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**Bridging The Governance Gap?
Corporate Power, Impunity, And The Role Of The Eu's
Corporate Sustainability Due Diligence Directive In
Addressing Human Rights Violations In Global Value
Chains**

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Abstract

The emergence of the Business and Human Rights (BHR) debate in the 1990s, driven by globalization, liberalization, technological advancements, and innovations in corporate structures, has underscored significant governance gaps arising from the misalignment between the scope of economic activities and the capacity of political institutions to manage their adverse consequences. This study explores these governance gaps, as conceptualized by Ruggie (2008), through the lens of corporate power and impunity, particularly examining their real-world implications on human rights with a focus on the Guarani Kaiowá indigenous peoples in Brazil. It also assesses the European Union's Corporate Sustainability Due Diligence Directive (CSDDD), a recently approved legislative effort inspired by the UN Guiding Principles on Business and Human Rights (UNGPs), and its potential in addressing the governance gaps. The study first examines the evolution of corporate power and the mechanisms, such as limited liability and separate personality doctrines, that have facilitated corporate impunity. These mechanisms have enabled Transnational Corporations (TNCs) to evade effective oversight and accountability for their human rights and environmental impacts. In the study's second section, the analysis then shifts to the real-world implications of these mechanisms, using the Guarani Kaiowá case to illustrate how agribusiness power, intertwined with state interests, has led to systemic human rights violations. Thirdly, the study critically evaluates the CSDDD as a potential remedy for these governance gaps, highlighting its approach to mandatory human rights and environmental due diligence obligations. Despite its significance as the first regional legislation of its kind, the Directive faces limitations including a narrow scope, vague terms, and procedural challenges that hinder effective remedy for victims. In conclusion, while the CSDDD marks a pivotal advancement in corporate accountability, this study asserts that it represents only a preliminary step. Addressing corporate impunity effectively requires a comprehensive approach that harmonizes stakeholder interests and promotes gradual progress. Recognizing corporations as integral components of the global system alongside states is crucial for developing robust and enforceable regulatory frameworks capable of bridging the governance gap and safeguarding human rights against corporate abuses.

Keywords: BHR, Governance Gap, Corporate Power, Corporate Impunity, Indigenous Peoples, CSDDD.

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1. Introduction

The current Business and Human Rights (BHR) debate emerged prominently as a result of the forces of globalization, liberalization, technological advancements, and innovations in corporate structures, which collectively expanded the global scope of business operations (Ruggie, 2008, p. 27). While many countries experienced increased prosperity and poverty reduction, rapid market expansion has also created governance gaps across various domains, arising from the misalignment between the scope of economic activities and the capacity of political institutions to manage their adverse consequences (Ruggie, 2008, p. 27). Transnational Corporations (TNCs) have been operating with substantial economic influence, sometimes surpassing that of states, while remaining minimally accountable for human rights violations within their value chains (Global Justice Now, 2018). The BHR agenda is one such domain where these gaps are particularly pronounced (Ruggie, 2008, p. 27).

Today, the interplay between corporate power and human rights is a critical issue in the globalized economy (Birchall, 2021). The origins of corporate power and its significant role in the capitalist world economy can be traced back to the early European colonial enterprise (Bragato, 2021, p. 34). This study contends that the governance gap identified by Ruggie (2008) arise from the evolution of corporate power, which has been facilitated by states granting various privileges to corporations, while simultaneously benefiting from these arrangements in an intertwined relationship.

In light of this premise, this study aims to further examine the governance gap and its interplay with corporate power and impunity, as well as their real-world implications, particularly in the context of the Guarani Kaiowá indigenous peoples in Brazil. Additionally, it explores the recently enacted European Union's Corporate Sustainability Due Diligence Directive (CSDDD) to assess how it responds to the governance gap identified over a decade ago by Ruggie in his 2008 report, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, which laid the groundwork for the United Nations Guiding Principles on Business and Human Rights (UNGPs). The central research question guiding this thesis is: "What are the consequences of the governance gap identified by Ruggie (2008), and how is the CSDDD responding to this governance gap?"

The study is divided in three main sections. The first section explores the concepts of corporate power and impunity, tracing their evolution and examining how legal frameworks, particularly the doctrines of limited liability and separate personality, have facilitated corporate impunity. These mechanisms have allowed TNCs to operate across multiple jurisdictions without a unified system for effective oversight, making them "both legally

ubiquitous and yet legally invisible” (Curie-Skłodowska, 2023, pp. 291-292). This section also addresses the challenges posed by these doctrines and how they have contributed to the architecture of impunity that shields corporations from accountability for human rights and environmental impacts.

The second section delves into the real-world implications of the evolution of corporate power and impunity on human rights through the case of the Guarani Kaiowá indigenous peoples in Brazil. In our view, this case illustrates the human rights violations resulting from the governance gap, highlighting the significant role played by agribusiness power intertwined with state interests. Despite recent constitutional protections, the rights and livelihoods of indigenous peoples in Brazil have been historically and systematically undermined, underscoring the urgent need for robust regulatory frameworks to hold corporations accountable for their adverse impacts on human rights and provide just remedies for affected communities.

The third section analyzes the CSDDD (or “Directive”) as a potential solution for bridging the governance gap. Drawing inspiration from the UNGPs, this Directive stands out as the first regional and EU-level legislation mandating human rights and environmental due diligence (mHREDD) obligations for companies (Paces, 2023b). This section evaluates the Directive’s material and personal scope, along with the civil liability regime it establishes. It also critically assesses some limitations of the Directive, including its narrow scope on large corporations, vague terminology, challenges related to the burden of proof, and further procedural obstacles that hinder victims of harm from seeking effective remedies.

While the CSDDD represents a notable advancement in strengthening corporate accountability, this study contends that it should be viewed as an initial, rather than a final, step. The Directive seeks to translate the principles of soft law, articulated over a decade ago in frameworks like the UNGPs, into binding regulations. This transition is critical, as “history teaches us that markets pose the greatest risks—to society and to business itself—when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability” (Ruggie, 2008, p. 3). Nonetheless, the Directive’s ultimate impact will hinge on its implementation, enforcement, and the ongoing commitment to refining global governance mechanisms (Bueno et al., 2024, p. 7).

Ultimately, this study emphasizes that effectively addressing corporate impunity requires a holistic approach that equilibrates stakeholder interests and fosters gradual progress over time. It highlights the imperative to recognize corporations as integral components of the global system, operating in conjunction with states (Babic et al., 2017, p.

22; Berle & Means, 1968, p. 313). We argue that corporations must be held not only to their responsibilities to respect human rights, as articulated by the UN Guiding Principles on Business and Human Rights (UNGPs), but also to duties to protect. This dual responsibility is crucial, in our view, for developing robust and enforceable regulatory frameworks that can effectively bridge the governance gap and ensure the protection of human rights against corporate abuses.

2. Corporate Power and Impunity: The Governance Gap

This section explores the concept and evolution of corporate power, linking it to the architecture of impunity, known as the array of public and private policies designed to foster corporate growth while minimizing accountability for negative externalities (Guamán, 2020). This study employs Ruggie's (2008) concept of "governance gap" to examine historical and legal mechanisms that have facilitated corporate impunity. Special attention is given to the separate personality and limited liability doctrines of Corporate Law, which allows parent companies to evade accountability for the actions of their subsidiaries within global value chains (GVCs). The analysis concludes with an evaluation of the United Nations Guiding Principles on Business and Human Rights (UNGPs), assessing their role as an initial attempt to address the governance gap.

This is particularly important for the BHR debate because it highlights structural issues still present within the current legal and economic frameworks that allow corporations to prioritize profits over ethical considerations. As George (2015, p. 19) elucidates, looking back is necessary to move forward with meaningful solutions to current global challenges, such as climate change, inequality, and conflict. Understanding historical contexts and mechanisms that perpetuate corporate impunity is fundamental for the development of effective strategies to address pressing global issues and promote a more sustainable and equitable economy for all.

2.1. Corporate Power: Exploring Concepts

In 2018, Global Justice Now (2018) reported that 69% of the global wealthiest entities were corporations rather than governments, highlighting the economic power held by corporations like Walmart, Apple, and Shell, which amassed more wealth than countries like Russia, Belgium, and Sweden. Among the top 200 entities, 157 were corporations, accounting for 78.5% (Global Justice Now, 2018). The disparity is further illustrated by the surge in private wealth in certain countries: in China, private wealth increased from 120% of

state income in 1978 to 530% in 2020, while in India, it rose from 290% in 1980 to 560% in 2020 (Global Justice Now, 2018; Chancel et al., 2022, p. 77).

In wealthy nations such as Germany, France, Japan, the US, and the UK, public wealth typically amounted to 15-30% of total wealth in the early 1980s but has since dropped to near 0% or negative values, which indicates, in Western countries, that private actors control the economy through their assets (Chancel et al., 2022, p. 78). If these countries sold all public assets to repay debt, public infrastructure and services would be privatized, with citizens paying rent to shareholders for their use - yet, in the US or UK, this would not fully repay the public debt due to negative public wealth (Chancel et al., 2022, p. 79). However, Chancel et al. (2022, p. 79) indicates that maintaining high public wealth levels is a political choice: Norway, for example, increased its public wealth from around 100% of national income in the 1990s to nearly 500% today by transforming profits from oil and gas extraction into public wealth, while Russia privatized its resources at low cost, resulting in minimal public sector gain.

Increased state debt heightens the influence of debt holders on state budgets and tax policies, leading to greater corporate influence over states (Deva, 2023, p. 393). This situation reveals a significant concentration of power within corporations, a factor that remains unaddressed by the BHR framework, including mandatory and voluntary mechanisms such as the CSDDD and the UNGPs, respectively (Deva, 2023, p. 393). Most of these mechanisms primarily recognize states as the principal subjects and duty-bearers (Deva, 2023, p. 393).

To illustrate the political power of multinational enterprises, Ruggie (2018, p. 5) utilizes a typology developed by Fuchs (2007). This typology includes three forms of power: “instrumental power,” which traditionally manifests through business lobbying; “structural power,” encompassing elements such as companies’ choices of location, the ability to shift risks to suppliers, and the influence over policy agendas; and “discursive power,” which involves the capacity of businesses and business associations to frame and define public interest issues in their favor, thereby shaping the prevailing ideas and norms, even for non-business entities like governments (Ruggie, 2018, p. 5).

Birchall (2021, p. 44) discusses the influence of corporate power on human rights, defining it as the ability of business enterprises to shape individuals’ capacities to enjoy their human rights. More specifically, corporate power over human rights refers to the ability of businesses to influence the realization, regression, or possibilities of human rights (Birchall, 2021, p. 44). The author analyzes this power in four contexts: power over individuals, materialities, institutions, and knowledge (Birchall, 2021, p. 44). The first context highlights

that human rights are inherent to individuals and can be violated through direct interaction; the second emphasizes that socio-economic rights depend on material foundations, which corporations can significantly affect; the third context notes that human rights are legal standards implemented through governance structures that corporations can influence; finally, the fourth context addresses corporate influence over the abstract frameworks through which human rights are understood, including "the power to define their own human rights responsibilities, priorities, exclusions, and to influence the field of BHR" (Birchall, 2021, p. 52).

This analysis raises critical questions: How has corporate power evolved to enable significant influence over governments, particularly when corporate wealth often surpasses that of many states? How can states be expected to fulfill their 'duty to protect' when they are intertwined with corporate interests? Do corporations merely have a 'responsibility to respect' human rights, as outlined in the UN Guiding Principles on Business and Human Rights (UNGPs)? As Bright et al. (2020, p. 690) observe, the corporate responsibility to respect human rights is increasingly being transformed into a legal duty, particularly as it is being codified in legislation such as the CSDDD. The duty to protect human rights should not be solely of states but shared with corporations, as "treating companies and states as the main duty-bearers" is fundamental to tackle inequality (Karp, 2023, p. 136). Thus, this study argues that the duty to uphold human rights is especially critical for corporations, considering their considerable wealth, substantial policy influence, and concentration of economic power.

The following discussion will address the evolution of corporate power, which is, in our view, essential for developing effective solutions, as meaningful progress requires examining and considering past developments (George, 2015, p. 19).

2.2. Corporate Power Evolution: Reflections

Power has historically been concentrated in distinct institutions, evolving from the Church in early medieval Europe to the state after the European Reformation, and currently, into corporations (Berle and Means, 1968, p. 313). The acquisition of power and the prominent role of corporations in the capitalist world economy can be traced back to the early European colonial enterprise (Bragato, 2021, p. 34). Koskenniemi (2017, p. 10) argues that "much of Europe's expansion took place through private operators, colonial or trading companies, and by way of private contract and the exercise of the right of private property", and that public law and private law relationship is "much closer than standard histories of the

role of law in imperial expansion suggest” (Koskenniemi, 2017, p. 12). Over the centuries, public and private international legal structures, tax and credit incentives, trade agreements, and government-led aid programs have all facilitated the rise of corporate power (Global Justice Now, 2018). Historical analysis of the period of overt colonialism, especially from the 16th to the 18th centuries, highlights that corporations have wielded substantial political and economic influence since that time, hindering the development of accountability mechanisms (Bragato, 2021, p. 42).

Consequently, the emergence, expansion, and consolidation of large TNCs, both historically and in contemporary contexts, are intricately linked to the exploitation of individuals and social groups stemming from colonial conquests and colonization efforts (Bragato and Filho, 2020, p. 155). Through the conquest and domination of the Americas and the Atlantic, colonial states and enterprises established the foundational structure of the global capitalist system, a structure further reinforced by subsequent waves of colonization across Africa, Asia, and Oceania (Bragato, 2021, p. 44). Colonies served as sources of raw materials fueled by unpaid labor to advance burgeoning bourgeois societies—a dynamic that persists to the present day (Bragato, 2021, p. 44). Bragato (2021, p. 44) highlights that “the large companies, and not the central states directly, were the early agents of European colonialism”. Therefore, this study argues that European colonial expansion was a result of a dynamic of shared interests between states and corporations, jointly shaping the modern capitalist economic system.

However, the theoretical distinction between states and corporations has persisted, yet in practice, they are intricately interwoven and inseparable (Babic et al., 2017, p. 22). Bragato (2021, p. 42) elucidates the historical development of TNCs, predominantly of English and Dutch origin, which initially emerged as state-financed commercial monopolies and accrued significant influence as states granted them territorial rights (Bragato, 2021, p. 42). Notably, the Dutch East India Company (VOC) and the West India Company (WIC) played pivotal roles in the Netherlands' ascent as a sovereign state and imperial power following the Eighty Years' War and its independence from Spain (Bragato, 2021, p. 43). During this epoch, the VOC was vested with an array of state-like prerogatives, including the establishment of colonies, construction of fortifications, conscription of military forces, administration of justice, negotiation of treaties with local rulers, and even the conduct of warfare (Bragato, 2021, p. 43). Miles (as cited in Bragato, 2021, p. 43) further observes that chartered companies such as the VOC, alongside entities like the English East India Company (EIC) and the Levant Company, exercised governance functions on a global scale through quasi-

imperial structures, using legal extraterritoriality to assert control over territories, populations, and facilitate trade activities.

Furthermore, through a Royal Charter from Britain, which succeeded the Netherlands as the preeminent European maritime power, the EIC was granted extensive privileges, including "the right to mint coins at its subsidiaries abroad, exercise judicial authority in their settlements, and, significantly, engage in warfare" (Bragato, 2021, p. 43). In parallel, the British West India Company pioneered a novel form of mercantilism distinct from the practices of Portugal, Spain, and the Netherlands, in an approach characterized by three different mechanisms: direct colonization, capitalist slavery, and economic nationalism (Bragato, 2021, p. 43). Direct colonization entailed the complete annexation of territories, rather than merely establishing ports of call, as was common practice among previous colonizers, which facilitated direct governance by the British Crown over various regions, notably India (Bragato, 2021, p. 43). In turn, the abundance of economic potential coupled with a scarcity of labor prompted British Crown Companies to turn to slave labor, primarily sourced from Africa, to maximize profits, expand infrastructure, and assert dominance in the global market (Bragato, 2021, p. 43). British Crown Companies amassed substantial financial surpluses, albeit subject to significant state oversight, a pattern mirrored by France at a later stage (Bragato, 2021, p. 43). The Crown exercised direct supervision over private enterprise, thereby implementing economic nationalist policies (Bragato, 2021, p. 44).

The historical development of TNCs brought by Bragato (2021) shows how colonialism played a pivotal role in fostering corporate power globally. Corporations gained access to raw materials, markets, and captive labor in colonized regions at exploitative costs (Bunker and Ciccantell, 2005; Magdoff, 1978). Governments of colonizing countries provided political, economic, and military support to corporations, establishing favorable policies and legal frameworks (Han et al., 2018; Kohn & Reddy, 2024). This concentration of wealth and power allowed corporations to exert significant influence, leading to monopolies, oligopolies, and the expansion of their global reach and influence (Kohn & Reddy, 2024). By enabling the exploitation of local labor and resources, colonialism facilitated the enrichment of the colonizing country's corporations at the expense of the colonized populations (Kohn & Reddy, 2024). The legacy of this dynamic continues to shape the global economic landscape today, as "settler colonialism is an ongoing process emergent in settler institutions and structures of recognition, not merely the legacy of past injustices" (Kohn & Reddy, 2024).

