor involved is actually the organ of a state.”²¹⁰ Nevertheless, human rights violations due to indiscriminate pesticide use continue to exist in places like Brazil where agribusiness has flourished.²¹¹ For this reason, an approach directly targeting states that do not diligently monitor their multinational corporations is necessary to ensure that multinational corporations are not affecting individual’s ability to enjoy a clean and healthy environment.²¹² Domestic law could be the most effective as it charges the state with creating accountability structures that carry out the instrument’s requirements.²¹³ As opposed to

²⁰⁷ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 461, 545 (2001).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 470.

²¹⁰ *Id.*

²¹¹ See generally PricewaterhouseCoopers Brasil, *Agribusiness in Brazil: An Overview*, PWC, <https://www.pwc.com.br/pt/publicacoes/setores-atividade/assets/agribusiness/2013/pwc-agribusiness-brazil-overview-13.pdf> (noting that agribusiness in Brazil represents 22% of Brazil’s GDP, 1/3 of all employment, and nearly 40% of its exports).

²¹² Other violations of human rights law that multinational corporations have been accused of include freedom from forced or slave labor, freedom to enjoy property, freedom from deprivation of or injury to health, and freedom from discrimination. See Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. OF TRANSNAT. L. 801, 818-819 (2002).

²¹³ Some countries have already implemented corporate due diligence laws. In 2017, France implemented the “Corporate Duty of Care” law, which requires large companies to come up with vigilance plans that cover all human rights abuses within their supply chain in order to minimize the impact of their activities on local communities and the environment. The law empowers victims and other concerned parties to bring the issue before a judge. The law, while groundbreaking and ambitious, has been criticized for only covering France’s 100 largest companies, and frees companies of liability if their plan is deemed “adequate” by the court, regardless of the harm caused. See Juliette Renaud, *France Adopts Corporate Duty of Care Law*,

targeting the host state, where a multinational corporation's business activities take place, legislation in the home state is the most practical and realistic way to regulate supply chain practices.²¹⁴

The OEIGWG's draft requires State Parties to investigate complaints made by victims.²¹⁵ The "need to provide grievance mechanisms and access to remedy to victims of adverse impacts from business operations" is critical to promoting sustainable supply chains and business accountability.²¹⁶ Complaint mechanisms give individuals the ability to access the human rights system that "has for so long regarded them as only peripheral actors to be given rights rather than as actors having the agency to claim these rights at the international level."²¹⁷ During the OEIGWG's sessions, civil society organizations have called for measures that impose direct obligations on businesses under international law, or the creation of an international tribunal that will have jurisdiction to try corporations directly for human rights abuses.²¹⁸ However, these approaches are limited by the practical realities of international law and its de-centralized nature.²¹⁹ The treaty's first draft (the "Zero Draft") contained an Optional Protocol ("OP") that relied on a National Implementation Mechanism ("NIM") to monitor and promote compliance with the instrument.²²⁰ Article 13 of the

FRIENDS OF THE EARTH INT'L (Feb. 22, 2017), https://www.foei.org/press_releases/france-adopts-corporate-duty-care-law.

²¹⁴ See Beth Stephens, *Corporate Liability: Enforcing Human Rights through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 402 (2001) ("reality around the world . . . is that home [sic] countries usually do not have the power to regulate multinational enterprises.").

²¹⁵ See Art. 4(10) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf ("State Parties shall investigate all human rights violations and abuses effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, in accordance with domestic and international law.").

²¹⁶ See Organisation for Economic Co-operation and Development (OECD) *supra* note 194, at 15.

²¹⁷ Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. OF COMP. & INT'L L. 153 (2012).

²¹⁸ See Humberto Cantu Rivera, *Negotiating a Treaty on Business and Human Rights: The Early Stages*, 40 UNIV. OF NEW SOUTH WALES L.J. 1200, 1214 (2017).

²¹⁹ See *id.* at 1215 ("states enter into negotiations and agreements in different fields at the international level, as an expression of their sovereignty and in pursuit of their different economic and development interests and national policies. As a result, an overlap of existing duties and commitments may give rise to conflicting obligations for states, which may find themselves unable to honour all of them.").

