**United Nations Working Group on Business and Human Rights**

**Request for inputs**

**Policy coherence in government action to protect against human rights abuses**

**Conectas Direitos Humanos’ submission**

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| *The UN Working Group on Business and Human Rights is pleased to inform you that it is undertaking a consultative process with all relevant stakeholders to inform its 2019 report to the General Assembly on “policy coherence in government action to protect against business-related human rights abuses”. It is therefore seeking your inputs on how your work has been impacted by policy coherence, or the lack thereof, in the field of business and human rights.* |

***What do you consider to be the main challenges in achieving policy coherence at the national level in the implementation of the Guiding Principles? How have these challenges impacted on your work in the field of promoting business respect for human rights?***

The main challenges to achieve coherence in national policies aimed at implementing the Guiding Principles are: (a) Lack of alignment between economic policies and international norms on business and human rights; (b) Missed opportunities; and (c) Political and institutional instability.

Lack of alignment between economic and financial policies and national and international parameters of companies and human rights

In the case of Brazil, an example of a public policy with economic and financial impact that may incorporate national and international standards to prevent corporate human rights abuses were the Cooperation Agreements and Investment Facilitation Agreements (CFIA). The ACFIs represent a new model Bilateral Investment Agreement (BIT) developed by Brazil, which aims to foster institutional cooperation and facilitation of mutual investment flows between countries based on a South-South Cooperation for Development (CSSD) framework[[1]](#footnote-0) An analysis of the CFIAs signed between Brazil and Mozambique, Angola, Mexico, Malawi, Colombia and Chile indicates the existence of legal provisions based on Corporate Social Responsibility principles, using verbs of low normativity, such as "encourage", "stimulate" and "support".[[2]](#footnote-1) Although the agreements with Colombia and Chile bring explicit references to the OECD Guidelines on Multinational Enterprises, there is no mention of human rights obligations contained in Chapter IV, such as need of human rights policy, due diligence in human rights, and reparation mechanisms.[[3]](#footnote-2) The opportunity to create a new model for a bilateral investment agreement aligned with international human rights standards regarding business enterprises is thus lost.

Missed opportunities

The list of missed opportunities includes the Brazilian State-Owned Companies Law, enacted in 2016.[[4]](#footnote-3) The law established mechanisms of transparency and governance for these companies, such as rules for disclosure of information, risk management practices, codes of conduct, oversight mechanisms, and minimum requirements for the appointment of directors.[[5]](#footnote-4) The text, however, did not incorporate changes proposed by civil society organizations to ensure the protection of socio-environmental rights, including the obligation to prepare and disseminate annual reports on policies and practices adopted to ensure respect for human rights and social and environmental responsibility. The law also failed to provide for the adoption of best practices and international protection parameters, as well as the elaboration of specific policies and an assessment of the human rights impacts of the projects. The absence of these mechanisms conflicts with the UN Guiding Principles on Business and Human Rights, which prescribed that both private and state-owned companies are responsible for respecting human rights and, to comply with this obligation, they should have policies in place that establish operational procedures and internal controls that can identify, measure, mitigate and remedy all the human rights impacts resulting from their activities.

Political and institutional instability

The context of economic, political and social crisis in Brazil from 2014 is exemplary in the analysis of the impact of institutional instability on the implementation of the Guiding Principles and business and human rights agenda. In a study[[6]](#footnote-5) on the implementation of the recommendations of the Working Group after a visit to Brazil in December 2015, we verified how numerous changes in the administrative structure of the Brazilian Ministry of Human Rights (BMHR) between 2015 and 2018 fragilized the commitment of the Brazilian State with the business and human rights agenda,[[7]](#footnote-6) jeopardizing the continuity of long-term projects, as well as the central role of federal body in the coordination of subnational entities.