From the colonial era to the modern era of globalization, the power of TNCs has persisted, a process that has been accelerated by the development of increasingly complex

global value chains, as corporations have fragmented their production processes across multiple countries, outsourcing and offshoring various stages of the supply chain (Marx et al., 2022, p. 1). Corporations engage in GVCs through subsidiaries, business partners, and integrated corporate structures, frequently utilizing Special Purpose Vehicles (SPVs) as daughter and sister corporations or employing a network of contractors, sub-contractors, and sub-sub-contractors (Marx et al., 2022, p. 1). Bragato and Filho (2020, p. 150) highlights that this mode of operation lead companies to operate in and source from countries with varying regulatory frameworks related to the protection and promotion of human rights, a dynamic that has contributed to the transformation of these companies into massive economic groups, highly fragmented, with influence across multiple regions. This has allowed them to take advantage of legal mechanisms such as the limited liability and separate personality doctrines, alongside disparities in labor costs, environmental regulations, and tax regimes, while making it more difficult to trace the origins of their products and the conditions under which they were produced (Bragato and Filho, p. 150; Roach, 2023, p. 41). The increasing power of corporations has been further enforced by the rise of neoliberal policies, which have prioritized the interests of multinational corporations over those of workers, communities, and the environment (Harvey, 2005, Mexhuani, 2024), making it increasingly difficult to address the social and environmental consequences of corporate activities.

Berle and Means (1968, p. 313) argue that the modern corporation wields economic power comparable to that of the state, creating a dynamic where economic power contends with political power. To Babic et al. (2017, p. 22), “the study of international politics needs to be made more realistic by integrating corporate power into its analyses”, and “corporations should not be studied as subordinate, but rather as juxtaposed to states in the global system” (Babic et al., 2017, p. 22). As Berle and Means (1968, p. 313) conclude, “the state seeks in some respects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state”, which is especially evident in the realm of accountability for the negative impacts of corporate activities (Berle and Means 1968, p. 313). Leveraging their considerable power, this study argues that corporations have molded an “Architecture of Impunity” in conjunction with states, a concept that will be explored in the subsequent section.

2.3. Power And Impunity: Two Sides Of The Same Coin

The array of public and private policies designed to foster corporate growth while minimizing accountability for negative externalities is known as the “Architecture of Impunity” (Guamán, 2020). The term refers to the systemic mechanisms that enable TNCs to avoid accountability for human rights abuses and environmental damage while expanding their operations and maximizing profits (Guamán, 2020). To Bragato and Filho (2020, p. 153), it can be seen as purposeful absence of mechanisms capable of reconciling law, policy and economy with accountability for the negative externalities stemming from their activities. These mechanisms are present in GVCs that obscure responsibility, corporate influence over state policies and legal systems, and neoliberal legal frameworks such as *Lex Mercatoria*, which in turn often include regulatory gaps, weak enforcement mechanisms, and favorable legal frameworks that prioritize corporate interests over public welfare, collectively creating an environment where corporations can operate with relative impunity, shielding them from the full consequences of their actions (Guamán, 2020).

This study contends that the Architecture of Impunity is linked to the historical development of transnational companies. Ahmad and Sen (2023) discuss diverse strategies employed by the EIC often regarded as the "mother of all corporations", to evade accountability for its recurrently human rights violations against the inhabitants of the Indian subcontinent during its operation from 1600 to mid-1800. For instance, "in the 17th and early 18th centuries, the EIC was characterized as the creator and maintainer of judicial institutions but not itself subject to their jurisdiction" (Ahmad and Sen, 2023), enabling the company to avoid liability as "victims of egregious harms—namely slaves transported to the company’s port cities via the Indian Ocean and laborers on the EIC’s plantations—did not have a legal basis to sue the company for the damages they incurred" (Ahmad and Sen, 2023). The authors further describe:

The EIC’s exemption from liability for harms committed in the east as part-sovereign part-corporation can be classified into three broad “immunities”: i) Institutional Immunity; ii) Doctrinal Immunity, and iii) Organizational Immunity. The first rendered the EIC above the law in the adjudicative institutions it established pre-1773; the second carved out a doctrinal exception under British common law for quasi-governmental interactions with non-Europeans post-1773; and the third distanced the EIC’s decisions and personnel from the site of harm. These three immunities each flowed from the company’s royal charters and created a robust shield that protected the company’s revenues from legal claims that could otherwise be brought by those

who the company routinely harmed in the course of its governance and business operations. (Ahmad and Sen, 2023)

This is an example of how state policies conferred upon corporations the authority to commit human rights violations in pursuit of economic profit with minimum accountability. A series of laws that economically and politically disenfranchised formerly enslaved people was central to the forging of a new global economic order and eventually the emergence of capitalism, and led to many of today's inequalities (Thomas, 2019; Marx et al., 2022, p.1). Likewise, the use of child labor was crucial for the expansion of industrial production during the Industrial Revolution and many children were employed in, for example, the cotton industry (Beckert, 2014, p. 37).

Currently, barriers to holding MNEs accountable for human rights violations are still existent, collectively shaping an architecture of impunity. Bragato and Filho (2020, p. 153) highlight that Amnesty International (2016) have identified as main barriers the limited liability and separate personality principles of Corporate Law; the legal doctrine of *forum non conveniens*, and the fact that few companies disclose significant information about their actual and potential risks and impacts on human rights. Additionally, it can be encompassed as barriers the substantial political influence wielded by corporations, which obstructs states from adequately penalizing these entities for their wrongdoings (Bragato and Filho, 2020, p. 156). Also, economic globalization has prompted MNEs to implement strategies for engaging in international trade with minimum risk to their investment (Toro, 2016, p. 153).

Four strategies are prominent, as outlined by Toro (2016, p. 152). The first primary strategy involves global-scale exports, enabling TNCs to distribute their products worldwide without significant commitments or expenses, while retaining control over operations and ensuring product quality; the second strategy involves licensing agreements, wherein TNCs transfer technology for a specific product, often through know-how contracts, in exchange for financial benefits, thus avoiding the costs associated with manufacturing the product themselves; the third strategy entails joint ventures, where corporations collaborate to undertake specific economic activities, dividing production tasks to reduce risks and gain market insights in the targeted activity's domain; the fourth strategy involves establishing subsidiaries in countries other than the TNC's home country, often peripheral nations - TNCs exercise direct control over these subsidiaries while evading responsibility for their activities, as they are subject to the legal jurisdiction of the host country (Toro, 2016, p. 152). All these strategies are interconnected, forming a feedback loop: establishing subsidiaries and engaging in joint ventures facilitate the process of exporting goods and services, including know-how

contracts, enabling TNCs to operate on a global scale in international trade (Toro, 2016, p. 153).

The persistent lack of corporate accountability serves as a stark reminder of the enduring legacy of colonial injustices and domination (Bragato and Filho 2020, p. 159). Quijano (1992, p. 14) coined the term "coloniality" to encapsulate this ongoing influence of colonial logic in contemporary times. Today's governance gap may, in fact, be reproducing colonial patterns in a post-colonial world (Ahmad and Sen, 2023). To Bragato and Filho (2020, p. 159), the "salvationist rhetoric of colonialism that justifies the irresponsible action of the TNCs in the peripheral host countries to the detriment of the rights of the most vulnerable populations guarantees the permanence of coloniality", while "local elites continue to play the same historical role to ensure the privileges of exploiting large corporations and benefit as intermediaries between the TNCs and the marginalized populations of their own country" (Bragato and Filho 2020, p. 159). As a result of this rationale, effective mechanisms to hold TNCs accountable are still notably absent, despite their longstanding benefit from human rights exploitation since colonial times (Bragato and Filho, 2020, p. 159).

The persistence of colonialist and corporate impunity mindsets continues to influence contemporary international law, political decisions, and economic practices (Bragato, 2021, p. 44). As global production and economic activities unfold within complex GVCs, linking diverse production activities across countries with distinct legal and administrative systems, the global *Lex Mercatoria* serves to protect the economic interests of TNCs (Guamán, 2020).

The following section will examine legal mechanisms that contribute to the architecture of impunity, with a particular emphasis on the limited liability framework within corporate law.

2.3.1. How Does The Law Enforce Corporate Impunity?

Ruggie (2018, p. 5) underscores that avoiding accountability as a strategy for corporate economic growth can be linked to foundational principles of Corporate Law:

Twenty-first century corporate globalization is built on foundational principles of corporate law that date back to the 19th century when they were intended to facilitate capital formation among natural persons: attributing legal personhood to corporations, investors' limited liability, and permitting one corporation to own another while still construing them to be separate legal. (Ruggie, 2018, p. 5)

The author, the former Special Representative to the UN Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, to whom the lead in designing the UNGPs is attributed, further points out that the main body of national law governing corporations is currently domestic corporate law and securities regulation, along with any applicable civil and criminal provisions in other areas of substantive law and regulations (Ruggie, 2018, p. 5). However, domestic law has limited reach beyond its national borders, and multinational enterprises exercise their power and authority transnationally, in a global system, and in some cases across more than 200 national jurisdictions (Ruggie, 2018, pp. 4-5). This global system lacks a central regulator, and surprisingly, the multinational enterprise barely exists under international law, despite its presence in the everyday world of economic activity (Ruggie, 2018, p. 4).

Ruggie (2018, p. 5) stresses that “the fact that public law (national and international) does not generally encompass the economic unity of the multinational firm is the single most important contextual factor shaping its power, authority, and relative autonomy”, which creates a global governance gap that defies solutions (Ruggie, 2018, pp. 4-5). According to the author, “governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences” are “the ‘root cause’ of business-related harms” (Ruggie, 2008, p. 3). This governance gap created by globalization is a root cause of the business and human rights predicament today, as it “provides a permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation” (Ruggie, 2008, p. 6). Ruggie (2008, p. 3) identifies a fundamental challenge in narrowing and ultimately bridging these gaps in relation to human rights.

In our interpretation of Ruggie’s work, the governance gap conceptualized by Ruggie (2008) refers to the structural lack of regulation and oversight of corporations, which allows these entities to accumulate power and wealth, influence political decision-making to their advantage (including to perpetuate the governance gap), externalize social and environmental risks onto society, and operate without accountability. This gap exacerbates structural global challenges such as inequality, climate change, and conflict, which are interrelated and mutually reinforcing. In this scenario, Booth (2023, p. 284) underscores:

Governance gaps result from the current global economic system, in which transnational companies often operate in resource-rich countries with weak rule of law or inadequate oversight by national governments, and with no clear, legally binding international obligations regulating their activities. The immense influence

and impact of companies are not coupled with the ability of society to effectively sanction or remedy adverse impacts. Given this context, communities and workers that are particularly vulnerable to social and environmental harm have immense difficulty holding companies to account for business-related harms. (Booth, 2023, p. 284)

Indeed, Ruggie (2008, p. 6) notes that the most severe cases of corporate-related human rights harm typically occur, although not exclusively, in contexts where governance challenges were most pronounced, disproportionately including low-income countries, nations that had recently emerged from or are still embroiled in conflict, and states where the rule of law is weak, and corruption levels are high. The author also highlights that companies have been found to be complicit in the actions of governments or armed factions in such settings (Ruggie, 2008, p. 6).

One of the pivotal legal instruments facilitating this unaddressed corporate power is the concept of limited liability, embedded within most domestic corporate law frameworks and instrumental in the rise of corporate dominance in the global economy (Mares, 2019). Bragato and Filho (2020, p. 153) highlight that Amnesty International have identified it as a main barrier to holding MNEs accountable for human rights violations. This mechanism allows corporations to create separate legal entities (subsidiaries) to operate with liability confined to the amount invested in each and, consequently, corporations can disperse operations worldwide with minimized accountability, with parent companies often hiding behind the corporate veil, increasing risks to unaddressed human rights abuses and enduring social challenges in their areas of operation (Bragato and Filho 2020, p. 153; Mares, 2019). Indeed, Paces (2023b) identifies that it is well-established among scholars that, to minimize liability risk, a common corporate strategy involves the establishment of subsidiaries and the outsourcing of activities. Alongside the limited liability and separate personality principles, it is worthy mentioning that the legal Private International Law's (PIL) doctrine of *forum non conveniens* is also frequently invoked as a main barrier to corporate accountability (Bragato and Filho, 2020, p. 153).

The study will next examine the limited liability mechanism in Corporate Law, focusing on how they enable corporations to avoid accountability. This will be linked to the governance gap caused by the absence of comprehensive national and international public laws addressing the economic unity of multinational enterprises.

2.3.1.1. Separate Personality And Limited Liability. The doctrines of separate personality and limited liability are pillars of the Architecture of Impunity framework, and they operate much as it did long before the recent wave of globalization (Ruggie, 2008, p. 5). They are not the same Corporate Law institutes, but they act together in the MNEs' architecture of impunity (Mares, 2019, p. 1). The principle of separation of personality has a broader scope, and limited liability derives from it as one of its aspects or consequences (Mares, 2019, p. 1).

Together, they enable corporations to operate as distinct legal entities and protecting investors' personal assets (Mares, 2019, p. 4). Parent companies and their subsidiaries "continue to be construed as distinct legal entities, which leads to the parent company generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless there is enough argument to lift the corporate's veil" (Ruggie, 2008, p. 5). Thus, the parent company can take advantage of the limited liability even if it owns all of its subsidiaries entirely, which means that "the corporate parent is generally not liable for risks incurred by a subsidiary, or monetary damages imposed on a subsidiary, beyond the extent of its investment in it" (Ruggie, 2018, p. 4). There are exception to the principles, but they are challenging to be applied as they are limited to high thresholds (Mares, 2019, p. 4; Ruggie, 2018, p. 4), such as in case of "demonstrable negligence, fraud, or other illicit conduct that the corporate parent directed or of which it had knowledge and did nothing to stop" (Ruggie, 2018, p. 4), or "where the subsidiary is under such close operational control by the parent that it can be seen as its mere agent" (Ruggie, 2008, p. 5).

Therefore, it is possible for a company (a parent company, with its own juridical personality) to own shares of another company (a subsidiary, also owner of a separated juridical personality), and not be held accountable for the activities and omissions of the subsidiary (Mares, 2019, p. 3). Similarly, a natural person can set up or buy shares in a company and not be held personally accountable beyond their investment (Mares, 2019, p. 3). This is because the combination of separate legal personality and limited liability doctrines ensures that shareholders' assets are generally protected from claims against the company - liability is capped at the amount invested and does not extend to the shareholder's personal assets in cases where the damage exceeds the investment (Mares, 2019, p. 4).

The principles are recognized in most domestic and international jurisdictions, and together they form one of the most significant obstacles for right holders to access remedies if they suffer damages as a result of corporation activities (Mares, 2019, p. 1). Ruggie's (2018, p. 4) pragmatic perspectives further enriches the debate:

Moreover, a subsidiary or affiliate may have subsidiaries and affiliates of its own, based on the same principle of limited liability. Some subsidiaries may be listed on stock exchanges in their own right, with the corporate parent remaining the majority or controlling shareholder. In all such cases, the parent company is not liable for harm caused by subsidiaries, other than in exceptional situations [...] that would provide grounds for what is known as “piercing the corporate veil”. But it remains the exception domestically and even more so across national borders. (Ruggie, 2018, p. 4)

Mares (2019, p. 1) further explains that according to the separate personality principle, a company is an artificial person and a separate legal entity from its owners and managers, which means that the company has its own juridical and artificial personality, separated from the natural personality of its shareholders and decision-making personal, such as Directors, C-Levels and managers. The limited liability principle, in turn, foresees that shareholders are only liable for the company's debts and obligations up to the amount they have invested in the company, which means that shareholders' assets are protected from claims against the company they hold a share of, and even if “something catastrophic happen to the subsidiary, the parent company is further protected by the ‘limited liability’ shield” (Mares, 2019, p. 3). In these contexts, artificial persons (companies) and natural persons can both be shareholders and, therefore, investors (Mares, 2019, p. 3), nomenclature that will be used without distinction for the purpose of this study.

Thus, the principles provide investors with the ability to compartmentalize the enterprise (Mares, 2019, p. 3). Investors (or shareholders), the company and its subsidiaries are, then, separate entities with their own assets, rights and obligations (Mares, 2019, p. 1). As mentioned before in this study, law governs the separate entities individually, not the enterprise as a whole (Ruggie, 2018, p. 13). It establishes legal independence for companies, enabling parent companies, subsidiaries and business partners to operate with their own distinct legal identity, assets and responsibilities and, as a result, organizations such as Starbucks and Apple “do exist in the everyday world of economic activity, but they don’t exist as entities in the law” (Ruggie, 2018, p. 320). In practice, however, there often exists an economic and operational unity across the entire corporate group (Bragato and Filho, 2020, p. 152), with subsidiaries and business partners being controlled by parent companies in a variety of ways, directly and indirectly (Mares, 2019, p. 7). For instance, the parent company can exercise control over the subsidiary's corporate governance through its voting rights, which have greater weight with larger shareholding, and can appoint the subsidiary’s board directors; other control methods include operational integration, overlapping directors and

officers, performance monitoring, financial supervision, budget and capital expenditure approval, and policy articulation (Mares, 2019, p. 7). Subsidiary managers respond to parent company expectations even in decentralized groups, with many multinational enterprises employing internal financing, management, and resource allocation mechanisms that integrate the entire enterprise (Mares, 2019, p. 7). Ruggie (2018, p. 13) elucidates that this situation creates a disjuncture between economic reality and legal convention that creates a global governance gap that defies voluntary and mandatory regimes of regulation, such as the Corporate Social Responsibility (CSR) and BHR agendas (Ruggie, 2018, p. 13).