²²⁰ *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporation and*

draft also establishes a committee of experts that can make recommendations on the implementation of the treaty and provide concluding observations on reports submitted by states.²²¹ Under the OP, NIMs can receive complaints by victims or their representatives, make recommendations to governments, investigate business practices, and demand inspections of business operations.²²² If two or more State Parties cannot agree on the scope or interpretation of the treaty, they can submit their dispute to the International Court of Justice.²²³ However, a major limitation of the draft and OP is that, should State Party or other body fail to adequately investigate and/or provide adequate legal assistance or access to judicial processes for victims, neither the Committee nor the NIMs have standing before national courts in civil, criminal or administrative proceedings. To give the draft and OP real teeth, the NIMs or another body established by the treaty should also have the authority to lodge class actions and collective claims in defense to better ensure that victims are able to access justice.²²⁴ While the Article 13 committee format falls in line with what is common to UN treaty bodies, there is no backup adjudicatory authority should all other mechanisms fail.²²⁵ This should be addressed in upcoming OEIGWG sessions. Further, environmental rights are only vaguely referred to in Articles 4.1, 8.1, and 9.2 of the draft—upcoming OEIGWG sessions should include discussions on ways to substantively detail environmental rights, as this is a “poor reflection of the recognition of environmental rights in current business human rights law today.”²²⁶

Despite the progress of NCPs (established by the OECD Guidelines) in providing a platform for the resolution of complaints of

Other Business Enterprises, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>.

²²¹ See *Oeigwg Chairmanship Revised Draft*, *supra* note 205, at Article 13.

²²² Marco Fasciglione, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, 12 DIRITTI UMANI E DIRITTO INTERNAZIONALE 629, 657-658 (2018).

²²³ See *Oeigwg Chairmanship Revised Draft*, *supra* note 205 at Article 16.

²²⁴ Gabriela Kletzel et al., *A Toothless Tool? First impressions on the Draft Optional Protocol to the Legally Binding Instrument on Business and Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/a-toothless-tool-first-impressions-on-the-draft-optional-protocol-to-the-legally-binding-instrument-on-business-and-human-rights>.

²²⁵ See Rivera, *supra* note 278, at 1220.

²²⁶ Liberty Shared, Submission Letter <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/SubmissionLater/LibertyShared.pdf> at 9

irresponsible business conduct within the supply chain, these decisions are non-judicial.²²⁷ The draft, however, requires State Parties to adopt domestic legislation that ensures that multinational corporations are conducting due diligence through their supply chains against an established set of universal rights.²²⁸ Corporations must regularly report on their business practices to the state party, who then must compile and pass on this information to the committee for review.²²⁹ One thing that could be a complementary addition to the draft is the establishment of a certification system that notifies downstream consumers that a business is complying with these international corporate responsibility standards.²³⁰

The California Transparency in Supply Chains Act, passed in 2012, specifically targets large retailers and manufacturers to address the risks that their product supply chains do not allow for slavery, forced labor, or human trafficking.²³¹ This Act is a partial model of how the proposed instrument could model its provisions. Companies subject to the Act must disclose certain information regarding “their efforts to eradicate slavery and human trafficking from their supply chains” and “educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, improve the lives of victims of slavery and human trafficking.”²³² While the Act is a huge step in its aim that corporations respect human rights standards, there are shortcomings. For example, the mechanisms listed in the Act don’t actually set a mandatory standard for due diligence, “nor do they hold companies directly legally accountable for actual adverse human rights impacts connected to their operations.”²³³ Without imposing civil or criminal liability, the law lacks the teeth to ensure that companies improve supply chain conditions.

²²⁷ See OECD, *supra* note 196.

²²⁸ See *Oeigwg Chairmanship Revised Draft*, *supra* note 205, at Art. 5.

²²⁹ See *id.* at Art. 5, 13.

²³⁰ The Kimberley Process Certification Scheme has been successful in shifting the diamond industry away from the sale of “conflict diamonds” that are mined and illegally traded to fund conflict in war-torn areas. See generally Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 42 J. BUS. ETHICS 42, 44 (2017).

²³¹ See Justine Nolan, *Business and Human Rights: The challenge of putting principles into practice and regulating global supply chains*, 42 ALTERNATIVE L. J. 42, 44 (2017).

²³² California Transparency in Supply Chain Act of 2010, S.B. 657.

²³³ See Nolan *supra* note 231, at 3.