National human rights institutions (NHRI) and other public agencies with human rights mandate are increasingly acting as alternative policy-makers vis-à-vis the paralysis caused by the political and institutional instability.[[8]](#footnote-7) In Brazil, the case of Office of the National Ombudsman (PFDC), an agency of the Federal Prosecution Service (MPF), is exemplary. In August 2018, the PFDC issued a technical note entitled "The Protection and Reparation of Human Rights in Business Activities."[[9]](#footnote-8) The document was elaborated based on reflections of the internal work group of the PFDC, as well as contributions from the interlocution with government agencies and civil society. According to the PFDC, international initiatives on this agenda, as well as the serious record of human rights abuses by companies in Brazil, require decision making by the state and society.[[10]](#footnote-9)

The technical note emphasizes that the dissemination and implementation of the UN Guiding Principles on Business and Human Rights, including with regard to the adoption of a National Action Plan, is positive, but must consider the various criticisms it receives from civil society and academia. For the Office of the National Ombudsman, "despite a welcome step in building more effective norms, PFDC also acknowledges the insufficiency of this framework to deal with the issue of human rights violations by companies," notes the technical note. The document also stresses the importance of Brazil investing in the formulation of a comprehensive public policy on human rights and companies, including to extend the positive normative precedents consolidated in legislation and jurisprudence for all cases of human rights violations.

***Is there an effort on the part of the government to improve policy coherence in the area of ​​business and human rights? If so, what is the nature of the process and has your organization been involved, for example, in the context of multi-stakeholder advisory bodies for developing and / or implementing National Action Plans or other policy frameworks? What were the challenges and opportunities encountered?***

Clear definition of priorities and a policy-making process based on a continuous multistakeholder dialogue are essential elements to achieve policy coherence in the area of business and human rights. The lack of participation in the construction of the business and human rights agenda has the potential to undermine the implementation of the Guiding Principles, which also relied on the engagement of business sector and civil society players.

An example of the negative impact of lack of participation in building the agenda of companies and human rights are the Brazilian National Guidelines on Business and Human Rights (NGBHR), enacted in November 2018.[[11]](#footnote-10)  The document provides criteria for implementation, monitoring and reparation for Brazilian and multinational companies working in the country to establish guiding principles regarding human rights and their activities. The document established criteria for implementation, oversight, accountability and reparation so that national and multinational business enterprises with activities in Brazil, establishing guiding principles of respect for human rights in their corporate actions. The promising aspects contained in the Guidelines – such as the inclusion of supply chains as a possible focal point of violations which companies are accountable for, priority in reparation and compensation for people in vulnerable conditions and mention of the need to improve transparency and participatory mechanisms – are overshadowed by the non-participatory nature of the development of the document and by the adoption of an optional approach to dealing with business obligations towards human rights.[[12]](#footnote-11)

In Brazil, a number of civil society working on business and human rights issues have maintained a critical position in drawing up a National Action Plan (NAP), based, among others, on skepticism about the social participation model adopted in other countries and on the generic character of NAPs designed elsewhere.[[13]](#footnote-12) Given this situation, the Brazilian government worked with the alternative hypothesis to develop a Plan of Response to the Recommendations on Business and Human Rights to the Brazilian State. According to the Brazilian government, the initiative "has as scope to carry out recommendations, main topics recommended by international organizations, identify actors and responsible, and through this survey build diagnosis."[[14]](#footnote-13)

Other initiatives adopted by the Brazilian government, in which Conectas actively engaged, were the elaboration of a Code of Conduct for Suppliers of the Ministry of Human Rights and elaboration of protocol of implementation of recommendations on companies and human rights.[[15]](#footnote-14)

Code of Conduct for Suppliers of the Ministry of Human Rights

In September 2018, the BMHR opened a public consultation on a "Code of Conduct and Respect for Human Rights for Suppliers of Goods and Services to the Ministry of Human Rights." According to the Ministry, the document aims to establish principles and clarify guidelines and responsibilities related to the respect of Human Rights for companies that supply goods and services to the BMHR, in addition to complying with several international recommendations on the subject, implementing the United Nations Guiding Principles on Business and Human Rights and the 3rd Brazilian National Human Rights Program (PNDH-3), which calls for action in this field. The Code of Conduct and Respect for Human Rights for Suppliers of Goods and Services to the Ministry of Human Rights was approved on November 20, 2018, providing that the expected conduct of suppliers of goods and services should be guided by protection, respect and redress, in line with the pillars of the United Nations Guiding Principles on Business and Human Rights. According to the BMHR, the norm makes it mandatory to adopt the principles, guidelines and responsibilities contained in the Code when publishing notices, and the inclusion of clauses in contracts, agreements and similar instruments, in order to guide companies and entities that supply the BMHR in the requirements laid down therein.