2.3.2.1.1. Challenges Of The Separate Personality And Limited Liability

Mechanisms. Proponents of limited liability argue that it plays a crucial role in facilitating investment, entrepreneurship, and the formation of large pools of capital - by enabling investors to diversify risk across multiple ventures, limited liability encourages the aggregation of resources that might not otherwise occur (Macey, 1995, p. 451; Mares, 2019, p. 23). This principle also reduces monitoring costs for both investors and creditors, and it facilitates trading activities as “shareholders can more easily sell their equity interests to potential buyers in liquid equity markets” (Mares, 2019, p. 23). Parent companies establish subsidiaries for various reasons, such as tax advantages, compliance with host country legal requirements, and the reduction of coordination costs through decentralization (Mares, 2019, p. 6). These economic benefits have contributed to the persistence and solidification of the limited liability principle (Mares, 2019, p. 6).

However, this approach also serves other purposes. By keeping assets separated, investors can limit losses if a new, risky operation fails, thereby erecting a firewall against claimants harmed by the operations of subsidiaries (Mares, 2019, p. 4). Corporations may establish subsidiaries and outsource activities to minimize liability risk (Duchin et al., 2022, p. 23; Hansmann & Kraakman, 1991, p. 3; Paccos, 2023b).

The study by Hansmann and Kraakman (1991, p. 3) shows that corporate strategies to avoid liability is not a new issue, as according to the authors, "increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims" (Hansmann and Kraakman, 1991, p. 3). The study further illustrates the issue: the predominant strategy in industries like tobacco and hazardous waste involved segregating hazardous activities into separate subsidiaries to shield assets, while in industries such as chemicals and oil transport, there was a trend toward disaggregating or downsizing firms as a primary method to evade liability (Hansmann and Kraakman, 1991, p. 3). The research also indicates that a significant number of small firms entering hazardous industries

in the United States over the past twenty-five years were driven primarily by the goal of mitigating liability for harms to consumers, employees, and the environment (Hansmann and Kraakman, 1991, p. 3).

When firms face lower liability than the harms they produce, albeit through different corporate vehicles, social harms such as environmental and human rights violations are overproduced (Ruggie, 2008, p. 6). If a multinational is merely violating international standards, but not breaking any law enforceable by courts, there is little incentive created to change its operating practices (Velluti, 2024, p. 15). It is not uncommon for the lack of human rights standards to be a conscious factor in corporations' decisions regarding location and manufacturing (Marx et al., 2022, p. 1). When this situation is combined with the state's lack of capacity to fulfill its duty to protect, the risk of affected parties not receiving adequate compensation for damages escalates further (Marx et al., 2022, p. 2; Ruggie, 2008, p. 6). In general terms,

Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters. (Ruggie, 2008, p. 6)

Host countries' frequent unwillingness or incapacity to enforce the protection of human rights exacerbates this issue, leading to frequent grave human rights abuses committed by companies (Marx et al., 2022, p. 2). Velluti (2024, p. 16) argues:

Corporate violations of human rights also go unchallenged because host states depend heavily on TNCs, as their economies are largely export-led. Corporations will use their economic leverage to challenge domestic sanctions by threatening to move elsewhere and/or terminate business in the sanctioning state. This explains why 'host countries are often unwilling or unable to impose criminal sanctions or provide civil remedies, and home countries generally do not exercise jurisdiction over the extraterritorial acts of multinational corporations. [...] Corporations thus remain immune to liability, and victims remain without redress'. (Velluti, 2024, p. 16)

Notably, “this dynamic is hardly limited to transnational corporations. To attract investments and promote exports, governments may exempt national firms from certain legal and regulatory requirements or fail to adopt such standards in the first place” (Ruggie, 2008, p. 6).

Consequently, large corporations that outsource parts and tasks to developing countries have experienced rising markups and profits, while markups for the producers in developing countries are declining, indicating that the gains from GVC participation are not equitably distributed across countries and the production chain (World Bank, 2020, p. 3). Producers, especially those in developing countries involved in the upstream segments of the value chain, often receive a smaller share of the economic benefits (World Bank, 2020, p. 3). For example, garment firms in the United States have seen increased markups, whereas producers in India have experienced declines (World Bank, 2020, p. 3). This disparity in wealth distribution fuels inequality, a systemic global challenge that unfolds to a range of socio-environmental consequences, including climate change and conflict (International Monetary Fund, n.d.).

This results in a risk-shifting dynamic, where the burden falls disproportionately on society's vulnerable groups, allowing investors to engage in excessive risk-taking without facing the full consequences (Bragato, 2021, p. 36). Claimants whose human rights have been infringed by the operations of corporate groups often struggle to obtain remediation, either due to the state's failure to protect its citizens or because the affiliate company is uncooperative (Mares, 2019, p. 3). Although the traditional critique of the limited liability principle in industrialized countries focuses on catastrophes and mass torts, particularly involving insolvent subsidiaries with outrageous losses that often constitute human rights infringements, the BHR critique extends further (Mares, 2019, p. 6). It addresses these significant issues and less pervasive torts, breaches of values enshrined in international human rights treaties, and the systematic exploitation of workers and communities (Mares, 2019, p. 6). Additionally, it encompasses the exploitation of the environment, which often leads to consequences primarily affecting the most vulnerable populations and the historical processes that have contributed to global challenges (Mares, 2019, p. 6). As Mares (2019, p. 6) emphasizes, these concerns have been central to the BHR discourse and the advocacy for greater accountability of multinational enterprises over the past five decades.

The case of the Guarani Kaiowá people in Mato Grosso do Sul, Brazil, serves, in our view, as a poignant illustration of how the burden of the governance gap disproportionately falls upon vulnerable societal groups. As the next section will show, these populations are

often struggling to obtain adequate remediation and meaningful solutions to the challenges they face, a consequence of agreements, policies and laws that enabled and continue to enable corporations to externalize the risks and costs of their operations onto society. We argue that this example powerfully underscores the profound inequities that arise from the persistent governance gaps and lack of effective accountability mechanisms governing multinational enterprises.

3. How Does Corporate Power Affect Human Rights? Agribusiness, Politics And Indigenous Peoples In Brazil: The Guarani Kaiowá Case

3.1. Introduction

The Guarani Kaiowá indigenous peoples constitute the largest Indigenous population in Brazil outside the Amazon region (Vieira & Santiago, 2022). Throughout history and into the present, their ancestral lands have faced dispossession due to colonization policies, legislation benefiting corporations, and violent conflicts, largely driven by agribusiness TNCs operating in the region (Vieira & Santiago, 2022). This ongoing dispossession has led to well-documented social and environmental harms, while legal frameworks have not only demonstrably failed to provide the Guarani Kaiowá people with adequate remedies or prevent further injustices, but have also provided TNCs with a legal allowance for exploitation (Bragato and Filho, 2020, p. 142).

This section will explore the plight of the Guarani-Kaiowá Indigenous peoples. The choice for this specific case study is based on the fact that governance gaps created by globalization (pointed by Ruggie (2008) and described before in this study), coupled with the TNCs' Architecture of Impunity, has been directly affecting the group over the last centuries, and should be seen as root causes of their predicament today. This discussion will inform the subsequent analysis of whether forthcoming legislation on mandatory human rights due diligence (mHRDD) is able to effectively address the governance gap and, therefore, underlying causes of human rights violations.

Moreover, selection of this study is also motivated by the fact that their case is not well known among the international community and Brazilian society, which still view Indigenous peoples as 'disappearing' and delegate responsibility for their fate to the state (Gallois, 2008). Delving on studies on the Guarani Kaiowá, this paper argues that they often focus on the state's duty to protect, frequently overlooking the duties and responsibilities of TNCs that operate and source agricultural commodities from the region.

It should be mentioned that this study recognizes that the case of the Guarani Kaiowá Indigenous peoples in Brazil is not an isolated instance but reflects broader patterns evident in other well-documented cases, such as Chevron's operations in Ecuador, Shell's activities in the Niger Delta, and Coca-Cola's practices in India (Holzendorff, 2013, p. 2). These cases, which predominantly involve Indigenous communities as victims, underscore the ongoing difficulties faced by native populations—who inhabited these regions long before the arrival of multinational corporations—in securing adequate compensation and justice for the harm inflicted by corporate activities (Holzendorff, 2013, p. 2).

The ultimate goal of this section is to contribute to the business and human rights (BHR) debate on meaningful ways for addressing root causes of business-related harms.

3.2. About The Guarani Kaiowá Indigenous Peoples

The Guarani Kaiowá, the largest Indigenous population in Brazil outside the Amazon region (Vieira & Santiago, 2022), is a subgroup of the Guarani people, which historically, the Guarani people lived in vast areas of Paraguay, Argentina, Uruguay, Bolivia and Brazil (Instituto Socioambiental, n.d.; Glass, 2011, p. 7). In Brazil, the Guarani people number more than 85,000 and are the most populous in the country (Instituto Socioambiental, n.d.). The state of Mato Grosso do Sul (MS) concentrates the largest number of Guaranis, according to the Brazilian Institute of Geography and Statistics' (Instituto Brasileiro de Geografia e Estatística [IBGE]) 2022 Demographic Census (IBGE, 2023).

According to Instituto Socioambiental (n.d.), archaeological research indicates that between 1000 and 1200 AD, Guarani cultural groups occupied territories corresponding to present-day southern Brazil, northern Argentina, and the eastern region of Paraguay. From the arrival of the Portuguese and Spanish in the 16th century until the 18th century, Guarani history was significantly influenced by Jesuit missionary efforts to convert them and by the harassment of Spanish *encomenderos* and Portuguese *bandeirantes* that sought to enslave the Guarani under the guise of protection (Instituto Socioambiental, n.d.; Wernet, 2018, p. 25). Consequently, with the arrival of the Spanish and Portuguese Europeans, Guarani territories became contested regions of strategic importance and geopolitical relevance, in addition to providing a forced and unpaid labor source from the Indigenous population (Instituto Socioambiental, n.d.).

From the 1920s, and more intensively from the 1960s, systematic and effective colonization of Guarani territories began, initiating a process of systematic expropriation of their lands by white settlers, which privatized the land for their own interests, seeking the

region's resources and business potential (Instituto Socioambiental, n.d.). The territory, which did not offer the mineral riches idealized by the Iberians in the “myth of El Dorado,” came to be seen as ideal for agribusiness development (Instituto Socioambiental, n.d.).

Efforts by the Guarani Kaiowá to reclaim their ancestral lands, alongside tensions over traditional territory demarcation and the expansion of mechanized soy and sugarcane monoculture, have led to prolonged, systemic and severe human rights violations such as lack of conditions to subsistence, lack of access to basic food, murders, forced disappearance, structural racism, harassment, and violent displacement (Bragato & Filho, 2020, p. 144; Benites, 2015; Oliveira, 2015).

Amidst Guarani Kaiowá indigenous territorial struggles in Mato Grosso do Sul, agribusiness in the region have been growing, alongside public policies that protect and promote agribusiness' interests (Bragato and Filho, 2020, p. 145). Currently, the state is in the Midwest region of Brazil, one of the country's largest agricultural regions producing cereals, legumes, livestock and oilseeds such as corn, soybeans, and sugarcane (Bragato and Filho, 2020, p. 145). These products are exported globally to various destinations around the world, turning into an attractive business for several TNCs.

Given this context, it is possible to conclude that the Guarani Kaiowá case represent a significant historical and ongoing struggle, underscoring the enduring impact of discriminatory and unfair policies that favor agribusiness interests over human rights.

3.3. How Has The Governance Gap Been Impacting The Rights And Livelihoods Of Indigenous Peoples In Brazil?

3.3.1. Background

To comprehend the current challenges faced by the Guarani Kaiowá people and connect these challenges to the Architecture of Impunity, it is imperative to examine underlying issues permeating the case. These issues can be understood as root causes of their rights' violations, which have been fostered by the governance gaps created by globalization, as identified by Ruggie (2008).

The following discussion will be divided into two sections: “Before the 1988 Constitution” and “After the 1988 Constitution.” The 1988 Brazilian Constitution, currently in force, formally recognized Indigenous rights and established a legislative framework for their protection. Prior to this, Indigenous peoples' rights were not legally recognized. However, as will be examined, even with the legal recognition the enforcement of these

rights remains problematic, particularly due to the interests of agribusiness that have settled in the region.

This structure is relevant because by examining the historical context and changes brought about by the 1988 Constitution, we can better understand the current challenges and identify potential pathways for advancing the enforcement of Indigenous rights in Brazil.

3.3.1.1. Before The 1988 Constitution. Brazil's agrarian history is characterized by a narrative of struggle and resistance against territorial dispossession and the encroachment of capital, which have shaped the social and economic relations established in the country (Pacheco, 2023, p. 249). To gain a deeper understanding of the land tenure structure and the framework of domination and violence represented by land ownership in Brazil, it is essential to examine the historical construction of property in the country, which directly affected indigenous peoples that originally occupied the land before privatization (Pacheco, 2023, p. 249).

This section will focus on the 20th century. However, it is essential to recognize that the historical development of property rights in Brazil extends back to the colonial era, which began around 1530 and concluded with Brazilian independence in 1822 (Vilela, 2023). Land records in Brazil emerged soon after the Portuguese crown established the system of hereditary captaincies, granting extensive land allocations, known as *sesmarias*, to landholders referred to as *sesmeiros*, to stimulate land occupation and agricultural production in Brazil (Diniz, 2005; Nozoe, 2006, p. 3; Pinto, n.d.). The earliest documents related to these captaincies date back to 1534 (Diniz, 2005). Additionally, the Alvará of 1795, which recognized land possessors and aimed to reform the *sesmarias* system, has had a lasting impact on contemporary land distribution dynamics in Brazil (Diniz, 2005), as it granted extensive land allocations to a relatively small number of families, a situation that has persisted into the present day through hereditary succession (Diniz, 2005). This land distribution system did not take the Indigenous peoples that originally occupied the land into account, who were regarded as 'savages' and were violently displaced (Roland, 2018, p. 12). From that time, Indigenous groups were perceived as a threat to the establishment of farms in the region (Roland, 2018, p. 17), a perception that endures to the present day.

Until the adoption of the Brazilian Constitution of 1988, Indigenous peoples were officially viewed through the lens of necessary assimilation and integration into "developed" society (Coll, 2022; Roland, 2018, p. 17). The conditions of Indigenous groups had been addressed solely through the Statute of the Indian, a Federal Law enacted in 1973, which governed the progressive process of "civilization" under the oversight of a specific federal

agency, the National Foundation for Indigenous Affairs (FUNAI), until their complete integration into developed society (De Oliveira Godinho, 2008, p. 248).

During this period, numerous laws, decrees, and ordinances were enacted with the aim of regularizing Brazilian land tenure, yet failing to acknowledge the land rights previously acquired by Indigenous peoples (Pacheco, 2023, p. 251). For example, in the early 20th century, with the assistance of the Indian Protection Service (SPI), the state implemented compulsory settlement through the establishment of indigenous reserves, which were demarcated between 1915 and 1928 (Pacheco, 2023, p. 250). This led to the normalization of a state policy that emphasized indigenous peoples did not require land, suggesting that Indigenous Posts would be sufficient to accommodate everyone, who would subsequently be absorbed into national society (Pacheco, 2023, p. 250). The creation of indigenous reserves is often misunderstood as a protective measure, but, in reality, it represents a significant loss of land and autonomy for Indigenous peoples, including for the Guarani Kaiowá (Cavalcante, 2014, pp. 50). The Brazilian state showed little concern for selecting lands of traditional occupation, failing in some instances to provide essential resources such as access to water courses; forcing different ethnicities to share the same space, often leading to conflict; and by demarcating territories that no longer provide the conditions necessary for traditional Indigenous subsistence (Cavalcante, 2014, pp. 51).

In parallel, Brazil was undergoing an internal institutional organization, after its proclamation and consolidation of the Republic in 1889 and 1891 and the end of Monarchy (Payne, 2022, p. 5). The period known as the First Republic (from 1889 to 1930) was for the most part quickly dominated by local oligarchies, which already existed during the Empire, but their influence was balanced by the Emperor invested with the Moderating Power (Payne, 2022, p. 71). From 1930 until 1988, Brazil politics went through "The Vargas Era" (1930-1945), "The Populist Republic" (1946-1964), "Military Dictatorship" (1964-1985), and the "New Republic", from 1985 onwards (Abreu and Widener, 2023).

