

An overview of the Brazilian NCP and the Brazilian Action Plan for RBC

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Introduction: Responsible Business Conduct in Brazil

Brazilian economy faces several challenges especially when it comes to productivity, fiscal outcomes, investment, education, social protection, income inequality and corruption. These aspects reflect on the well-being and business environment and impact on inclusive and sustainable growth. Although Brazilian economy is classified as upper middle income by the World Bank, it remains "one of the most unequal countries in the world in terms of income distribution".^[1] In addition, one of the biggest and more long-lasting challenges for the Brazilian economy is the high prevalence of informal work.^[2] The situation has also worsened with the consequences of the COVID-19 pandemic that negatively impacted Brazilian companies, especially with regard to the services, industry, construction and trade sector.^[3]

At the international level, Brazil has ratified multiple key instruments that ensure responsible business conduct (RBC) related to human and labour rights, environmental protection and anti-corruption areas. Besides that, Brazil is an active key partner of the OECD since 1994 having adhered to the OECD Guidelines on Multinational Corporations in 1997 and subsequently established a National Contact Point (NCP) in 2003.

Brazil adopted the National Guidelines on Business and Human Rights in 2018, marking an important step towards policy coherence for RBC. At the end of 2020, the Brazilian NCP received a mandate to develop a National Action Plan to promote RBC (Plano de Ação

direcionado à promoção da Conduta Empresarial Responsável – PACER). In a similar line, in 2021 a process to develop a National Action Plan on Business and Human Rights (NAP) was announced. The Ministry of Economy through the NCP and the Ministry of Women, Family and Human Rights were set to work together to guarantee consistency between the development processes of the PACER and the NAP, which includes a consultation process with relevant stakeholders.

It must be underlined that Brazil has not yet developed a consistent practice of incorporating an RBC approach in major policy instruments for national development. Moreover, only in recent years the work of the NCP has become more visible to the Brazilian private sector, and this sector has been organizing events and meetings at both state and federal level. Despite this fact, it is necessary that the NCP take more actions to raise awareness when it comes to its procedures to file specific instances, mainly amidst civil society organizations and trade unions. Against this backdrop, the OECD 2020 Business Survey in Latin American and the Caribbean (LAC) found that:

- Around one fourth of respondents (27%) report having knowledge of the NCP system, compared to the higher share of the respondents (68%) that indicate not knowing the mechanism. Engagement with the NCP was rated on average 3.1 out of 10 by respondents [...]. The majority of respondents indicate the need for support and training on RBC-related issues. Specifically, 57% reported the need for capacity building and training activities on due diligence in general, 50% need for training on OECD-RBC instruments, and 43% on NCP tools.[4]

The Brazilian Action Plan for Responsible Business Conduct

In December 2020, the Resolution 2/2020 of the National Investment Committee (Coninv) approved the beginning of the work for the development of a Brazilian Action Plan for Responsible Business Conduct. The plan aims to build and coordinate governmental and business initiatives that promote responsible business conduct (RBC). The plan is expected to be presented by August 2022 followed by a 60-day public consultation. The plan will take into account the public policies that have already been implemented or are to be implemented by the Federal Government's planning and budgeting instruments. To prepare the plan and map all the initiatives adopted in the area of RBC, research and consultations have been carried out with the federal government, subnational governments, the business sector, and other interested parties.

The survey and the treatment of the collected information about RBC policies implemented by the government and companies will not only address issues related to the areas covered by the OECD's Guidelines for Multinational Enterprises, but will also shed light on state-owned enterprises, public procurement, trade, and investment.

The Brazilian NCP

In Brazil, the NCP is a part of the Ministry of Economy and an inter-ministerial working group that meets intermittently, composed of representatives from eight ministries and agencies. This inter-ministerial working group allows the Brazil NCP to have access to experts at the government level. However, the Brazilian NCP does not have a formal advisory body, although it receives assistance regarding the thematic diversity of the Guidelines and to enhance the effectiveness of its activities from certain state bodies including, the Special Secretariat for Federal Revenue of the Ministry of Economy, the Ministry of Environment, and the Attorney General; and from other organizations and research institutes, such as the Brazilian Institute for the Environment and Natural Resources, and the Chico Mendes Institute for the Preservation of Biodiversity.

With regard to the effective functioning of the NCP, some issues may be pointed out, for example, the fact that civil society stakeholders have raised concerns regarding

impartiality and independence because of the location of the NCP's Coordination and Secretariat within the Ministry of Economy, located in the capital of Brazil, Brasília. In addition, in the past years, the number of events organized by the NCP or the events where the Brazilian NCP participated in has been low considering the size of the country. Besides that, no strategy has been created to directly promote RBC among target sectors/groups or even to have events specifically addressing some key issues.

Taking into account their dual mandate – to promote the Guidelines and act as a non-judicial grievance mechanism – NCPs can (and should) have an active role in promoting RBC across government agencies and seeking policy coherence. The NCPs contribution to policy coherence across government is increasing through National Action Plans on Business and Human Rights (NAPs).

In this sense, the recent report OECD Responsible Business Conduct Policy Reviews: Brazil highlighted some areas and concrete actions where the Brazilian NCP could play a major role in promoting policy coherence and coordinating RBC issues across governmental bodies. These key areas are human rights; labour rights; environment; anti-corruption; public procurement; state-owned enterprises; and trade and investment. As for the actions that require more attention these go from due diligence to remedies measures. Also, the report states that the staff and resources allocated to the Brazilian NCP should be kept at the current level as a minimum, and a stakeholder advisory body could be added to increase its visibility, impartiality, and ability to foster stakeholder engagement, in particular in relation to the PACER.