The document, however, fails to provide specific measures to increase transparency and accountability, including: (a) Consultation of the “dirty list” of slave labor[[16]](#footnote-15) in the selection of subcontractors or in the procurement of goods and services; (b) Guarantee of social control and transparency in relation to slave labor, through the commitment to maintain a list of direct suppliers, updated periodically, publicly available online; (c) Establish minimum standards to be complied with in a process of human rights due diligence.

Protocol for the implementation of corporate and human rights recommendations

During the second half of 2018, the Brazilian Ministry of Human Rights undertook consultation with civil society organizations in order to obtain support for the construction of a document to respond to the recommendations on Business and Human Rights to the Brazilian State. According to information from the BMHR, more than 130 actors would have been consulted, among them federal agencies, companies and civil society, with a view to collecting information on initiatives under the responsibility of those institutions that were in line with the recommendations, and the possibility of developing new actions that demonstrate their commitments in the implementation of the matter. Although the spectrum of entities consulted was broad, it is noteworthy that there was no public consultation for the construction of the document responding to recommendations, and the criteria that led to the selection of entities that were consulted by the BMHR were not clear.

***What do you consider to be the main challenges in the implementation of the Guiding Principles across the sub-national levels, for example in the Federal States?***

One of the main challenges to vertical policy coherence in the implementation of the Guiding Principles is the lack of awareness of the business and human rights agenda at the subnational level. In Brazil, the debate on business and human rights, whether by its bread scope or by the relative novelty in its normative development at the international level, is still relatively unknown by the public administration. When talking about corporate human rights obligations, there is often an association with the issues of guaranteeing rights to people with disabilities in the workplace or, also, racial and gender diversity in business enterprises. These are important elements, but more associated to the logic of corporate social responsibility than a true commitment to observe national and international parameters of human rights protection in corporate practice.

Alignment between subnational entities in federal states

A continental country such as Brazil, a federal republic composed of 26 states, a federal district and more than 5,500 municipalities, home to more than 210 million inhabitants, presents inherent and monumental challenges to adoption of public policies of any kind. In the case of the implementation of the Guiding Principles, there is a knowledge gap between federal bodies (such as Ministry of External Relations and Ministry of Human Rights) – which have more frequent access to debates carried out by international organizations and organs – and local authorities and agencies (like State Secretariats and City Councils). This divide is also perceptible in business sector (considering multinational companies and local business enterprises) and civil society organizations (taking into account international NGOs and organizations and social movement with limited scope of action). The lack of a common ground on business and human rights standards, national and internationally, may make it difficult to adopt more effective policies and practices to prevent corporate human rights abuses.

***Are there examples of lessons learned from policy coherence in the implementation of other areas of social or environmental policy that could be beneficial in the area of ​​business and human rights?***

An example of a lesson learned is the resolution of the Brazilian Central Bank that established a regulatory framework of social and environmental responsibility for financial institutions in Brazil. The Central Bank of Brazil’s Resolution 4327/2014[[17]](#footnote-16) established that these entities should (i) prepare a Social and Environmental Responsibility Policy ("PRSA") (or, if necessary, update); (ii) to institute governance systems and administrative routines to internalize PRSA in internal processes; and (iii) prepare a plan of action with concrete actions for the implementation of the PRSA, which should be submitted to the BCB. For the implementation of these obligations, the standard provides that financial institutions should be guided by the principles of relevance and proportionality. With regard to the content of the PRSA, the Resolution established that it should contemplate: a) guidelines for socio-environmental actions in business and relations with interested parties; b) guidelines for identification, evaluation and management of socio-environmental risk; c) governance guidelines to ensure the implementation, monitoring and evaluation of the effectiveness of the actions established.