Some reason that international human rights law is not well-adapted to hold multinational corporations accountable for human rights abuses is because these laws generally hold the State accountable for imposing human rights standards within their jurisdictions.²³⁴ Thus, Article 6(7) of the draft treaty, which requires State Parties to include in their domestic legislation a provision to hold corporations criminally, civilly, or administratively liable for human rights abuses within their supply chains, is a critical component to the draft.²³⁵ While corporations are increasingly criminally liable in many states, there lacks a mechanism to hold them liable for violations of international law.²³⁶ To more effectively deter harmful corporate behavior, holding whole corporations, rather than just individuals, accountable is most likely to affect systemic change.²³⁷ Many businesses have found that maintaining sustainable supply chains are not just good from a human rights and environmental sustainability standpoint, but are also good for business by improving knowledge of operations, reducing risk, and improving public perception, among other things.²³⁸ There is also increasing body of research that shows that sustainable supply chains are good for company's bottom line.²³⁹

B. Sustainable Farming Practices

As a part of this framework, State Parties should also require agribusiness to shift their business practices towards sustainable farming

²³⁴ See generally SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 9 (1st ed., 2004).

²³⁵ See Connie de la Vega et al., *Holding Businesses Accountable for Human Rights Violations*, FRIEDRICH-EBERT-STIFTUNG, AT 9.

²³⁶ See Ronald Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955 (2008). The International Criminal Court (ICC) has announced that it will begin to increase its focus on environmental crimes. See OFFICE OF THE PROSECUTOR, ICC, POLICY PAPER ON CASE SELECTION AND PRIORITIZATION (2016). However, in the context of pesticide use, the ICC is ill-suited to hold states and corporations accountable, as the ICC cannot investigate or prosecute governments, corporations, political parties, or rebel movements—it can only investigate individuals who are members of a group. The ICC “is not formally extending its jurisdiction, but the court said it would assess existing offences, such as crimes against humanity, in a broader context.” John Vidal & Owen Bowcott, *ICC widens remit to include environmental destruction cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>. While this is a promising new direction for the ICC, it would not be the proper avenue except in egregious circumstances.

²³⁷ See Slye, *supra* note 236, at 963.

²³⁸ See de la Vega, *supra* note 235, at 7.

²³⁹ See de la Vega, *supra* note 235, at 7-8.

as part of the effort to move away from conventional, pesticide-intensive practices. Despite agrochemical company's contentions, there are sustainable technological options available for Brazilian farmers, especially considering the social, environmental, and health costs.²⁴⁰ Agroecology is an integrated approach to agriculture "that simultaneously applies ecological and social concepts and principles to the design and management of food and agricultural systems", optimizing the "interactions between plants, animals, humans and the environment while taking into consideration the social aspects that need to be addressed for a sustainable and fair food system."²⁴¹ One aspect of agroecology is that it imitates natural ecosystems through biological processes to create nutrient recycling systems that replace the need for the fertilizers or pesticide inputs that are generally used in conventional agriculture for pest control.²⁴² Integrated Pest Management ("IPM") uses information on the life cycle of pests and their interaction with the environment to manage pest damage through the most economical means, and with the least possible hazard to people, property, and the environment.²⁴³ In addition to the encouragement of agroecology and IPM, it is important that in poorer countries where there is social inequality, such as Brazil, "the reduction of pesticides should also . . . be articulated with policies aimed at agricultural reform and toward family agricultural production."²⁴⁴ As part of the proposed legally binding framework, State Parties must require corporations to incorporate these practices into their supply chain.

C. Possible Objections

Many corporations have undertaken social responsibility campaigns voluntarily and may argue that any additional binding framework would be superfluous. Nestlé, for example, is one big-name company that has created social responsibility campaigns in response

²⁴⁰ See Wagner Lopes Soares & Marcelo Firpo de Souza Porto, *Estimating the Social Cost of Pesticide Use from acute poisoning in Brazil*, 68 *ECOL. ECON* 2721, 2728 (2009).

²⁴¹ *The 10 Elements of Agroecology – Guiding the transition to sustainable food and agricultural systems*, FAO, <http://www.fao.org/3/i9037en/i9037EN.pdf> (last visited Mar. 6, 2020).

²⁴² See *id.* at 7.

²⁴³ Integrated Pest Management (IPM) Principles, EPA, <https://www.epa.gov/safepestcontrol/integrated-pest-management-ipm-principles>.

²⁴⁴ See Soares & Porto, *supra* note 240.

to a slew of bad press in developing countries, particularly in Brazil.²⁴⁵ Voluntary corporate social responsibility proponents argue that companies respond to social responsibility concerns to boost their reputations with consumers, trading partners, and investors—good reputations translate into better sales, profitability or higher stock price.²⁴⁶ Many of these companies may argue that reputational drivers alone are enough to encourage compliance.

