

Business and Human Rights in Brazil: Trends and Outlook for the Coming Years

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Abstract: This article explores how the integration of environmental, social and governance (“ESG”) factors into decision-making and investment strategies is expected to strengthen the implementation of human rights principles and requirements by companies operating in Brazil.

On June 16, 2011, the United Nations Guiding Principles on Business and Human Rights (“UNGPs” or “the Principles”) were endorsed by the Human Rights Council, setting a milestone for the protection of human rights. The UNGPs are guidelines “directed at States and companies that clarify their duties and responsibilities to protect and respect human rights in the context of business activities and to ensure access to an effective remedy for individuals and groups affected by such activities.”¹

The three pillars on which the Principles are grounded are: (i) the State’s duty to protect and fulfill human rights and fundamental freedoms; (ii) the corporate responsibility to respect human rights; and (iii) the need for access to appropriate and effective remedies, both judicial and non-judicial, when business-related human rights abuse occurs.

According to Principle 15, companies must: (i) institute a policy commitment

to meet their responsibility to respect human rights; (ii) carry out ongoing human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts; and (iii) have in place processes to enable the remediation of any adverse human rights impacts they cause or contribute to.

The company’s commitment should be expressed in a publicly available policy statement—stand-alone or integrated into existing statements and codes of conduct—and reflected in operational policies and procedures. Companies are expected to respect all internationally recognized human rights, but one important step to be taken when developing the policy commitment is identifying which human rights issues are most salient to operations. For instance, “[e]nterprises in sectors that routinely work with toxic products, such as chemical companies, many manufacturing companies, as well as mining companies, may pose a particular risk to the right to safe water.”²

In addition, “[i]n the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and

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similar factors) to meet its responsibility to respect human rights.”³ The due diligence process encompasses the following steps: (i) identifying and assessing actual and potential adverse human rights impacts; (ii) integrating findings from impact assessments into policies and procedures and taking action to prevent or mitigate impacts; (iii) tracking effectiveness of response; and (iv) communicating human rights impacts and related response measures to relevant stakeholders. Also, pursuant to Principle 22, “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”

Even though discussions on mandatory human rights due diligence have been gaining increased attention over the past months, particularly in the European Union, such a trend has yet to reach Latin American countries, including Brazil. In spite of that, Brazil and Brazilian institutions and enterprises have adhered to a variety of global frameworks, standards and initiatives aimed at the implementation of human rights principles and requirements. Besides the UNGPs, those include, inter alia, the Universal Declaration of Human Rights, the OECD Guidelines for Multinational Enterprises, the ILO Declaration on Fundamental Rights and Principles at Work, the United Nations Global Compact, the Equator Principles, the IFC Performance Standards and the Sustainable Development Goals.

Human rights protection is also guaranteed under the Brazilian Constitution and domestic laws and regulations. For example, Decree No. 9571/2018, which sets out the National Guidelines on Business and Human Rights (“NGBHRs”), is a non-binding framework directed at Brazilian and multinational companies operating in the country, and Resolution No. 5/2020 of the National Council for Human Rights, which introduces the National Guidelines for a Public Policy on Business and Human Rights and is directed at companies and the government, enhance the NGBHRs and improve human rights protection against violations by business enterprises.

There is, however, still a long path ahead, as Brazil has a long record of corporate human rights abuses. Examples include dam incidents and the recent increase in illegal deforestation and land seizures in the Amazon, often associated with violence, threats

and killings of indigenous peoples and activists.

Adopting and enforcing more effective practices and policies to prevent business-related human rights violations is particularly challenging in a country with continental dimensions, a myriad of ecosystems and natural resources, and profound socioeconomic inequalities within and among different regions.

Under the current political scenario in Brazil and with the lack of standardized and mandatory requirements applicable across different business sectors at the national, regional and local levels, it is expected that the human rights agenda will be implemented mainly by private actors and civil society organizations.

The rising concern of investors, policymakers, shareholders, customers and other stakeholders with ESG issues is a strong motivation for companies to adopt sustainable and responsible practices. Such concern will likely result in the improvement of decision-making, engagement, transparency and accountability, and it is expected to be the main driver for the integration of a human rights-based approach into business practices in Brazil.

According to the “Investor Toolkit on Human Rights,” released in May 2020 by the Investor Alliance for Human Rights, “[r]espect for human rights is strongly associated with value chain resilience and a stable business operating environment. In parallel, investors are increasingly aware of and concerned about the significant operational, financial, legal, and reputational risks portfolio companies might face when they fail to manage human rights risks.”⁴ Among these risks are “potential project delays and cancellations, lawsuits and other legal risks such as noncompliance with emerging human rights-related regulations, scrutiny from national-level grievance mechanisms such as OECD National Contact Points (NCPs), significant fines, productivity and recruitment challenges, and negative press coverage.”⁵

Similarly, the 2018 report of the Working Group on Business and Human Rights to the UN General Assembly states that “[t]he responsibility to carry out human rights due diligence applies regardless of any ‘business case’ argument. Failure to conduct adequate diligence on risks to people will often have not only a human cost, but may also come back to haunt the business.”⁶ The Group recommends investors to “implement human rights due diligence as part of their

own responsibility under the Guiding Principles, more systematically require effective human rights due diligence by the companies they invest in, and coordinate with other organizations and platforms to ensure alignment and meaningful engagement with companies.”⁷

In view of the above, even if Brazil takes longer to strengthen its regulatory framework to promote

policy coherence in the implementation of the UNGPs and overall protection of human rights against corporate violations, the demand for action by investors and other stakeholders should be a key factor to push companies to adopt and enhance human rights policies, due diligence processes, grievance and communication mechanisms, and a response to adverse impacts.

Endnotes

- ¹ UN Office of the High Commissioner of Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, at 5, HR/PUB/14/3 (2014), available at: https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf
- ² OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*, at 21, HR/PUB/12/02 (2012), available at: www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
- ³ *Id.* at 6.
- ⁴ Investor Alliance for Human Rights. *Investor Toolkit on Human Rights*, at 5. Available at: <https://investorsforhumanrights.org/sites/default/files/attachments/2020-05/Full%20Report-%20Investor%20Toolkit%20on%20Human%20Rights%20May%202020c.pdf>
- ⁵ *Id.*
- ⁶ Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/73/163, at 6.
- ⁷ *Id.* at 25.

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