Despite positive features, the Resolution 4327 is criticised by lacking substantive and binding elements to guide the socioenvironmental policies, alongside objective and verified criteria to assess environmental risks of financial operations. The approach focused on processes, rather than on substantive rules, would aim to insert the theme of social and environmental responsibility in a gradual way, so as to "even" level the practices of the different types of entities operating in the national financial system.[[18]](#footnote-17)

1. Caio Borges. “A responsabilidade das empresas pelos direitos humanos no novo modelo de acordos bilaterais de investimentos brasileiros” In: Instituto Equit Gênero, Economia e Cidadania Global (org), **Acordos de Investimento à Brasileira**. Rio de Janeiro: Instituto Equit, 2015, p. 45. Available at <<http://bit.ly/2G9ICXA>>. Last access: 17.06.2019. [↑](#footnote-ref-0)
2. Ibid., p. 46. [↑](#footnote-ref-1)
3. Idem. [↑](#footnote-ref-2)
4. Brazil. Law no. 13,303, dated June 30, 2016. Available at <<http://bit.ly/2MTEluY>>. Last access: 17.06.2019. [↑](#footnote-ref-3)
5. Conectas Direitos Humanos. "State-Owned Companies Law marks first year amid criticism" 30.06.2019. Available at <<http://bit.ly/2MOQaT9>>. Last access: 17.06.2019. [↑](#footnote-ref-4)
6. Conectas Human Rights. "Recommendations of the UN Working Group on Business and Human Rights in Brazil: Status of Implementation by Government and Companies", São Paulo, 2018. Available at <<http://bit.ly/StatusRecomenda>>. Last access: 14.06.2019. ("Conectas, 2018") [↑](#footnote-ref-5)
7. Ibid., p. 51. [↑](#footnote-ref-6)
8. Conectas, 2018, p. 68. [↑](#footnote-ref-7)
9. Federal Prosecution Service. "PFDC launches technical note on protection and reparation of human rights in the context of business activities" (in Portuguese). 27.08.2018. Available at <<http://bit.ly/2FYH0jO>>. Last access: 10.06.2019. [↑](#footnote-ref-8)
10. Conectas, 2019, p. 29. [↑](#footnote-ref-9)
11. Conectas Human Rights. "Decree for a human rights seal for business". 30.11.2019. Available at <<http://bit.ly/2XbBgKV>>. Last access: 14.06.2019. [↑](#footnote-ref-10)
12. More information on Conectas Human Rights. "Second Monitoring Report on the Recommendations to Brazil of the UN WG on Business and Human Rights". São Paulo, 2019. Available at <<http://bit.ly/StatusRecomendaVer2>>. Last access: 14.06.2019. ("Conectas, 2019") [↑](#footnote-ref-11)
13. Conectas, 2018, p. 52. [↑](#footnote-ref-12)
14. Ibid., p. 53. [↑](#footnote-ref-13)
15. Other initiatives adopted by the Brazilian Ministry of Human Rights in the period include the establishment of guidelines on business performance within the scope of the National Program for the Protection of Human Rights Defenders and the aforementioned Guidelines on Business and Human Rights. On criticisms of documents, based, among others, on the low social participation in its elaboration, see Conectas, 2019, p. 51 et seq. [↑](#footnote-ref-14)
16. More on the Brazilian “dirty list” of slave labor: Conectas Direitos Humanos. “The back and forth of the slave labor dirty list in Brazil”. 20.02.2019. Available at <<http://bit.ly/2MQDFXm>>. Last access: 10.06.2019. [↑](#footnote-ref-15)
17. Central Bank of Brazil. Resolution 4,327, of April 25, 2014. Available at <<http://bit.ly/2WMblKc>>. Last access: 10.06.2019. [↑](#footnote-ref-16)
18. Conectas, 2018, p. 61. [↑](#footnote-ref-17)