From 1930, successive governments of different ideological persuasions have promised agrarian reform, but they have never delivered, because the powerful landholding elite have consistently succeeded to block it (Robles, 2018, p. 2). A relevant period in this regard is the Military Dictatorship. "Based purely on economic considerations, the military dictatorship opened up the Brazilian Cerrado, or Savanna, lands for agro-export crops and cattle ranching by providing subsidized rural credit, price support mechanisms, technical assistance, and marketing and storage facilities" (Chaddad, 2015). According to Nehring (2022, p. 17), it "consolidated agrarian elite interests around limiting (redistributive) agrarian

reform and focusing on agricultural research to support large-scale industrial production” effectively enforcing the “Green Revolution” in the country, characterized by a paradigm shift in agricultural production through the use of chemical fertilizers, irrigation, mechanization, pesticides, and genetically improved seeds, all aimed at increasing productivity (Campagnolla & Macêdo, 2022, p. 2). The Green Revolution, while bringing substantial wealth to corporations of all areas of the agribusiness industry, resulted in lasting negative externalities for Brazilian society, including land concentration and rural exodus, simplification and vulnerability of productive systems through monoculture and reduction in the number of cultivated species, deforestation and degradation of natural biomes and biodiversity, dependency and overuse of pesticides and synthetic fertilizers, water contamination, soil deterioration, and increased greenhouse gas emissions (Campagnolla & Macêdo, 2022). Robles (2018, p. 5) adds:

By 1985, the States of Mato Grosso, Mato Grosso do Sul, Goiás, Rondônia, and Pará had experienced a remarkable agricultural and livestock expansion. All of this, however, came at a great social and environmental cost: Indigenous peoples were displaced from their traditional lands, and monoculture and cattle ranching accelerated tropical deforestation (Robles, 2018, p. 5).

On March 15, 1985, Sarney was sworn into office as President, promising to tackle the agrarian question by launching the National Plan for Agrarian Reform (PNRA) and the Special Credit Program for Agrarian Reform (PROCERA), aiming at encourage the insertion of settled peasants into the productive process by providing financing at low interest rates and promising to settle 1.4 million landless peasants over four years (Robles, 2018, p. 5-7). Progressive members were elected by Brazilian society to the 1987 National Constituency Assembly (ANC), to write Brazil’s new constitution, determined to enshrine agrarian reform in the new Brazilian constitution through a special amendment (Robles, 2018, p. 6). However, the amendment failed in the final vote and Sarney’s agrarian reform promise went unfulfilled (Robles, 2018, p. 7). According to Robles (2018, p. 7), the powerful Brazilian agribusiness supporting organizations, such as Brazilian Rural Society (SRB), Confederation of Agriculture and Livestock of Brazil (CNA), Brazilian Cooperative Alliance (OCB), Ruralist Democratic Union (UDR), and Brazilian Association of Agribusiness (ABAG), joined forces with industrialists and financiers to successfully defeat the amendment and undermine the implementation of the PNRA and underfund PROCERA. The final version of the Brazilian constitution merely reaffirmed previous constitutional principles as the basis for future agrarian reform programs, as the anti-agrarian reform forces used their political

influence within the ANC to undermine the project (Robles, 2018, p. 7). At the same time, the expansion of agribusiness was displacing Indigenous peoples from their traditional homeland with increasing violence, with little attention to the historically unresolved issue of indigenous lands rights (Robles, 2018, p. 17).

Leveraging and directly influencing this situation, foreign companies began to settle in the region along with the spread of agriculture with the support of government policies put forward by the Brazilian government with the aim of economic land use (Buscioli, 2016, p. 88). These policies, such as tax exemptions and incentive plans, were fundamental for the advancement of agricultural commodities, such as coffee, soybeans and sugar cane, and, concomitantly, for indigenous peoples land losses (Buscioli, 2016, p. 88).

3.3.1.2. After the 1988 Constitution. The legal approach to Indigenous rights was officially transformed with the 1988 Constitution, which began to recognize the diversity within national society and granted Indigenous groups and their members a range of special individual and collective rights aimed at protecting and promoting their distinct identity and habitat (De Oliveira Godinho, 2008, p. 248). Currently, the primary challenge in Brazil regarding Indigenous rights is not their legal recognition, which is ensured by the 1988 Brazilian Constitution and various other legal instruments, but rather the enforcement of these rights (Franceschini, 2016, p. 34).

Despite the 1988 Constitution and other legal instruments guaranteeing Indigenous rights, Indigenous peoples have continued to suffer violations of their human rights: the integrationist policy institutionalized until 1988, which perpetuated the notion that Indigenous peoples should abandon their identities and ancestral practices to assimilate into a society considered superior, remains present in political discourse (Coll, 2022). This fosters discrimination that has been perpetuated in Brazil for centuries, including the framing of the white population as superior in relation to Indigenous peoples (Coll, 2022).

From 1988 onwards, the Brazilian political landscape has been characterized by political instability and corruption, encapsulated by the phrase *rouba mas faz* ("he steals, but he gets things done") and the widely spread expression *caixa dois*, meaning "off-the-books funds" (Kolling, 2019; Osipian, 2013, p. 200). The agribusiness sector has been deeply entangled in this scenario: the largest corruption scandal, known as "Operation Car Wash" or *Lava Jato*, was uncovered during the period of 2014-2018, revealing the participation of TNCs in the scandal and culminating in the imprisonment of former President Luiz Inácio Lula da Silva ("Lula"), which divided public opinion in Brazil regarding the legality and political motivations behind Lula's imprisonment (Novaes and Silva, 2019). This situation

played a significant role in Jair Bolsonaro's election in 2018 (Kolling, 2019; Watts, 2017). Bolsonaro, a right-wing politician, campaigned on a platform of ending corruption and used this discussion to achieve electoral success; however, his administration has perpetuated it and further expanded elite and corporate power (Kolling, 2019; Paula, 2023). The "Operation Car Wash" scandal and Bolsonaro's election prominently featured the involvement of TNCs, with JBS, a major player in the agribusiness industry, playing a significant role (Silva et al., 2021).

The period during which Jair Bolsonaro served as President of Brazil (2018-2022) further reinforced this discriminatory discourse. In fact, according to Indigenous organizations, Bolsonaro implemented a “genocidal policy” (Brasil de Fato, 2022). During Bolsonaro’s administration, for instance, the Bill 490/2007, popularly known as the *Temporal Landmark Bill*, swiftly advanced through the Chamber of Deputies and was approved in 2023. This bill proposed that the demarcation of Indigenous territories should only consider the areas occupied by Indigenous peoples up until the promulgation of the Brazilian Federal Constitution in October 1988, which would effectively grant amnesty for all violations and land grabbing suffered by Indigenous peoples before that year (Conselho Indígena Missionário, 2024). The bill was reviewed in 2023 by the Supreme Federal Court (STF) under a procedure known as “Repercussão Geral” which entails the Supreme Court defining its interpretation of the rights guaranteed to Indigenous peoples by the 1988 Federal Constitution (Portal da Câmara dos Deputados, 2023; Conselho Indígena Missionário, 2024).

The issue did not end there. Despite the highest court’s decision, the Senate approved the legislation, which then proceeded to the President of the Republic and the National Congress (Conselho Indígena Missionário, 2024). President Lula, who reassumed office in 2023, vetoed the temporal landmark; however, in January 2024, the Brazilian National Congress overrode the veto (Conselho Indígena Missionário, 2024). Currently, the Temporal Landmark continues to threaten Indigenous rights in Brazil, as the STF must now declare the law unconstitutional through a Direct Action of Unconstitutionality (Conselho Indígena Missionário, 2024). Until such a declaration is made, which could take years, the law remains in effect, and Indigenous rights remain at risk (Conselho Indígena Missionário, 2024). In practice, this means that groups opposed to Indigenous peoples may seek to apply the law in public administration acts—for example, in procedures carried out by FUNAI or the Ministry of Justice regarding ongoing demarcation processes, and there may also be attempts to use the judiciary to invalidate demarcations or seek repossession of lands from Indigenous

communities based on this law, as it is already occurring in some cases (Conselho Indígena Missionário, 2024).

The approval and enactment of the temporal landmark legislation clearly demonstrate the consequences of the governance gap concerning the protection of Indigenous rights in Brazil. This law was heavily influenced by the “ruralist bloc”, or the Parliamentary Front for Agribusiness (FPA), which was created during the ANC and holds substantial sway in Brazilian politics as one of the largest and most active blocs in the Chamber of Deputies, as they represent the interests of large agricultural producers and landowners (Sasaki, 2019). Among the reasons for the ruralist bloc’s support for agribusinesses are the personal stakes of Congress members, many of whom are large landholders and producers of agricultural commodities themselves, as well as the involvement of bribery, money laundering, and kickbacks in lobbying efforts to advance corporate interests within policy decisions (Sasaki, 2019; Peng, 2015).

Generally, the FPA advocates for increased rural financing, relaxation of labor laws, and criticizes environmental legislation and agrarian reform (Sasaki, 2019). The FPA exerts significant influence over discussions in Congress, particularly in areas such as environmental legislation, agrarian reform (where they support the granting of property titles), Indigenous territories and rights (especially land demarcation, which they view as an impediment to rural development), and rural labor regulations (where they advocate for the relaxation of labor laws, including allowing work for 18 days without rest, reducing regulations on pesticide use and management, and permitting workers to be compensated with housing and food, which opens avenues for conditions akin to slavery), according to Guia do Estudante (2017). For example, the ruralist bloc played a decisive role in the approval of the Brazilian Forest Code in 2012: under the influence of agricultural producers, the new legislation granted amnesty to those who had deforested beyond permissible limits up to July 2008, stipulating that they would not face penalties as long as they recovered the deforested areas (Sasaki, 2019).

In 2023, Luiz Inácio Lula da Silva reassumed office as President of Brazil after winning the 2022 elections (Tribunal Superior Eleitoral, 2022), following a prolonged political crisis marked by corporate involvement and corruption scandals. One of his significant early actions was the establishment of the Ministry of Indigenous Peoples, promising to address the historical Indigenous rights issue (Ministério dos Povos Indígenas, n.d.). Additionally, Lula reinstated the Ministry of Human Rights and Citizenship (Ministério dos Direitos Humanos e Cidadania, n.d.), which has begun incorporating the BHR agenda

through discussions aimed at formulating the National Policy on Business and Human Rights (Ministério dos Direitos Humanos e da Cidadania, n.d.). The future will strongly rely on the enforcement of these new policies and commitments.

3.3.2. How Did This Background Affect The Guarani Kaiowá Indigenous Peoples, And What Role Corporations Have Played In Their Human Rights Violations?

The historical and legal framework governing land distribution and property rights in Brazil have had profound implications for the Guarani Kaiowá Indigenous peoples, particularly in the context of corporate activities (Coll, 2022). The Guarani Kaiowá endure some of the most severe and revealing barriers to justice for Indigenous peoples, facing confinement, murders, harassment, threats, and various forms of violence since the early 20th century (Coll, 2022). The ongoing efforts of the Guarani Kaiowá to reclaim their ancestral lands, coupled with tensions over traditional territory demarcation and the expansion of mechanized soy and sugarcane monoculture since the 1970s, have led to prolonged violent conflicts and numerous indigenous deaths in the southern region of Mato Grosso do Sul (Bragato and Filho, 2020, p. 143).

To illustrate this issue, Bragato and Filho (2020, p. 144) provide a comprehensive analysis:

The attacks that generate territorial conflicts and the deaths of Guarani and Kaiowá indigenous people are perpetrated, in the view of Tonico Benites (2015), by "ranchers, ruralist politicians, who are also graduated and highly specialized in paralyzing the process of indigenous lands demarcation". Benites (2015) points out that these individuals act through private security companies that farmers hire to carry out offensives against indigenous people or organized criminal groups. Criminal groups, even, according to a report by Renan Antunes de Oliveira (2015), "are the ones that most disturb, even though it is only the tip of the iceberg: they do the dirty work here and there, they put Funai employees on the run. They live protected in the farms of the principals, with the certainty of impunity". The perpetrators' power and the threat of the *jagunços* are so great that, in 2015, Federal Prosecutor Ricardo Ardenghi requested the Ministry of Justice to send support from the National Security Force to protect the Kurussu Ambá indigenous land community, which was under attack of these groups, but their request was declined (Oliveira, 2015)". (Bragato and Filho, 2020, p. 144)

Thus, Bragato and Filho (2020, p. 144) underscores that the Guarani and Kaiowá indigenous people in Mato Grosso do Sul are victims of systematic discrimination, facing

ongoing and severe violations such as "murders, femicides, suicides, malnutrition, lack of access to basic food, structural racism, violent eviction, and forced disappearance of leaders and teachers" (Bragato and Filho 2020, p. 144).

According to Coll (2022), the difficulty in enforcing Indigenous rights is linked to the persistence of a colonial culture within the judiciary and the institutional racism present in state and federal public policies. The legal regime that has been institutionalized reflects a colonial and Eurocentric framework—interpreting the world according to European values—, resulting in enduring consequences, such as difficulties in recognizing collective land rights within a state model that prioritizes private property (Coll, 2022). Another consequence is that individuals are treated less favorably simply because of their Indigenous identity, exposing the racism they encounter (Coll, 2022). Legal aid services also face challenges in providing assistance, with numerous reports of denied or inadequate service (Coll, 2022).

As a result, Guarani Kaiowá individuals, unable to provide for their survival in the reserves and with sparse income sources, usually work in the plantations that supply these industries, usually sugarcane plantations, as their land no longer offer conditions for subsistence (Bragato and Filho, 2020, p. 158). Neves da Silva et al. (2021, p. 332) argue that this situation exemplifies the forced integration of indigenous peoples into the capitalist system as a source of cheap labor, effectively denying their ethnic and cultural uniqueness.

Referencing legal professionals working in the matter, Coll (2022) asserts that the situation faced by Indigenous peoples constitutes genocide, and the reluctance to formally recognize and condemn the Brazilian state for this crime is indicative of the pervasive colonial mindset within the Legislative, Executive, and Judiciary branches (Coll, 2022).

According to Franceschini (2016, p. 28), the severe situation faced by the Guarani and Kaiowá regarding rights such as health, food and nutrition, access to water, education, safety, equality, and social security, among others, is a consequence of the failure to secure their territorial rights, compounded by the violence and discrimination they experience, and the inefficiency of institutions tasked with protecting their rights. In our view, it is also a failure resulting from the governance gaps Ruggie (2008) stresses about. Franceschini (2016, p. 29) further elaborates:

Together with those factors, difficulty gaining access to justice – not just access to the Judiciary, but, above all, to the value of justice, whether to demand their territories back or to demand public policies that are suitable to their cultural requirements – condemns them to a series of rights abuses. For example, the violation of all the dimensions of the human right to adequate food and nutrition (HRtAFN). The more

obvious example of this violation is the death of indigenous children as a consequence of malnutrition or constant exposure to pesticides, which in turn leads to abuses of their right to good health and education, given that it is scientifically proven that children – particularly those younger than 24 months – who do not have a proper diet, do not have the necessary immune system to stay healthy and have reduced learning capacities. Thus, these are problems that create vicious impoverishment and degradation cycles for an entire people. (Franceschini, 2016, p. 29)

3.3.2.1. The Role Of Agribusiness. The influence of agribusiness in policymaking processes and the state's support for agribusiness is seen by Robles (2018, p. 1) as the "main reason for the persistence of skewed land concentration" and, therefore, indigenous land rights violations. The author further stresses:

Agribusiness has not only undermined agrarian reform efforts but has also generated a growing dependency on a socially and environmentally destructive monoculture agricultural economy. Moreover, Brazil's current political and economic crisis has further undermined the struggle for agrarian reform. (Robles, 2018, p. 1)

In the region traditionally inhabited by the Guarani Kaiowá, the main current agricultural exports include soy, cattle, and sugar cane, which are produced by large landholders and corporate groups, including TNCs that control extensive areas of land through ownership or leasing arrangements (Buscioli, 2016, p. 88; Franceschini, 2016, p. 28). The agricultural commodities produced in the region are exported globally and contribute to the energy and food supply worldwide, with well-known TNCs playing a significant role in the process (Buscioli, 2016, p. 88).

Despite the strong connection to the injustices perpetrated by the state, the responsibilities and duties of TNCs are not adequately addressed in discussions concerning Indigenous peoples and land distribution in Brazil, and Brazilian society often leaves these issues to be managed by the state (Gallois, 2008).

State complicity with corporate endeavors has historically been existent, as previously showed in this study. Pacheco (2023, p. 251) underscores that the state of Mato Grosso do Sul, where the Guarani Kaiowá people originally occupied, employed various strategies to legitimize the "illegal" - illegal practices such as false power of attorney documents, fictitious individuals purchasing land, disregard for legal boundaries, physical and moral coercion, and impunity were not uncommon, as well as corruption. Through incentives and leveraging local producers' inability to compete autonomously, along with the low land prices and inadequate

public oversight, TNCs strategically established their operations in Mato Grosso do Sul to be close to production activities (Bragato and Filho, 2020, p. 145). In fact, with indigenous peoples concentrated in reserves and land being sold at a very low cost, the acquisition of land by foreign companies in Mato Grosso do Sul has made the state the fourth in the country with the largest land area owned by foreign companies, such as ADM, Bunge, Cargill, Shell, LDC, Odebrecht, and Biosev (Buscioli, 2016, pp. 104-106). Many of them are based and operating in the south-central region of Mato Grosso do Sul - either by owning large tracts of land, partnering with other corporate groups, leasing from local producers, or purchasing production directly (Buscioli, 2016, p. 120), leading to a set of other consequences for Brazilian society, including environmental degradation, economic dependency, and cultural conflicts.