State of remedies before the Brazilian NCP

In parallel to the efforts to develop the NAP in Brazil, a substantive number of cases have been submitted to its National Contact Point (NCP). Given the activity of different NGOs and civil society organizations, the creation of a NAP comes at a crucial moment not to be dismissed, and consequently the plan can serve to fuel and propel the submission of further cases.

According to the OECD NCP case database, the Brazilian NCP has dealt with 39 specific instances, which constitutes the fourth NCP in terms of number of cases when compared to the entire NCP network and the one with the highest number of cases in the context of the Latin American region. In addition, the Brazilian NCP has acted as a supporting NCP in 3 cases. The sectors of manufacturing (10 cases), finance (9 cases) and agriculture, forestry and fishing (8 cases) are representative of most of the cases the NCP has been handling. The chapters that are more frequently used as a basis for the specific instances are the chapters on employment and industrial relations, general policies (including due diligence), human rights and environment. To complete the picture, it can be mentioned that 23 cases were submitted by trade unions, 12 by NGOs and 9 by individuals.[5]

Nevertheless, when analyzing the outcomes of these mediation procedures before the NCP, it is disappointing to notice that most cases did not result in an agreement, or the agreement was reached outside the NCP process. From the various cases the Brazilian NCP has handled, we can highlight two of them where an agreement was reached, and recommendations were provided by the NCP, as well as a follow-up plan: Kinross Brasil Mineração and Paracatu neighboring associations and Suape Environmental Association, Conectas Human Rights, Fishermen colony of the city of Cabo de Santo Agostinho, and Both ENDS & Van Oord Marine Operations Services. In the *Kinross Brasil Mineração and Paracatu neighboring associations*, a case submitted in 2013, a set of recommendations were issued by the NCP to the company including the necessity to inform residents from neighbouring areas of their work and future projects to build a relationship of trust and to conduct due diligence processes that assess the adverse impacts of the company's mining activities. In the case against Van Oord, a Dutch multinational enterprise, submitted in 2015, the agreement was reached outside the NCP process, although the NCP issued a follow-up

statement where it recommended the company to review its environmental impact assessment protocols with the aim of identifying elements that can be reinforced, increasing the safety of dredging and demolition activities. Moreover, in this last case, the NCP announced a second follow-up during 2022.

As for the assessment of the work of the Brazilian NCP carried out by OECD Watch, some elements have been identified as requiring crucial improvements. In relation to the procedures, there are key problems that have to do with the accountability and the field-research. In this regard, OECD Watch concluded that “The NCP appears not to have made a determination in any final statements, nor do its Rules of Procedure commit the NCP to doing so”, adding that “The NCP does not appear to have conducted in-country fact-finding, nor do its Rules of Procedure commit the NCP to doing so”. As regards the organization and structure of the NCP, OECD Watch highlighted that although the NCP has an advisory body that involves a number of ministerial units and additional governmental bodies, it does not include NGOs, trade unions or business representatives. Moreover, the NCP has not undergone a peer review or scheduled one during the last years. Regarding the NCP Rules of Procedure, these include the commitment to resolve cases within a 12-month period (3 months for the initial assessment, 6 months for good offices, 3 months for the final statement). However, this has not been followed in practice nor does the NCP promptly advise parties of all reasonable delays. Since 2020, delays are explained by referring to the challenges related to the COVID-19 pandemic. These delays seriously affect the effectiveness of the NCP. On a positive note, the NCP has made itself more accessible by a change of location or the use of video conferencing by covering the costs of mediation.

In conclusion, the Brazilian NCP is strategically positioned to enforce and tackle key human rights, labour rights and environmental issues in accordance with the OECD Guidelines. It can also help reinforce the implementation of human rights and environmental due diligence for companies involved through its mediation system. However, the biggest hurdle continues to be the non-binding nature of the NCPs recommendations. More importantly, some key reforms in its structures and procedures are necessary in order to offer remedies to the parties that could be truly considered effective.

[1] OECD (2020), Responsible Business Conduct Country Fact Sheet – Brazil, OECD Paris, available at <https://mneguidelines.oecd.org/responsible-business-conduct-country-fact-sheet-brazil.pdf>

[2] OECD Economic Surveys: Brazil 2020, OECD Publishing, Paris. Available at: <https://dx.doi.org/10.1787/250240ad-en>

[3] Instituto Brasileiro de Geografia e Estatística – IBGE (2020), Press release: “Pesquisa Pulso Empresa: Entre as empresas que estavam fechadas na 1ª quinzena de junho, 39,4% encerraram atividades por causa da pandemia”. Available at: <https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-denoticias/releases/28294-pesquisa-pulso-empresa-entre-as-empresas-que-estavam-fechadas-na-1-quinzena-de-junho-39-4-encerraram-atividades-por-causa-da-pandemia>

[4] OECD Responsible Business Conduct Policy Reviews: Brazil, 2022, p. 31, available at: <https://mneguidelines.oecd.org/oecd-responsible-business-conduct-policy-reviews-brazil.pdf>

[5] OECD Responsible Business Conduct Policy Reviews: Brazil, 2022, p. 33, available at: <https://mneguidelines.oecd.org/oecd-responsible-business-conduct-policy-reviews-brazil.pdf>

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