Unfortunately, while some of these arguments may hold true, there is still a lack of strict compliance with human rights and environmental standards, as consumers and shareholders alike are not necessarily aware of every practice along the supply chain. Nor are companies likely to be moved without sanctions.²⁴⁷ Consumers and shareholders alike tend to respond to high-profile abuses, but when there is not clear transparency within the supply chain, it is much easier for violations to go unchecked.

Non-governmental organizations (“NGOs”) also play a major role in corporate social responsibility—NGO activism has helped drive major changes in corporate behavior.²⁴⁸ NGOs have increasingly become some of the biggest actors in encouraging corporate social responsibility.²⁴⁹ From the early 1990s, NGOs have been leaders in calling on corporations to accept responsibility for environmental degradation and human rights abuses and to promote sustainable development.²⁵⁰ Further, many NGOs view voluntary corporate responsibility standards as an insufficient substitute for binding international legal standards—for one reason, there lacks a universal agreement on what the social and environmental obligations of corporations are.²⁵¹ Without universal standards, corporate social responsibility

²⁴⁵ Andrew Jacobs and Matt Richtel, *How Big Business Got Brazil Hooked on Junk Food*, N.Y. Times (Sept. 16, 2017), <https://www.nytimes.com/interactive/2017/09/16/health/brazil-obesity-nestle.html>.

²⁴⁶ See Thomas McInerney, *Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L. J. 171, 184 (2007).

²⁴⁷ See *id.* at 187.

²⁴⁸ See Terrance Guay and Jonathan P. Doh, *Non-Governmental Organizations, Shareholder Activism, and Socially Responsible Investments: Ethical, Strategic, and Governance Implications*, 52 J. BUS. ETH. 125, 129 (2004).

²⁴⁹ See *id.* at 136.

²⁵⁰ See Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETH. AND INT'L AFFAIRS 71, 75 (2002).

²⁵¹ See *id.* at 175.

may act as small, fixes that stand in the way of real global reform.²⁵² While 95% of the world's largest corporations have corporate social responsibility programs, many of those same companies also lobbied governments for *less* regulation.²⁵³ NGOs and other civil society organizations should be have a voice at the bargaining table in future OEIGWG sessions.

VII. CONCLUSION

Pesticide poisoning remains a rampant problem in rural Brazil.²⁵⁴ Despite the growing movement towards organic foods and farming sustainable practices, monocultures that are dependent on pesticides are all too prevalent in Brazil, as Brazil has become one of the leading players in the global food system.²⁵⁵ A critical examination of the food supply chains of multinational food corporations operating in Brazil, such as JBS and Copersucar, is imperative in creating greater transparency for consumers who want to know where their food is coming from.²⁵⁶ As corporate social responsibility campaigns are insufficient to fully enforce human rights—complaint and environmentally friendly practices at every step along the supply chain—it has become increasingly clear that a binding framework is necessary—one that allows international bodies to hold multinational corporations accountable for their extraterritorial conduct with regards to pesticide use. As Brazil is experiencing a wave of anti-environmentalism sentiment from the top of the government, it is now more than ever critical that the international community step in to protect Brazil's natural environment, a place so critical to mitigating the effects of climate change, and protect the health of Brazil's most vulnerable populations.²⁵⁷

²⁵² See Gillian B. White, *The Inadequacy Of Social Responsibility Programs*, THE ATLANTIC (July 23, 2015), <https://www.theatlantic.com/business/archive/2015/07/corporate-social-responsibility/399206/>.

²⁵³ See *id.*

²⁵⁴ See generally "You Don't Want to Breathe Poison Anymore", *supra* note 52.

²⁵⁵ See Jay Rocha, *Brazil Faces Drops in Crops*, THE GUARDIAN (Sept. 3, 2013), <https://www.theguardian.com/environment/2013/sep/03/brazil-food-crops-climate-change>.

²⁵⁶ See David Linich, *The Path to Supply Chain Sustainability*, DELOITTE 5, https://www2.deloitte.com/content/dam/insights/us/articles/supply-chain-transparency/DUP785_ThePathtoSupplyChainTransparency.pdf.

²⁵⁷ See Andrew Freedman, *Amazon Fires Could Accelerate Global Warming and Cause Lasting Harm to a Cradle of Biodiversity*, WASH. POST (Aug. 22, 2019), <https://www.washingtonpost.com/weather/2019/08/21/amazonian-rainforest-is-ablaze-turning-day-into-night-brazils-capital-city/>.