During fieldwork in 2023 as a consultant, I assessed farms supplying TNCs companies and evaluated their stage against 'sustainable agricultural' standards. An aspect I observed that merits attention in this study was the organizational culture developed against Indigenous communities residing near large farms in both Mato Grosso do Sul and Mato Grosso states. These communities are frequently labeled by employees of the large-scale farms that supply TNCs as lazy and untidy, and there is a general lack of information or understanding about them, escalating consequences of racism and even hate speech. As a consequence of the organizational culture and implemented policies, indigenous peoples are prohibited from entering these large farms, effectively isolating them and restricting their freedom of movement due to the expansive size of the farms that encircle their lands.

On the other hand, it is worth noting that there are – although few - politicians opposing to the Parliamentary Front for Agribusiness (FPA) ideals. The coordinator of the Parliamentary Front for the Environment, Nilto Tatto, has criticized the stance of the ruralist bloc and predicted challenges for Brazilian agribusinesses in light of new socio-environmental sustainability requirements in the international market (Portal da Câmara dos Deputados, 2024). He remarked, “Agribusiness does not need Indigenous lands. It is important for agribusiness to understand that stripping Indigenous peoples of their rights is effectively shooting itself in the foot. They do not seem to grasp this” (Portal da Câmara dos Deputados, 2024). He further added that “perhaps there is a lack of clarity in the leadership of the Parliamentary Front for Agribusiness, which has a narrow and short-sighted perspective that does not contribute positively to Brazil” (Portal da Câmara dos Deputados, 2024).

3.3.2.1.1. Corporate Voluntary Initiatives. Some initiatives have attempted to restrict sugar and ethanol TNCs from purchasing sugarcane from lands originally owned by the

Guarani Kaiowá. For example, in 2009, the Federal Prosecutor in Dourados (a city in Mato Grosso do Sul) entered into an agreement with Usina São Fernando (then part of the Bumlai Group), whereby the company pledged to refrain from acquiring or encouraging the cultivation of sugarcane, even through leasing arrangements, on rural properties intersecting with areas identified, declared, or approved as traditionally occupied lands by indigenous communities (Glass, 2011, p. 7, p. 9). Moreover, following the mobilization of various human rights and international environmental organizations accusing the TNC Raízen of appropriating lands claimed by the Guarani Kaiowá, the corporation, owned by Shell and Cosan groups, signed a commitment in 2012 to permanently cease acquiring sugarcane produced in areas recognized by the Ministry of Justice as indigenous lands (Glass, 2011, p. 7, p. 9). Additionally, Raízen committed to monitoring the conduct of its sugarcane suppliers regarding the rights of the Guarani Kaiowá populations (Bragato and Filho, 2020, p. 146).

Conversely, TNC Bunge, also involved in sugar and ethanol production in Mato Grosso do Sul, declined to engage in discussions regarding the procurement of raw materials from lands claimed by the Guarani Kaiowá - Bunge faced accusations and did not deny purchasing sugarcane from farms located within the Jatayvary indigenous territory, already designated by the Ministry of Justice as belonging to the Guarani Kaiowá (Glass, 2011, p. 7, p. 9). The company confirmed that it sources supplies from five farms within the Jatayvary indigenous area and acknowledges the issues related to sugarcane cultivation on indigenous lands (Glass, 2011, p. 7, p. 9). In 2012, when questioned about this matter, the company stated that it would take immediate steps to suspend the relevant contracts if there is a definitive decision by the competent authorities (homologation by the Presidency of the Republic and registration in the Real Estate Registry) recognizing the land as indigenous, if the contracts are still in force (Glass, 2011, p. 7, p. 9).

3.4. Conclusions

As showed in this section, in the realm of territorial rights, there is a significant conflict between the commercial monoculture practices on large estates and the traditional land use of Indigenous communities. The latter's land use does not align with the wealth and production criteria of large-scale agriculture. This conflict has historically hindered the recognition and protection of Indigenous territorial rights and led to persistent human rights violations (Franceschini, 2016, p. 28).

In Brazil, prior to the 1988 Constitution, indigenous peoples were viewed through an assimilationist lens, with policies and laws that failed to recognize their land rights and

enabled the expansion of agribusiness interests at the expense of indigenous communities (Coll, 2022). Even after the 1988 Constitution formally recognized indigenous rights, the enforcement of these rights has remained problematic, exacerbated by political instability, corruption, and the continued influence of the powerful agribusiness lobby (Coll, 2022).

The historical and legal framework governing land distribution, agribusinesses and indigenous rights in Brazil have had severe consequences for the indigenous peoples (Bragato and Filho 2020, p. 144; Franceschini 2016, p. 28). The Guarani Kaiowá case exemplifies how these governance gaps, created by the interplay of state policies, corporate interests, and discriminatory mindsets, have allowed for the systematic dispossession and marginalization of indigenous peoples, underscoring the need for meaningful reforms to address the root causes of business-related human rights violations peoples (Bragato and Filho 2020, p. 144; Franceschini 2016, p. 28). The Guarani Kaiowá face some of the most egregious human rights violations, including confinement, murders, harassment, and violence, as they struggle to reclaim their ancestral lands amid the expansion of agribusiness, such as soy and sugarcane monoculture, in Mato Grosso do Sul, where they have originally occupied (Bragato and Filho 2020, p. 144). Unable to sustain themselves in the reserves, many Guarani Kaiowá are forced to work as cheap labor in the plantations that supply these industries, exemplifying the forced integration of indigenous peoples into the capitalist system (Neves da Silva et al. 2021, p. 332).

The difficulty in enforcing indigenous rights is rooted in the persistence of a colonial mindset and institutional racism within the judiciary and public policies, which prioritize private property over collective land rights (Bragato and Filho 2020, p. 144; Coll, 2022). The influence of agribusiness in policymaking processes and the state's support for agribusiness are seen as the main reasons for the persistence of skewed land concentration and the violation of indigenous land rights in Brazil (Robles, 2018, p. 1). The region traditionally inhabited by the Guarani Kaiowá is dominated by the production of major agricultural exports like soy, cattle, and sugarcane, which are controlled by large landholders and corporate groups, including TNCs (Buscioli, 2016, p. 88; Franceschini, 2016, p. 28).

Despite the strong connection between agribusiness and the injustices perpetrated against indigenous peoples, the responsibilities and duties of these TNCs are often overlooked, with the state complicity in corporate impunity going unaddressed. From this section's analysis, we conclude that both Brazil and the state of Mato Grosso do Sul, home to the Guarani Kaiowá, have implemented strategies to promote agribusiness expansion through

incentives, low land prices, and insufficient oversight through its policies, resulting in persistent and unaddressed human rights violations.

4. Addressing The Governance Gap In Global Value Chains? An Analysis Of The EU's Corporate Sustainability Due Diligence Directive

4.1. Introduction And Background

Throughout history, the law has changed in response to societal transformations, therefore often lagging behind the demands for reform (Abel, 1982, p. 785). While practices such as forced labor are now outlawed worldwide, legal doctrines that have enabled corporate abuses, such as limited liability, have remained. As globalization and international trade have rapidly evolved, giving rise to a new era of international competition, the complexity of global supply chains has intensified (European Commission [EC], 2024). "As supply chains go global, more intermediate goods are traded across borders, and more parts and components are imported for use in exports" (Gereffi and Lee, 2012, p. 25). It is now challenging for downstream and midstream companies to trace the origins and conditions of production for the raw materials and components that make up the everyday products available to consumers (Mujanovic and Österberg, 2022, p. 16). For example, cell phone batteries contain cobalt that could potentially be sourced from TNCs relying on child labor or other exploitative practices (Amnesty International, 2016, p. 28). Still, the lack of ability to trace the origin of minerals is the most imminent barrier to the responsible sourcing of these raw materials (Mujanovic and Österberg, 2022, p. 16). Sugar is present in many everyday products consumed by society, from food to fuel. The impacts of its large-scale production raise controversies, as it is associated with severe human rights violations worldwide, including those of workers, indigenous people, land, and environmental rights (de Andrade & Miccolis, 2010, p. 214). Yet, under the established global legal framework, companies profiting from the sale of these cell phones have been able to avoid accountability for human rights violations occurring upstream in their supply chains, unravelling a governance gap conceptualized by Ruggie (2008) and referenced in this study.

In recognition of the need to address this governance gap, Ruggie (2008; 2018) designed the UNGPs, which further inspired the European Union in designing the Corporate Sustainability Due Diligence Directive (CSDDD), according to its Recitals (5) and (14). The Directive, approved on May 24th, 2024, aims to foster sustainable and responsible corporate behavior throughout companies' operations, including across their global value chains, by ensuring that companies in scope identify and address adverse human rights and

environmental impacts of their activities, independently if they occur inside or outside Europe (EC, 2024).

The CSDDD is the first regional and EU-level legislation that creates an obligation for large companies to undertake risk-based human rights and environmental due diligence to identify, assess, address and remedy potential and actual adverse impacts through the corporation's value chain, alongside liability for failure to meet these obligations (Paccès, 2023a). The CSDDD's civil liability regime encompasses the company's activities within the group and across the entire value chain, including parent companies, their subsidiaries, and business partners under its scope (Paccès, 2023a).

The subsequent sections will delve into CSDDD provisions and evaluate their potential effects on corporate impunity regarding negative externalities resulting in human rights violations. The objective of this analysis is to understand the extent to which the CSDDD addresses the governance gap described by Ruggie (2008) and whether its civil liability regime effectively counters corporate impunity. To achieve this, the study will reflect on the material and personal scopes of the CSDDD alongside its civil liability regime, extracting the main shortcomings from this analysis.

4.2. From Soft To Hard Law: The Role Of The UNGPs

The UN Guiding Principles on Business and Human Rights (UNGPs), developed by John Ruggie (2008) and endorsed by the UN Human Rights Council in 2011, have represented a significant advancement in global governance for corporate human rights responsibilities (Aaronson & Higham, 2011, p. 4). As a soft law framework, the UNGPs introduced a crucial approach to Human Rights Due Diligence (HRDD), based on the 'Protect, Respect and Remedy' Framework. With 31 guiding principles, the UNGPs outline three pillars of action: (1) the state's duty to protect against human rights abuses; (2) corporate responsibility to respect human rights; and (3) the victims' right to access an effective remedy when their human rights are violated (UNGP, 2011). The UNGPs aimed to find "ways to reduce or compensate for the governance gaps created by globalization, because they permit corporate-related human rights harm to occur even where none may be intended" (Ruggie, 2008, p. 3). As mentioned earlier in this study, according to Ruggie (2008, p. 4), governance gaps lie between the scope and impact of economic forces and actors, with one of the most important factors shaping their power being the lack of regulation on the economic unity of the transnational firm (Ruggie, 2018, p. 5). "These governance gaps provide the permissive environment for wrongful acts by companies of all

kinds without adequate sanctioning or reparation" (Ruggie, 2008, p. 4). Therefore, the UNGPs' fundamental goal was to narrow and ultimately bridge the gaps in human rights. Ruggie (2008, p. 27) contextualized:

The current debate on the business and human rights agenda originated in the 1990s, as liberalization, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally.

Many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. But as has happened throughout history, rapid market expansion has also created governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences. The area of business and human rights is one such domain. (Ruggie, 2008, p. 27)

Many studies have critically analyzed the UNGPs (Deva et al., 2023; Holly, 2024; Karp, 2023; Mares, 2010a; Rasche & Waddock, 2021). Despite being essential to the advancement of the business and human rights (BHR) agenda, these critiques often overlook that the UNGPs were designed to serve as an initial step and framework, acknowledging the inevitability of gaps given the political and economic landscape surrounding corporate power and impunity. As Ruggie (2013, p. 59) describes, "On the one hand, you have NGOs with ambitious agendas for a 'treaty' on corporate responsibility and human rights. On the other hand, you have companies saying 'no, anything but that!'" According to Ruggie, "no single silver bullet can resolve the BHR challenge. A broad array of measures is required, by all relevant actors" (Ruggie, 2013, p. 87). Thus, his immediate objective was to develop and secure agreement on a normative framework and corresponding policy guidance for the BHR domain, establishing both its parameters and perimeters (Ruggie, 2013, p. 87). This was achieved by emphasizing the importance of closer engagement between companies and the individuals and communities they impact (Ruggie, 2013, p. 88). Ruggie further stressed, "To move this agenda forward, governments would have to endorse such a framework, and governments were more likely to endorse it if it enjoyed broad stakeholder buy-in" (Ruggie, 2013, pp. 88-89). Therefore, the UNGPs were a product of stakeholder engagement, as a more authoritative framework would likely have faced resistance from economic forces and lacked governmental endorsement.

Karp (2023) provides an interesting analysis of the UNGPs. By situating them within the historical context of the neoliberal world order that accelerated in the early 1980s, Karp (2023, p. 137) argues that "the UNGPs do not represent a meaningful shift away from this

neoliberal form of world order”, particularly due to “their structural separation of the ‘state duty to protect’ from the ‘corporate responsibility to respect’; and their substantive conceptualization of HRDD within the ‘corporate responsibility to respect’”. According to Karp, this framework constitutes companies as private actors who are free to value and act as they wish, provided they do no harm (Karp, 2023, p. 137). As a result, Karp observes that “the UN Guiding Principles (UNGPs) and their concept of human rights due diligence (HRDD) cannot succeed in their current form, because they reify neoliberalism’s public/private divide” through their separation of state duties from corporate responsibilities, positioning states to set the context for action, while companies are free to act within that context, subject to the constraint of respecting human rights (Karp, 2023, p. 136). Karp (2023, p. 136) contends that the responsibility to respect human rights is only one aspect of the broader normative basis of corporate human rights obligations. He argues that genuine respect for human rights can only be partially achieved by treating companies and states as the primary duty-bearers (Karp, 2023, p. 136).

Considering the political and economic limitations of the UNGPs, Karp (2023, p. 136) acknowledges that “HRDD may come to be seen as a pragmatic solution to a set of problems for a neoliberal world order”. Aaronson and Higham (2011, p. 5) add that the effectiveness of the UNGPs hinges significantly on policymakers educating firms and citizens about corporate human rights responsibilities and encouraging proactive action.

In sum, in our view, Ruggie has acknowledged the limitations of the UNGPs, aiming to create a tool suitable for transitional use, aware that a more disruptive tool would not gain acceptance from businesses and governments. Ruggie (2013, pp. 87-88) concluded that voluntary initiatives alone are unlikely to bridge the BHR governance gaps and that advancing requires “finding ways to drive more authoritative guidance into market practices”. Thus, the UNGPs were an initial attempt to address the governance gap, not a silver bullet solution, as Ruggie himself described. This approach was necessary to balance stakeholders’ interests, necessitating concessions to achieve broad acceptance (Ruggie, 2013). Ruggie emphasized that “those measures must cohere and generate cumulative progress over time” (Ruggie, 2013, p. 87).

Over a decade after their introduction, the UNGPs have served as the cornerstone for several significant developments in the field of BHR. They directly influenced the incorporation of human rights due diligence into various frameworks, including the OECD Guidelines for Multinational Enterprises (2011), the International Labour Organisation’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

(2017), the International Finance Corporation's Performance Standards (2012), and the Equator Principles (2013) (Marx et al., 2022). Additionally, human rights due diligence features in the Draft Treaty on Business and Human Rights (Marx et al., 2022).

Subsequent legislative measures have built upon the UNGPs, applying to TNCs and encompassing both home and host states, thus having extraterritorial effects. Examples are the French Duty of Vigilance Act 2017, The Netherlands Child Labour Due Diligence Act 2019, the German Corporate Due Diligence in Supply Chains Act 2021 and the Norwegian Transparency Act 2021 (Marx et al., 2022). In 2024, the EU introduced the first regional and EU-level legislation that creates an obligation for large companies to undertake risk-based human rights and environmental due diligence (Paccès, 2023b). The EU CSDDD figures today as the only regional legislation which has specific provisions on HRDD (Paccès, 2023a).

Significantly inspired by the UNGPs, the key question is whether the CSDDD was designed to advance the UNGPs by addressing their inherent challenges recognized by Ruggie (2008) and highlighted by critical analyses (Deva et al., 2023; Holly, 2024; Karp, 2023; Mares, 2010a; Rasche & Waddock, 2021), or if it merely transposed the soft law principles into a hard law framework without tackling the deeper causes of human rights violations that have been identified.

4.3. CSDDD's Material Scope: Risk-based Human Rights and Environmental Due Diligence (HREDD)

According to Article 1(a)(b)(c), companies in scope should carry on risk-based HREDD obligations, including actions to identify, assess, prevent, mitigate and provide remediation to adverse impacts that may occur with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies, under the penalty of incurring in civil liability. In addition, the Directive sets out an obligation for large companies to adopt and put into effect, through best efforts, a transition plan for climate change mitigation aligned with the 2050 climate neutrality objective of the Paris Agreement as well as intermediate targets under the European Climate Law (EC, 2024).

The following sections under this topic will elucidate the concepts of the CSDDD's material scope deemed crucial for delineating the extent of the Directive's civil liability provisions.

4.3.1. Human Rights, Environmental Rights and Climate

Considering the obligation of carrying out risk-based HREDD, it is fundamental to understand the definition of “human rights” and “environmental rights” for the purpose of the CSDDD.

Drawing from Recital (32), the concept of human rights for the purpose of the directive comes from a sample list of rights and international instruments mentioned in different Recitals and in the Annex to the Directive. It includes all five fundamental principles and rights at work as defined in the 1998 ILO Declaration on Fundamental Principles and rights at work, which affirms the obligations and commitments that are International Labor Organization (ILO) membership inherent, namely: freedom of association and the recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the abolition of child labor; the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment (ILO, n.d.).

Human rights for the CSDDD are also the rights enshrined in the international instruments listed in Part I, Section 1, of the Annex to the Directive, entitled “rights and prohibitions included in international human rights instruments”. Examples by the provision are the right to life, the prohibition of torture, the right to liberty and security, prohibition of forced or compulsory labor, among others. It also includes “human rights and fundamental freedoms instruments” listed in Part I, Section 2, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others.

According to the CSDDD, the term “adverse human rights impact” means an impact on persons resulting from an abuse of one of the human rights listed or enshrined in these instruments. The definition includes both the abuse itself by the company and the possibility that it could have reasonably foreseen the risk that such a human right might be affected, taking into account the specific circumstances of the case (Article 3 (c)(i)(ii)). The term "abuse" should be interpreted in line with international human rights law (Recital (32)).

Regarding "environmental impacts", Recital (32) refers that due diligence should encompass impacts resulting from the violation of one of the prohibitions and obligations listed in Part II of the Annex to the Directive, interpreted in line with national, international and EU environmental law. Prohibitions, according to the Directive, include causing measurable environmental degradation, such as soil changes, water or air pollution, harmful emissions, excessive water use, land degradation, deforestation, and impacts that impair food

production, access to safe drinking water, sanitary facilities, health, or ecosystem services that support human well-being.

Recital (32) underscores that due diligence requirements should aim to preserve and restore biodiversity, improve environmental quality—particularly air, water, and soil—and thereby better safeguard human rights. Recital (33) further specifies that companies may need to adopt additional standards related to gender, age, race, ethnicity, class, caste, education, migration status, disability, and social and economic status, depending on context and circumstances. The CSDDD emphasizes the need to pay special attention to individuals at heightened risk due to marginalization or vulnerability, including indigenous peoples as protected by the UN Declaration on the Rights of Indigenous Peoples. It also highlights the importance of Free, Prior, and Informed Consent (FPIC) and international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities. Recital (36) highlights the interconnection of governance with adverse human rights and environmental impacts, explicitly recognizing that corruption and bribery can intertwine with such impacts. The CSDDD thus expects companies to consider these factors in their HREDD practices, ensuring alignment with the principles of the UN Convention against Corruption.

Furthermore, the CSDDD requires companies to adopt and implement annual climate change mitigation transition plans. These plans must aim to ensure, through best efforts, that the company's business model and strategy are compatible with the transition to a sustainable economy and the goal of limiting global warming to 1.5°C, in line with the Paris Agreement. Framed as an “obligation of means”, national authorities are expected to supervise the adoption and design of these plans, but not that they are effectively implemented (Recital 73). This raises questions about the provision's ability to drive the necessary corporate action on climate change (Bueno et al., 2024, p. 3).

4.3.2. Due Diligence

The due diligence obligations outlined in the directive are “obligations of means”, indicating that the CSDDD lays down rules on due diligence obligations, and not due diligence results (Recital 19). Thus, we conclude that the civil liability provisions under the directive are not tied solely to adverse human rights or environmental impacts, but rather to damages resulting from an intentional or negligent failure to carry out due diligence. “Due diligence is a responsibility to investigate and deal with risks of adversely affecting human

rights, rather than a responsibility to avoid any violation of human rights” (O'Brien and Christoffersen, 2023, p. 183).

The Directive outlines a cycle of risk-based human rights and environmental due diligence by laying down, in Article 5, eight "steps" to its implementation by companies, which are specified in Articles 7 to 16: (a) integrate due diligence into company policies and management systems; (b) identifying and assessing actual or adverse impacts and, where necessary, prioritizing actual and potential adverse impacts; (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimizing their extent; (d) providing remediation for actual adverse impacts; (e) carrying out meaningful engagement with stakeholders; (f) establishing and maintaining a notification mechanism and a complaints' procedure; (g) monitoring the effectiveness of their due diligence policy and measures; (h) publicly communicate due diligence.

The CSDDD designed its due diligence cycle drawing inspiration from globally acknowledged non-binding frameworks that have innovatively specified and developed practical steps for voluntary HREDD in their texts, such as the UN Guiding Principles on Business and Human Rights (UNGPs), the Guidelines for Multinational Enterprises (MNE Guidelines) established by the Organization for Economic Co-operation and Development (OECD), the OECD Due Diligence Guidance for Responsible Business Conduct, as well as the International Labor Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, as CSDDD recitals, including (5), (6), and (37), extensively refer to these frameworks. The latter notes that companies can utilize these frameworks as guidance to evaluate adverse human rights impacts, comprehend how their activities may affect human rights, and identify prohibited corporate behaviors based on internationally recognized standards.

The objectives of due diligence are the ones stated in Recital (19), that is, "addressing adverse human rights and environmental impacts", which should take into account the "degree of severity" and the "likelihood of the adverse impact". This applies to companies' operations, including subsidiaries' and business partners' operations, in chains of activities of the companies. In addition, third-country companies with significant operations in the Union are also covered. If the company lacks the capacity to completely prevent or achieve the elimination of adverse impacts, the requirement is for a company to undertake "appropriate measures" that are capable of accomplishing the objectives of due diligence. In order to measure if the company took these "appropriate measures", the recital mentions that the circumstances of the specific case should be taken into account, such as the nature and extent

of the adverse impact, and relevant risk factors, i.e., the specificities of the company's business operations and its chain of activities, sector or geographical area in which its business partners operate, the company's power to influence its direct and indirect business partners, and whether the company could increase its power of influence.

Recital (50) aims to add to the meaning of "appropriate measures" by suggesting that if a parent company identifies potential adverse impacts caused by its business partners, terminating the business relationship should be a last resort. Instead, "appropriate measures" should be taken such as using the company's influence to address the issues, temporarily suspending the business relationship with the supplier, developing a tailored action plan to prevent the impact, and exploring alternative business partnerships.

Despite this, the terms "appropriate measures," "degree of severity," and "likelihood of the adverse impact" remains vague and could pose challenges in establishing liability, which will be discussed further in this study.

In conclusion, this study highlights that due diligence is an ongoing, long-term commitment, not a one-time fix, a compliance-check exercise or a "one-size-fits-all" solution. It must be tailored to the particular characteristics and context of the company. We suggest that identifying and assessing impacts may start with a Human Rights Impact Assessment (HRIA), which defines areas of focus, translating the due diligence scope into easy-to-understand indicators or standards that should be constantly reviewed, as regularly revisiting the HRIA helps uncover previously unseen impacts. In our view, integrating human rights due diligence goes beyond crafting policy documents: it requires training, cultural shifts, and empowering employees and stakeholders. In turn, we understand that preventing and mitigating involves measures like developing action plans and seeking contractual assurances from direct partners. Companies should also encourage business partners to seek similar assurances from their own partners, within the scope of their shared activities, as outlined in Recital (46).

In conclusion, this study emphasizes that due diligence should be understood as a continuous, long-term commitment rather than a one-time fix, one-size-fits-all solution, or a compliance check-box exercise, and it must be tailored to the specific characteristics and context of each company and right holders. We recommend initiating the process of identifying and assessing impacts through a Human Rights Impact Assessment (HRIA), which delineates focal areas and translates the scope of due diligence into clear, actionable indicators or standards. Regular review of the HRIA is vital to identify and address emerging impacts. The effective integration of human rights due diligence extends beyond the

formulation of policy documents; it requires substantial training, cultural shifts, and the empowerment of both employees and stakeholders. Preventative and mitigative actions should encompass the development of action plans and the procurement of contractual assurances from direct partners, as outlined in Recital (46). Moreover, the establishment of complaint procedures is essential for the due diligence process - when implemented with trust and a commitment to safety, they provide valuable insights into adverse impacts and offer a clear remedy path for rights holders (Office of the UN High Commissioner for Human Rights [OHCHR], 2022). Stakeholder engagement is a critical component, as it fosters trust, partnership, and provides inputs for inclusive strategies, ensuring that diverse perspectives are incorporated to it (OHCHR, 2022). These elements, in our perspective, are integral to a comprehensive due diligence framework.

According to the Office of the UN High Commissioner for Human Rights (2022):

The key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups. Proactive and meaningful stakeholder engagement occupies a central and crucial place in human rights due diligence. In the framework laid down in the UNGPs, it is a key source of information from which companies can better identify, understand and address human rights risks, and by which companies can track the effectiveness of their responses. It enables an enterprise to identify whether stakeholders have the same or different perspectives on what constitutes an impact on their human rights and on how significant an impact may be. Where direct consultation with (potentially) affected stakeholders is not possible, business enterprises are expected to consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society. (OHCHR, 2022)

4.3.3. Risk-based Approach

A risk-based approach to due diligence was a concept introduced to the CSDDD through amendments by the European Parliament. According to our analysis, it wasn't present in its initial version by the Commission. In this regard, in comparison to the first version of the Directive, the section from articles 5 to 16 of the text adopted on April 24th, 2024, underwent unapparent but impactful transformations. While the initial version stipulated the obligation to "identify actual or potential adverse impacts" and "prevent and mitigate potential adverse impacts and bring actual adverse impacts to an end and minimize their

extent", the adopted text adds the possibility of prioritizing actual and potential adverse impacts to address and minimize extent.

If a company identifies and assesses multiple adverse impacts that are likely to occur within complex value chains, it can prioritize which impacts to address first. In other words, the company may choose to address certain adverse impacts "later", using the prioritization provision as a defense to argue that those impacts were not immediate priorities for mitigation. This approach poses challenges in terms of liability, as it may be used as an excuse in case an adverse impact occurs - an issue that will be discussed in the analysis of the civil liability provisions.

4.4. CSDDD: Personal Scope And Extraterritoriality

The personal scope of the due diligence is fundamental for the effectiveness of the liability approach introduced by the CSDDD (Paccès, 2023b). When a company falls under the personal scope of the directive, the company's own operations, their subsidiaries and, where related to their value chain, their business partners are obliged to comply with the due diligence duty (EC, 2024). Therefore, the extraterritorial effect of the EU CSDDD is evident, encompassing both European and non-European companies, each with specific requirements.

Article 2, titled "Scope," delineates the personal scope of the EU CSDDD. This provision specifically targets approximately 6,000 companies worldwide that employ over 1,000 individuals and have achieved a net turnover exceeding EUR 450 million in each of the last two consecutive financial years (EC, 2024). Moreover, the Directive extends its reach to encompass large non-EU companies, totaling approximately 900 entities with a net turnover exceeding EUR 450 million within the EU, irrespective of their employee count (EC, 2024). Furthermore, the Directive applies to companies that fall short of these criteria but serve as the ultimate parent entity of a group that met these thresholds in the preceding financial year; to companies which are formed in accordance with the legislation of a third country, provided that they generated a net turnover of at least EUR 450 million in the EU, or is the ultimate parent company of a group that on a consolidated basis reached that threshold; and to the company or ultimate parent company of a group that entered franchising or licensing agreements in the EU in return for royalties that amounted to more than EUR 22 500 000 in the EU, if the company generated a net turnover above EUR 80 million in the EU (Article 2).

Micro companies and small and medium-sized enterprises (SMEs) are not covered by the proposed rules (EC, 2024). The emphasis on regulating large companies while exempting small businesses is justified by the aim of avoiding administrative and financial burdens for

smaller firms (Velluti, 2024, p. 21). However, by restricting the scope so narrowly, the proposal deliberately "ignores many harmful business operations, as staff size and annual turnover are not reliable indicators of a company's actual impact on the lives of workers and communities worldwide" (Velluti, 2024, p. 21). Thus, scope thresholds should not be interpreted as limiting the overall corporate responsibility. As the Office of the United Nations High Commissioner for Human Rights (2022) acknowledges, some limitations regarding the scope of mandatory due diligence laws, including the CSDDD, may be necessary to ensure legal certainty and manageability of the regulations (Cerrahoglu, 2023).

Moreover, the CSDDD restricts the scope to a company's "chain of activities", defined in the Directive is without prejudice to the terms "value chain" or "supply chain" (Article (1)(g); Recital 25). It is a novel yet imprecise and ambiguous concept that encompasses only limited downstream impacts, excluding distribution, transport, and storage of products subject to export controls under Regulation (EU) 2021/821 or related to weapons, munitions, or war materials, once export is authorized (Article (1)(g)(ii)), failing to fully account for businesses' supply chain responsibilities (European Network of National Human Rights Institutions, 2024).

Nonetheless, the inclusion of the ultimate parent company within the Directive's scope should be celebrated. Article 1(1)(a) aims to ensure that subsidiaries and business partners of parent companies are also obliged to conduct due diligence. When necessary, according to the provision, the parent company should provide proportionate support for SMEs through capacity-building, training, upgrading management systems, and targeted financial support such as direct financing, low-interest loans, guarantees of continued sourcing, or assistance in securing financing. Although constrained by its narrow focus and enforcement challenges, this advancement is notable: it starts to address the regulatory gap regarding the economic unity of multinational firms—a key factor influencing their power, authority, and autonomy (Ruggie, 2018, p. 5)—and thus addresses the governance gap identified by Ruggie (2008), as TNCs operate globally as interconnected corporate groups despite the legal separation between parent companies and subsidiaries (Mojska, 2023).

4.4.1. Exploring Extraterritorial Implications

As the CSDDD will have extraterritorial implications, companies outside of the scope may be affected, including companies in the value chain of a company subject to the Directive and parents of an EU subsidiary subject to the Directive. To illustrate, parent companies might have to design and implement human rights and environmental due

diligence policies throughout the corporate group, even if they - the parent companies - don't fall under the scope of the Directive (Enriques & Gatti, 2022). If an EU subsidiary of a United States (US) parent company is subject to the proposed Directive, the parent itself is effectively subject to it, albeit indirectly (Enriques & Gatti, 2022). The nature of the EU due diligence obligations implies that the US parent will have to monitor that its subsidiaries under the scope of the CSDDD have all the procedures in place to fulfil the due diligence requirements under the Directive (Enriques & Gatti, 2022). Hence, to adequately exercise its oversight duties, the US parent will have no choice but to engage in the same due diligence exercise that the CSDDD subsidiary is directly responsible for (Enriques & Gatti, 2022). Moreover, not only would a US parent have to monitor its CSDD subsidiary's compliance with duties arising from the Proposed Directive, but it would also have to comply with such duties itself if it qualifies as an existing business relationship in such subsidiary's value chain (Enriques & Gatti, 2022). The exact number of these companies has not yet been estimated.

Furthermore, as one of the greatest implications of the text, the extraterritorial effects may, therefore, lead to legislative changes in third countries (Bueno et al., 2024, p. 6). This trend is already underway, as evidenced by the comprehensive database titled "Symposium on Business and Human Rights (BHR) Regulatory Initiatives Outside Europe", compiled by the Business and Human Rights Journal Blog (n.d.), which highlights regulatory developments in countries such as Brazil, Taiwan, Western European Balkans, China, Canada, Australia, and various African nations.

Bradford (2020, p. 26) refers to this adaptation as the 'Brussels effect', the unilateral influence of the EU policies across the globe. Currently, the EU is the predominant regulatory regime where the five elements underlying the Brussels Effect exist (market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility), "explaining why the EU—and not, for example, the United States—wields unilateral influence across a number of policy areas" (Bradford, 2020, p. 26).

In our opinion, with regard to corporate accountability, the inclusion of the ultimate parent company within the Directive's scope is a key aspect of the CSDDD's extraterritorial effects. This represents a preliminary, albeit limited, effort to address the regulatory gap in corporate groups and the governance gap identified by Ruggie (2008), which includes the architecture of impunity regime that has been built to protect companies.

The CSDDD's extension of due diligence obligations to parent companies, subsidiaries, and business partners, regardless of their location, indicates a recognition of the limitations of corporate law's separate personality and limited liability doctrines, but only in a

limited extent: the personal scope remains narrow, and the due diligence obligations are still incipient, focusing on an “obligation of means” rather than results, as noted in Recital (19) and addressed further in this study. The civil liability regime established by the CSDDD introduces further constraints. These issues will be explored in the following sections.

4.5. CSDDD: Civil Liability Regime

This section will delve into the civil liability regime established by the CSDDD, primarily delving into the conditions for civil liability and further obstacles to access to justice.

4.5.1. Conditions for civil liability

The Directive is the first to establish mandatory due diligence that clearly outlines the conditions for parent company liability within its value chain (Bueno & Bright, 2020), though it remains overly cautious with those conditions as delineated in Article 29 (Bueno & Oehm, 2024). Civil liability under the CSDDD arises if a company meets the following criteria: failure to carry out the due diligence obligations set in the Directive; fault-based failure, due to negligence or intention; and damage caused to a natural or legal person’s interest protected under national law (Article 29).

Several key aspects of these conditions emerge to our sight, including: the definition of failure to meet the due diligence obligations stipulated by the Directive; the determination of who bears the burden of proving the company’s fault; and the requirement that harm must affect a legal or natural person. These issues will be examined in detail in the following sections.

Finally, Article 29 complements the administrative supervision by member states (Articles 24-28) and does not restrict liability under national law nor constrain jurisdictions with stricter tort regimes (Holly, 2024, p. 15; Bueno & Oehm, 2024, p. 1).

4.5.1.1. Condition 1: Failure to carry out due diligence obligations. Having examined the material scope and the definition of due diligence obligations, we will now address pertinent shortcomings related to these aspects. In our opinion, two primary issues emerge: the vagueness of fundamental terms, which challenges civil liability recognition, and the fact that the directive imposes an obligation of means rather than an obligation of results. This is particularly important as obligations should be legally defined with sufficient clarity to establish clear criteria for determining legal liability.

4.5.1.1.1. Vagueness Of Fundamental Terms. Starting with the former issue, the material scope of ‘human rights’ and ‘environmental rights’ within the Directive is often

perceived as vague, broad and imprecise (O'Brien & Christoffersen, 2023, p. 192; Schmid & Thomale, 2024). This characteristic generates divergent opinions: from an economic perspective, it may impose significant costs on European companies, thereby creating competitive disadvantages; conversely, from a human rights standpoint, O'Brien & Christoffersen (2023, p. 192) argue that such ambiguity is not only advantageous but necessary, allowing for flexible, context-specific application of obligations—the non-binding UNGPs, for instance, benefit from their inherent vagueness (Schmid & Thomale, 2024). This study holds that the directive's attempt to legally define obligations should be regarded as illustrative rather than exhaustive, and stresses that any due diligence action must carefully consider the specifics of each case to ensure comprehensive and contextually appropriate protection of human rights. The attempt to clarify the obligations is welcomed as it serves as guidance, but it must not be interpreted as a limitation, or a compliance-check exercise. Academic research, non-binding initiatives and Voluntary Sustainability Standards (VSS) play a relevant role in this context, which will be addressed further in this study.

Furthermore, as we have mentioned before in this study, the due diligence objectives are mentioned in Recital (19), that is, "addressing adverse human rights and environmental impacts", which should take into account the "degree of severity" and the "likelihood of the adverse impact". From the companies' perspectives, challenges are encapsulated in Recital (19): the terms "appropriate measures," "degree of severity," and "likelihood of the adverse impact" are subjective and lack explicit legal definitions, leaving no clear threshold for what constitutes sufficient action (Schmid and Thomale, 2024). In legal disputes, companies may use general notions of appropriate measures, severity, and likelihood to argue that they have adequately considered these factors in meeting their due diligence obligations, posing challenges in establishing liability (Schmid and Thomale, 2024).

In our opinion, sufficient action would require a case-specific analysis that takes into account factors such as the company's influence, ability to assess the situation, and available financial resources for implementing solutions. In addition, we contend that the transposition of these concepts into national law and the development of case law will be crucial for providing clarity, and, ultimately, judicial courts will be responsible for determining whether corporations have met their due diligence obligations in cases of human rights and environmental harm. Drawing from this rationale, the challenge will fall on the party bearing the burden of proof: if member states assign the burden of proof to claimants in their domestic laws, it could pose a significant, if not insurmountable, challenge for right holders—who are typically the most vulnerable—in proving the company's fault or

negligence in meeting due diligence requirements. This will be a particularly important aspect to follow in the coming years as these standards continue to evolve and be enforced.

4.5.1.1.1. "Risk-based approach": considerations regarding civil liability. The “risk-based approach” is another ambiguous term that could challenge liability recognition, in our view. Recital (44) asserts that if a company “cannot prevent, mitigate, bring to an end, or minimise the extent of all the identified actual and potential adverse impacts at the same time to the full extent, it should prioritise the adverse impacts based on their severity and likelihood”. The challenge is that companies might generally argue that their inability to address all adverse impacts simultaneously justifies prioritization to shield them from liability.

While not the optimal solution, in our perspective, the possibility to adopt a risk-based approach and prioritize adverse impacts is a realistic option given the complex scenario of GVCs. This approach is particularly useful in preventing the abrupt termination of commercial relationships, which could result in more severe adverse impacts than those initially deemed non-prioritized. It is also important to acknowledge the constraints of strict budgets and limited capacity faced by many sustainability teams within corporations, as well as the resistance of leaders to allocate sufficient budgetary resources, which often undermines the implementation of sustainability efforts - a pattern I could observe myself while working as a sustainability consultant for TNCs.

To address this gap, this study posits that companies should be required to demonstrate that they had assessed and identified the adverse impacts before prioritizing them, providing a clear reasoning for how the priorities were determined. We stress that companies should not be able to argue that couldn't give priority to an adverse impact that was not identified, as a means to avoid accountability, and such behavior should raise a red flag as an attempt to evade responsibility. We maintain that companies cannot simply neglect certain adverse impacts in favor of others, but must demonstrate a well-reasoned prioritization and time-bound plan to mitigate all the impacts identified, indicating when the non-prioritized impacts would be addressed. Additionally, the company must still monitor and disclose information on all adverse impacts that were found, under penalty of liability for failure to comply with the obligation to carry out their due diligence obligations.

This study further emphasizes that a substantial advancement in addressing this issue could involve legal measures to compel directors and shareholders to allocate sufficient budgetary resources for due diligence and sustainability efforts in order to ensure that corporations' sustainability teams are adequately resourced to effectively address and mitigate

the company's adverse impacts. However, this appears to be an unlikely development, as the provisions concerning directors' duties present in the initial draft were omitted from the final version of the Directive, thereby creating a significant accountability gap.

4.5.1.1.2. Due Diligence As An Obligation Of Means, Not Results. Regarding the latter issue, as foreseen in Recital (19), the due diligence obligation is an "obligation of means", not of results. Put differently, the liability is not for the adverse impacts on human rights or the environment per se, but for damages resulting from an intentional or negligent failure to conduct the mandatory due diligence. This distinction is crucial: if a company performs due diligence and its operations still cause adverse impacts, the company will not be liable under the directive's designed liability framework, although it may still be liable under other legal frameworks. Thus, undertakings that can demonstrate the company exercised all due care in accordance with the Directive to prevent the harm in question, or that the harm would have occurred regardless of the care taken, have the potential to dispel civil liability (Holly and O'Brien, 2021, p. 29).

This argument is further strengthened by the ambiguity surrounding what qualifies as sufficient due diligence in practice, which takes us back to the former issue: the vagueness of terms. Companies can claim that, despite the occurrence of damages, they have adequately followed the due diligence process (Sherman, 2021, p. 23). Therefore, how "negligent failure to carry out due diligence" will be interpreted in real-world scenarios is a critical issue to monitor (Sherman, 2021, p. 23). Specifically, the extent to which a corporation's implementation of human rights and environmental due diligence shields it from liability, and what constitutes sufficient due diligence to avoid civil liability, are questions that will be addressed on a case-by-case basis. The challenge will again lie with the party that bears the burden of proof.

Ultimately, the vagueness of due diligence obligations and the lack of precise legal definitions pose significant challenges in establishing clear criteria for determining legal liability. This ambiguity enables companies to claim they have generally met their obligations, and if the burden of proof rests with the claimant, they will face considerable challenges. In this context, academic research, non-binding initiatives and VSS become relevant, a subject that will be explored next.

4.5.1.1.3. The role of voluntary initiatives in clarifying due diligence obligations. In practical terms, companies still grapple with uncertainty regarding whether the due diligence requirement has been met. As the material scope of the CSDDD is dynamic and varies with each situation, soft law frameworks such as OECD Guidelines and UNGPs, along with

academic research and VSS industry initiatives, offer supplementary guidance on implementing due diligence (McCorquodale et al., 2017). As voluntary initiatives, they provide detailed methodologies, case studies, and best practices aimed at enhancing clarity and accountability in corporate governance structures, ultimately bridging gaps and advancing the understanding of HREDD, despite the ongoing evolution and enforcement challenges in legal frameworks (McCorquodale et al., 2017).

Soft law and academic research have advanced the specification of due diligence processes and criteria (McCorquodale et al., 2017). Academic research enhances the field by critically evaluating these guidelines, identifying gaps, and proposing methodologies to improve the clarity and effectiveness of due diligence practices, while studies on integrating human rights due diligence into corporate governance, alongside empirical case studies, further support best practices (McCorquodale et al., 2017). Industry groups and non-governmental organizations have established comprehensive standards and certification schemes that offer practical tools for companies to fulfill their due diligence obligations (McCorquodale et al., 2017). Instruments such as the OECD Guidelines and the UNGPs offer detailed recommendations and best practices guidance (Warhurst, 2022).

Indicators and standards are being developed to create clarity within organizations, demonstrate compliance with due diligence obligations, and avoid liability (Warhurst, 2022). Voluntary Sustainability Standards (VSS) have long been engaged in crafting social and environmental criteria, often incorporating independent auditing by certification bodies (Warhurst, 2022). Initiatives such as SMETA and the Fair Labor Association's (FLA) Workplace Code of Conduct provide benchmarks for labor standards and compliance (Fair Labor Association, n.d.; Sedex, n.d.). Certification schemes such as the Roundtable on Sustainable Palm Oil (RSPO) and the Forest Stewardship Council (FSC) promote responsible environmental management and include social criteria (FSC, n.d.; RSPO, n.d.). The Global Reporting Initiative (GRI) offers standards for sustainability reporting, addressing labor practices, human rights, and community impacts (Global Reporting, n.d.). The Ethical Trading Initiative (ETI) supports global respect for workers' rights through its Base Code, which enhances labor conditions in supply chains (Ethical Trade, n.d.). Additionally, the Social Accountability International (SAI) SA8000 Standard is a recognized certification for decent workplaces, grounded in international labor standards and human rights conventions (SAI, n.d.).

Although they should not be viewed as sufficient on their own, as they are complementary instruments to law and other CSR initiatives, we understand that these efforts

have facilitated the understanding of due diligence, fostering a more consistent approach across borders.

More recently, legal initiatives like the Corporate Sustainability Reporting Directive (CSRD) and the European Financial Reporting Advisory Group (EFRAG) standards have emerged to provide guidance. While the CSDDD sets the obligations, the CSRD establishes the reporting legislation, and EFRAG standards serve as the reporting tool (EC, n.d.).

Noteworthy, we argue that VSS and mandatory due diligence carries distinct approaches. In our view, while VSS can support the due diligence process, it cannot replace it. Standards and indicators can help companies understand their obligations, but meeting these benchmarks alone is insufficient (Marx et al. 2022, p. 204). In our view, Due diligence requires regular assessment, adaptation and monitoring, and the integration of new indicators and sustainability criteria outside the scope of the VSS as the due diligence strategy develops - therefore, it involves regularly conducting full assessments, such as the Human Rights Impact Assessment (HRIA), to evaluate not only the VSS indicators but also to discover and address issues outside their current scope. Furthermore, we content that Due Diligence should adopt a right holders-based approach, prioritizing the identification and mitigation of risks from the perspective of stakeholders, thereby constantly uncovering new and previously unnoticed risks. In contrast, VSS operate within a relatively static framework, often providing companies with a predetermined set of criteria and indicators that may lag behind emerging risks and issues (Marx et al. 2022, p. 204). A proactive approach to due diligence ensures companies continually enhance their sustainability practices and adapt to evolving risks, with VSS serving as a supportive tool rather than a complete solution (Marx et al. 2022, p. 204). This perspective is supported by Marx et al. (2022, p. 204):

Research suggests that in some contexts, voluntary standards, certifications, and labels can have some positive impact on human rights. However, it is clear that VSS are insufficient for improving incomes, livelihood stability, food security, poverty rates, or employment, and are unable to limit child labor, forced labor, human trafficking, sexual discrimination, or union suppression. Effectiveness appears to be highly idiosyncratic, context-specific, and contingent on numerous highly dynamic variables (2022, p. 204).

In this context, Recital (52) asserts that relying on voluntary initiatives alone is insufficient to avoid liability. While industry and multi-stakeholder initiatives can help create additional leverage to identify, mitigate, and prevent adverse impacts, companies engaged in such initiatives, or utilizing third-party verification or contractual clauses to support the

execution of due diligence obligations, should still be subject to penalties or liability for any infringements of the Directive and the resultant harm experienced by victims (Marx et al. 2022, p. 204).

4.5.1.2. Condition 2: Fault-Based Failure To Carry Out Due Diligence, Due To Negligence Or Intention: The Issue Of The Burden Of Proof. The CSDDD establishes that civil liability arises from a company's fault in fulfilling due diligence obligations, whether due to negligence or intent (Article 29). This raises the critical question: who bears the burden of proving this fault? Notably, the Directive refrains from specifying which party must substantiate the fulfillment of liability conditions (Recital 81). Accordingly, national legislations will prescribe the burden of proof, permitting Member States to incorporate presumptions favoring claimants. Absent such provisions, claimants must establish fulfillment of all conditions, aligning with procedural norms in each jurisdiction (Zimmermann, 2024). The way Member States transpose civil liability rules will significantly influence the access to justice issue and will necessitate close monitoring.

The burden of proof placed on the victim is one of the most apparent procedural and access to justice obstacles (Font-Mas, 2020, p. 148). Aiming at addressing these challenges, particularly the procedural imbalance in cases where there is economic disparity between the parties and unequal access to factual materials, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive (Vandenbussche, 2019). It empowers courts to order defendants to disclose evidence within their possession, if claimants provide reasonably accessible facts and evidence supporting their claims, alongside indications that further evidence resides with the defendant. In cross-border cases within the EU, the Taking of Evidence Regulation also governs such disclosures (Silva de Freitas and Kramer, 2024). It is questionable whether this provision provides a suitable answer to the enforcement obstacle (Schmid and Thomale, 2024). While conceptually beneficial, practical implementation poses concerns: firstly, criteria for such disclosures are vaguely defined, granting courts discretionary powers; secondly, the process can be financially burdensome, as there is no indication of the party that should be responsible for funding discovery procedures (Zimmermann, 2024). Moreover, claimants typically need to specify the types of documents sought, which can be challenging without access to qualified legal representation proficient in both EU and national laws (Zimmermann, 2024).

Given that the directive primarily applies to large corporations, it is reasonable to conclude that rights holders, who are likely more vulnerable compared to the companies

covered, may struggle to prove a company's undue diligence and establish the causal link between the company's actions (or omissions) and the resulting harm (Lafarre, 2022). Therefore, a more feasible approach would be for the CSDDD to incentivize procedural reforms such as the possibility to request shifting the burden of proof, as well as allowing access to legal aid for foreign claimants residing in third states when the defendant is a company based in the forum state (Font-Mas, 2020, p. 150). In our view, the decision to reverse the burden of proof would be left to the judge's discretion, considering technical and economic insufficiency aspects such as the claimant's ability to demonstrate the credibility of their assertion, their economic disadvantage, or the difficulty faced by the more vulnerable party in producing the evidence. Our opinion is that this would compel companies to defend themselves independently, rather than waiting for claimants or even judges to identify and request each document needed for disclosure. Additionally, we contend that the introduction of an evidence disclosure regime under Article 29(3)(e) would be more effective as a supplementary measure to support the fundamental shift of the burden of proof in favor of the more vulnerable party.

We stress that requiring vulnerable claimants to prove that a company neglected due diligence is unjust and, sometimes, unfeasible, and having the burden of proof placed on the claimant without the possibility for inversion would signify a lack of commitment to the directive's efficacy and enforcement, indicating the continuity of the architecture of corporate impunity.

Additionally, as previously noted in this study, the burden of proof poses significant challenges for claimants in many aspects of the CSDDD. This includes demonstrating compliance with ambiguous terms such as "appropriate measures", "degree of severity", and "likelihood of the adverse impact". The evidence disclosure regime outlined in Article 29(3)(e) of the CSDDD, while useful, is insufficient on its own to address the inherent economic and technical imbalance between claimants' and corporations.

4.5.1.3. Condition 3: Harm That Affects A Legal Or Natural Person. Despite the extensive attention given to environmental due diligence, the CSDDD's civil liability provisions are not invoked in cases of environmental rights violations that do not affect a natural or juridical individual, which seems contradictory. In our opinion, the contradiction is particularly apparent considering that the CSDDD seems to understand the link between human rights and environmental rights, in alignment with the United Nations Resolution A/RES/76/300 which recognizes the human right to a clean, healthy, and sustainable environment.

Therefore, environmental impacts invariably affect human rights. However, when adverse impacts on environmental rights arise, under the current CSDDD civil liability regime it is necessary to establish the connection between these environmental impacts and their effects on the rights of individuals or legal entities. If, during the transposition into national law, the burden of proof is placed on the claimants, they will bear the responsibility and associated costs of demonstrating the link between environmental rights and personal rights, which can pose challenges to technically and economically vulnerable claimants.

4.5.2. Access To Justice: Further Obstacles

Besides the obstacles discussed earlier in this section, there are additional barriers to accessing justice that must be considered in the CSDDD to evaluate its effectiveness in addressing corporate impunity and Ruggie's (2008) concept of the governance gap. This section will delve into some of these aspects.

4.5.2.1. Jurisdictional Issues. The possibility of filing civil lawsuits against TNCs for harm inflicted on individuals or the environment, though not a comprehensive solution - particularly in terms of prevention - unquestionably represents a fundamental pillar in addressing corporate human rights violations (Font-Mas, 2020, p. 147). In this regard, a fundamental question arises: Which courts have jurisdiction to adjudicate claims involving human rights abuses by EU-based parent companies through its subsidiaries, contractors, and business partners operating in third countries? How does the CSDDD address these issues?

Private international law (PIL) generally assigns jurisdiction based on a connection to the forum state (Augenstein, 2016, p. 11). At the European Union's level, the [Brussels I Regulation](#) requires the defendant to be domiciled in an EU Member State (Augenstein, 2016, p. 11; Hartley, 2022, p. 211). Article 7(2) of Brussels I (2012) sets out the rule for jurisdiction in tort under EU law, allowing courts to handle cases where the harmful event occurred or may occur (*forum delicti commissi*), the most obvious way to seek redress (Marullo, 2020, p. 58). The Court of Justice of the European Union (CJEU) has interpreted this to include both the place where the damage occurred and the place of the event which gave rise to that damage (Hartley, 2022, p. 216).

Claims involving TNCs headquartered in the EU are permissible under Articles 4 and 63(1), which identify a company's domicile as the place of its statutory seat, central administration, or principal place of business (Perrone, 2023, p. 398). According to Perrone (2023, p. 398), this enables victims from third countries to sue parent companies domiciled in an EU state for damages and violations occurring outside European territory. Therefore, in

the European context, domestic courts have predominantly asserted their jurisdiction on the basis of the *forum necessitatis* principle, which allows for the acceptance of claims in the absence of an alternative forum (Marullo, 2020, p. 59). According to Marullo (2020, 59), this assertion is rooted in the prohibition against the denial of justice and the right to a fair trial under Article 6(1) of the European Convention on Human Rights (ECHR).

Recent rulings by European courts are paving the way for a potentially significant advancement in the field of transnational litigation, particularly in the areas of BHR (Marullo, 2020). Notable decisions in the *Kiobel III*, *Ikebiri*, *Vedanta*, and *Shell* cases have seen European courts asserting their jurisdiction over both parent companies and their subsidiaries when there is a sufficient connection "that allowed the subsidiary to be joined to the proceedings before the state of origin" (Marullo, 2020). This approach supports the concept of a unitary company, acknowledging that the parent company's decisions and strategies control the entire corporate group (Marullo, 2020).

In the Netherlands, the *Milieudefensie* case was particularly groundbreaking, as it involved the Royal Dutch Shell (Shell) being sued for environmental damage caused by its foreign subsidiary based in Nigeria, the Shell Petroleum Development Company of Nigeria SPDC (Perrone, 2023, p. 402). Four Nigerian fishermen from various villages filed separate actions against Shell, seeking compensation for environmental damage and pollution caused by oil spills from its Nigerian subsidiary, the SPDC, claiming both parent and subsidiary companies liable for negligence by the argument that the Dutch parent company held direct liability for its actions or omissions, and had a duty of care stemming from the Nigerian subsidiary's operations (Perrone, 2023, p. 402). The District Court of The Hague asserted its jurisdiction based on Articles 4 and 63 of the Brussels I Regulation, considering Shell had its headquarters in the Netherlands, and, regarding the subsidiary SPDC, the court recognized its international jurisdiction due to the Article 7(1) of the Dutch Code of Civil Procedure, which allows the connection between claims if reasons of efficiency justify a joint hearing, determining that the claims against the parent company and its subsidiary were so closely linked that it was necessary to hear and decide them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (Perrone, 2023, p. 402).

Similarly, in Italy, the *Ikebiri* case saw Nigerian indigenous communities suing the Italian TNC ENI and its controlled company, the Nigerian Agip Oil Company Limited (NAOC), for environmental damage in Nigeria in 2010 (Perrone, 2023, p. 403). The Court of Milan attributed jurisdiction under Articles 3 of the Italian law No. 218 of 1995 and Article 4 of the Brussels I Recast Regulation, based on the strong bond between ENI and NAOC, and

to avoid parallel proceedings in different states for the same harmful event (Perrone, 2023, p. 403).

The existing case law suggests grounds for optimism regarding the assertion of jurisdiction in transnational civil proceedings. Yet, jurisdictional obstacles persist with the CSDDD, which does not adequately address these issues (Michaels and Sommerfeld, 2023). More broadly, PIL needs to evolve in order to overcome the persistent obstacles undermining access to justice and to protect effectively the interests of the victims (Marullo, 2020). In fact, the CSDDD lost the opportunity to fully enforce its objectives by not establishing a level playing field regarding jurisdiction and applicable law to its enforcement, resulting in those critical issues being left to be governed by the diverse national laws and case law of EU member states (Marullo, 2020). This fragmentation can lead to inconsistent access to justice and unequal enforcement of the directive's goals across the EU.

4.5.2.2. Other Procedural Issues. Civil liability under substantive law is ineffective without procedural rules enabling its enforcement (Zimmermann, 2024). Access to justice in the EU is often unsatisfactory in disputes involving defendants from outside the EU (Perrone, 2023, p. 399). The literature identifies a myriad of persistent obstacles that continue to impede access to effective remedies in such cases, mainly "the imbalance of power between the parties, the business structure, the lack of availability of class actions, the standing of NGOs, the duration of the proceedings, the costs, evidentiary issues and issues regarding the prescription" (Marullo, 2020).

In the context of supply chain liability, affording legal proceedings in Europe and having access to the same level of legal expertise as corporate defendants are significant procedural problems related to access to justice (Zimmermann, 2024).

Recognizing that affordability is crucial for ensuring access to justice, Article 29(3)(b) prohibits Member States from making supply chain liability lawsuits "prohibitively expensive". However, while national laws may waive court costs, this alone does not ensure a level playing field. As Zimmermann (2024) highlights, it is likely that claimants will struggle to secure legal representation with the requisite expertise, time, and willingness to manage the risks associated with liability, while corporations can afford to hire highly skilled professionals to defend their interests.

Given the substantial financial risks that private individuals encounter when seeking redress in courts—due to procedure duration and high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's expenses, particularly daunting in cases involving large corporations—Silva de Freitas and Kramer (2024) underscore

measures that could improve access to justice. Suggestions include aligning litigation costs with the damages sought, offering free legal representation through state-funded services, setting financial thresholds for losing parties' obligations, and supporting civil society organizations that provide financial and legal aid to victims of business-related human rights abuses (Silva de Freitas and Kramer, 2024).

In sum, major barriers to justice often faced by claimants in business-related human rights and environmental cases remain unaddressed by the CSDDD (European Coalition for Corporate Justice, 2022, p. 20). The Directive delegates critical procedural issues to member states during the transposition process, necessitating close monitoring to ensure effective implementation at the national and regional level.

4.5.3. Liability In Case Of Adverse Impacts Caused By Business Partners. The business structure remains a persistent obstacle to access to justice, continuing to impose challenges for effective remedies in cases of human rights violations caused by TNCs (Marullo, 2020). As it is widely recognized that corporations often establish subsidiaries and outsource activities as part of their strategy to mitigate liability risks, the ongoing debate surrounding outsourcing practices and contractor liability continues to be a critical and enduring issue in this domain (Paccès, 2023b).

Particularly, the discussion regarding the inclusion of business partners within the scope of a company's liability is a delicate aspect of the CSDDD proposal (Paccès, 2023b, p. 3). In terms of causation nexus, the CSDDD excludes liability if the damage is solely caused by business partners (Art. 29(1)). Hence, while the CSDDD establishes regulations concerning companies' obligations regarding actual and potential adverse impacts on human rights and the environment, encompassing their own operations, those of their subsidiaries, and those of their business partners within the chains of activities (Article 1(1)(a) CSDDD), it does not extend liability to relationships with business partners if the adverse impact was solely attributable to the business partner. Recital (58) anticipates that in those cases, the company may opt to provide voluntary remediation or use its influence over the partner to facilitate remediation. Notably, remediation is not obligatory concerning business partners according to the directive.

This brings into question the definition of "business partners" and its implications for supply chain liability, particularly concerning indirect partners (Paccès, 2023b, p. 4). According to Article 3(f)(i)(ii) of the CSDDD, a 'business partner' can be either direct or indirect. A direct business partner is an entity with which the company has a commercial agreement relating to its operations, products, or services, or to which the company provides

services for its chain of activities. An indirect business partner, on the other hand, does not fall under the definition of a direct business partner but engages in business operations related to the company's operations, products, or services. In our view, this definition lacks clarity and may require clarification through case law.

To provide further clarity, Recital (46) explains that to comply with the prevention and mitigation obligations, companies should develop and implement a prevention action plan and seek contractual assurances from direct business partners to ensure compliance with the code of conduct. This should include obtaining corresponding assurances from their partners, provided their activities are part of the company's value chain (Recital 46). The contractual assurances should be accompanied by appropriate measures to verify compliance, “including – but not restricted to – independent third-party verification” (Pacces, 2023b, p. 5; Recital 46). However, “the company should only be obliged to seek contractual assurances, as obtaining them may depend on the circumstances” (Recital 46). To ensure comprehensive prevention of potential adverse impacts, companies should also make financial or non-financial investments, adjustments or upgrades which aim to prevent adverse impacts and collaborate with other companies, in compliance with Union law (Recital 46). Therefore, in our view, the company can be liable for not complying with its due diligence obligations if it doesn't seek contractual assurances from direct business partners. However, Recital (46) highlights that the company should only be obliged to seek contractual assurances, as obtaining them may depend on the circumstances.

Excluding the causal link concerning business partners may potentially encourage greater outsourcing and a negligent attitude towards partners who do not conduct due diligence (Felbermayr et al., 2024). “CSDDD could push employment in developing countries into the informal sector, where the situation regarding human rights, labor standards and environmental pollution is much worse” (Felbermayr et al., 2024).

Therefore, it appears that if a company wants to avoid liability, it could do so by outsourcing risky activities to indirect business partners and using as an intermediary a direct business partner that does not meet the CSDDD's personal scope threshold (Pacces, 2023b). The company could seek contractual assurances but wouldn't need to worry about obtaining them, as indicated in Recital (46). This strategy could create unintended consequences, such as increased outsourcing of activities to partners that fall outside the regulatory scope, increased supply chain complexity, and reduced transparency and efficiency (Felbermayr et al., 2024).

4.6. Conclusions of the section

The CSDDD represents a significant step forward in addressing the challenges posed by corporate law's separate personality and limited liability doctrine by establishing due diligence obligations across the value chain of companies within its scope. This is a commendable development, as the CSDDD is the first regional and EU-level legislation to mandate that large companies undertake risk-based human rights and environmental due diligence (Paccès, 2023). The Directive encompasses the identification, assessment, addressing, and remediation of potential and actual adverse impacts throughout a corporation's value chain, and it includes liability for failing to meet these obligations. As such, it marks an initial step towards addressing the governance gap conceptualized by Ruggie (2008) and elaborated upon in this study.

However, the directive's effectiveness is curtailed by several significant factors. Proving the conditions for civil liability remains challenging, enforcement is difficult, and procedural complexities continue to hinder claimants. Further obstacles include the imbalance of power between the parties, the complexity and opacity of business structures, the lack of provisions for collective actions, the protracted duration of proceedings, and issues related to the costs and burden of proof (Marullo, 2020).

The CSDDD also missed the opportunity to establish a uniform level-playing field across all member states, instead delegating numerous discretionary decisions regarding its enforcement to the member states during the transposition of the directive into national law. In practice, in our view, this could lead to uneven enforcement, with some member states potentially being less stringent, thereby attracting companies seeking to benefit from more lenient regulations. Additionally, this study holds, that this scenario could foster competition among countries to host companies within their territories, potentially undermining the directive's objectives. Ruggie (2018) has highlighted that avoiding accountability can be a strategy for corporate economic growth, a principle deeply rooted in corporate law. Scholars have noted that corporations often devise strategies to evade liability, such as establishing subsidiaries and outsourcing activities to minimize liability risks (Duchin et al., 2022, p. 23; Hansmann & Kraakman, 1991, p. 3; Paccès, 2023b).

Ultimately, the enforcement and effectiveness of the CSDDD will heavily depend on how member states transpose the directive into national law, an aspect that requires vigilant monitoring to ensure the directive achieves its intended impact.

5. Conclusion

This article has delved into the intricate issue of corporate power and impunity, with a particular focus on the governance gap identified by Ruggie (2008). This gap has enabled TNCs to operate with minimal accountability for human rights violations within their value chains. The discussion was structured into three main sections. Firstly, it analyzed the evolution of corporate power and the mechanisms that reinforce corporate impunity, such as the doctrines of limited liability and separate personality. Secondly, it investigated how these dynamics manifest in real-world scenarios, specifically examining the plight of the Guarani Kaiowá indigenous peoples in Brazil. Lastly, the article explored the European Union's Corporate Sustainability Due Diligence Directive (CSDDD) and its potential to bridge the governance gap.

Ruggie (2008, p. 5) conceptualizes the “governance gap” as the disparity between the limited regulatory framework governing TNCs and the significant impact these corporations have on human rights and the environment, often resulting in violations. This gap has facilitated the creation of an “architecture of impunity,” characterized by public and private policies that promote corporate growth while minimizing accountability for negative externalities (Guamán, 2020). Corporate law's doctrines of limited liability and separate personality serve as prime examples of legislation designed to shield corporations from accountability. These mechanisms allow hundreds of subsidiaries and economic agents to operate across numerous states without unified international legal oversight, rendering TNCs “both legally ubiquitous and yet legally invisible” (Curie-Skłodowska, 2023, pp. 291-292).

The Guarani Kaiowá case illustrates the severe human rights impacts resulting from the governance gap. Despite recent constitutional and legal protections, indigenous rights in Brazil have been systematically undermined by powerful agribusiness interests intertwined with state interests. This confluence of interests has led to significant human rights violations, exemplifying the detrimental consequences of unrestrained corporate power and impunity.

In the context of the governance gap and the resulting human rights violations, this study evaluated the European Union's Corporate Sustainability Due Diligence Directive (CSDDD), the first regional and EU-level legislation to impose mandatory human rights and environmental due diligence (mHREDD) obligations on large companies (Paccès, 2023b). Drawing inspiration from soft law, particularly the UNGPs, the CSDDD innovatively transposes these obligations into regional hard law, including civil liability provisions. However, its potential to bridge the governance gap is limited by several critical issues. Its narrow personal scope, vague terms, and challenges in proving fault-based civil liability

undermine its impact on global value chains (GVCs). Procedural obstacles, such as the burden of proof, jurisdictional issues, and barriers to justice, continue to impede victims' access to remedies. The literature highlights persistent obstacles in achieving justice, including power imbalances, complex business structures, lack of class action mechanisms, NGO standing issues, lengthy proceedings, high costs, evidentiary challenges, and statute of limitations concerns (Marullo, 2020). These barriers reflect ongoing difficulties in securing justice for those affected by corporate malpractice.

Furthermore, this study argues that CSDDD may have been introduced in an outdated form. When Ruggie outlined the UNGPs, he established three pillars of action: (1) the state's duty to protect against human rights abuses; (2) corporate responsibility to respect human rights; and (3) the victims' right to access an effective remedy when their human rights are violated (UNGP, 2011). Ruggie's (2008) objective at that time was to develop and secure agreement on a foundational normative framework and corresponding policy guidance for the BHR domain. The three pillars of action in the UNGPs were first disclosed in 2008, prompting numerous scholars to analyze their shortcomings. More than 15 years later, the CSDDD has transposed human rights due diligence into regional hard law but has failed to address systemic shortcomings of the UNGPs, such as the reliance on state action for enforcement and the perception of corporations as merely having a responsibility to respect human rights by conducting due diligence. In this respect, the CSDDD may have started already outdated, demonstrating that legal changes often lag societal transformations and the demands for reform (Abel, 1982). Moreover, global challenges such as climate change, biodiversity loss, warfare, and extreme poverty require cohesive and prosocial action on a global scale (Reinhardt & Whitehouse, 2024). These systemic shortcomings of the UNGPs warrant further research to identify and address.

In conclusion, while the Corporate Sustainability Due Diligence Directive (CSDDD) represents a significant step towards advancing corporate accountability by translating principles from soft law into hard law, it can only be considered an initial measure in a broader array of necessary actions. The CSDDD, though groundbreaking in its mandatory human rights and environmental due diligence requirements, falls short of fully addressing the systemic issues of corporate impunity. For example, victims of long-standing governance gaps and severe structural violations—such as the Guarani Kaiowá—may only see marginal benefits from this Directive.

The effectiveness of the CSDDD will largely depend on its transposition, implementation and enforcement by member states, alongside a broader commitment to

enhancing global governance mechanisms. This includes the need for meaningful engagement by corporations and sustained efforts to refine regulatory frameworks to close the governance gap and safeguard human rights against corporate abuse (Bueno et al., 2024, p. 7). Moreover, as Karp (2023, p. 136) notes, genuine respect for human rights can only be partially achieved by treating both companies and states as primary duty-bearers, and legislation efforts must reflect this comprehensive view.

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