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**COMPLIANCE
AND SUSTAINABILITY**

**BRAZILIAN AND
PORTUGUESE PERSPECTIVES**

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2020

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TABLE OF CONTENTS

COMPLIANCE AND SUSTAINABILITY. INTRODUCTION	1
Manuel Lopes Porto	
FOREWORD.....	7
Clóvis de Barros Filho	

I

GENERAL PART

1.	
ENVIRONMENTAL COMPLIANCE: OPPORTUNITIES AND CHALLENGES TO ENSURE GREENER BUSINESS PERFORMANCE, REAL AND NON-SYMBOLIC	21
Alexandra Aragão	
2.	
THE PRINCIPLES OF EQUATOR AS STRENGTHENING MECHANISMS OF SUSTAINABLE INVESTMENTS. THE CONFORMITY OF INVESTMENT	37
Grace Ladeira Garbaccio · Douglas de Barros Lages	
3.	
ALIGNING CORPORATE SUSTAINABILITY STRATEGY WITH THE GLOBAL OVERVIEW	51
Ivan de Paula Rigoletto	

4.	THE ESG INFORMATIONS (ENVIRONMENTAL, SOCIAL AND GOVERNANCE) DISCLOSED ON SUSTAINABILITY REPORTING AS A CURRENT PARADIGM FOR FINANCIAL INVESTMENTS IN CORPORATIONS AND ITS REGULATION IN BRAZIL AND THE EUROPEAN UNION	63
	Vinícius Meireles Laender	

II SPECIAL PART

STRATEGIES AND PUBLIC AND PRIVATE COMPLIANCE INSTRUMENTS

1.	COMPLIANCE AUDITS IN THE PUBLIC SECTOR. WHERE ARE WE GOING?	81
	Matilde Lavouras	
2.	PUBLIC COMPLIANCE AS AN INSTRUMENT FOR PROMOTING SOCIAL AND ENVIRONMENTAL SUSTAINABILITY	95
	Mônica Faria Baptista Faria	
3.	THE SUSTAINABILITY TAXONOMY OF THE EUROPEAN UNION. ON THE WAY TO THE OASIS OF RESPONSIBLE INVESTMENT	109
	Maria João Paixão	
4.	ENVIRONMENTAL COMPLIANCE AND TAXATION. THE CASE OF AIR QUALITY IN CITIES	125
	Suzana Tavares da Silva · António Braz Simões	
5.	CORPORATE SOCIAL RESPONSIBILITY: CAN CONSUMERS AND INVESTORS BE PARTNERS FOR THIS PURPOSE?	143
	Inês Pena Barros	

III SPECIAL PART

SECTOR COMPLIANCE: ENERGY, AGRICULTURE, TOURISM AND MINING

- 1.**
SOCIO-ENVIRONMENTAL COMPLIANCE AND
ENFORCEMENT IN THE BRAZILIAN ELECTRICAL SECTOR.
AN APPROACH TO REGULATION IN THE ELECTRICITY
SECTOR AND SOCIO-ENVIRONMENTAL COMPLIANCE
THROUGH THE STUDY OF LEGISLATION AND OTHER
LEGAL ASPECTS REGARDING ENVIRONMENTAL LICEN-
SING RESTRICTIONS TO MITIGATE THE SOCIO-
-ENVIRONMENTAL AND ECONOMIC RISKS OF THE
GENERATION AND DISTRIBUTION OF THE ELECTRIC
POWER INDUSTRY 161
Márcio de Castro Zucatelli
- 2.**
COMPLIANCE AND SUSTAINABILITY.
ENVIRONMENTAL IMPACTS AND RISK MANAGEMENT
ASSOCIATED WITH WIND FARMS IN BRAZIL 181
Rachel Starling Albuquerque Penido Silva
- 3.**
THE SUSTAINABILITY OF BRAZILIAN AGRIBUSINESS
IN THE ASPECT OF FOREST PRESERVATION.
A COMPARISON OF FOREST DATA FROM BRAZIL
AND PORTUGAL 197
Soraya Saab
- 4.**
INVESTMENT IN (SUSTAINABLE) TOURISM IN LISBON.
ON THE WAY TO A TRAGEDY OF THE COMMONS? 211
João Nogueira de Almeida

5.

MARIANA AND BRUMADINHO.

WHY DID COMPLIANCE PRACTICES NOT PREVENT

THOSE TRAGEDIES?219

Gabriel Lima Fernandes

CONTRIBUTORS 235

II

SPECIAL PART

STRATEGIES AND PUBLIC AND
PRIVATE COMPLIANCE
INSTRUMENTS

PUBLIC COMPLIANCE AS AN INSTRUMENT FOR PROMOTING SOCIAL AND ENVIRONMENTAL SUSTAINABILITY

MÔNICA FARIA BAPTISTA FARIA

Abstract: Recently, the Brazilian public administration has been adopting some tools employed by private companies to improve their own corporate governance. The Brazilian public administration has chosen to follow that path, aiming to raise its efficiency standards and address goal deviations, illegal activities and corruption. Among these tools, the application of compliance protocols stands out, involving the establishment of both direct and indirect standards of conduct for the internal politics of public administration. The intent of this article is to investigate how the adoption of compliance by the National Agency of Mining (Agência Nacional de Mineração (ANM)) might affect the social and environmental sustainability of mineral extraction activities in Brazil. Although the compliance programme has not yet been completely implemented by the ANM, the presence of more efficient structural and internal control mechanisms can already be noted, overcoming — at least in part — the deficiencies inherited from the National Department of Mineral Production (Departamento Nacional de Produção Mineral (DNPM)). Therefore, even though it has been only partially implemented, the compliance programme has enabled

advancement towards the more proactive management of monitoring and inspection to achieve social and environmental sustainability.

Keywords: Public administration, public compliance, sustainability, mining.

Introduction

Focusing on efficiency and on avoiding goal deviations and corruption, the Brazilian state has been editing norms for the implementation of integrity politics, among them Law 12.846/2013, which deals with the administrative and civil accountability of juridical persons for actions that undermine the public patrimony (national or foreign), principles of public administration, or international commitments made by Brazil¹.

A similar orientation has been determined for the structuring of indirect public administration under Law 13.303/2016, which, in accordance with the content of the first paragraph of Article 173 of the Constitution of the Federative Republic of Brazil (CFRB/88), establishes mandatory programmes for integrity and corporative governance in public companies, joint stock companies and their subsidiaries under the scope of the Union, the states, the Federal District or the municipalities². The

¹ Such as the oecd Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the oas Inter-American Convention Against Corruption (1996) and the United Nations Convention against Corruption (2003).

² In the article entitled “Corrupção e compliance nas empresas públicas e sociedades de economia mista: racionalidade das disposições da Lei de Empresas Estatais (Lei 13.303/2016)”, Clóvis Alberto Bertolini de Pinho *et al.* claim that the inspiration for Law 13.303/2016 is the establishment of control mechanisms for conflicts of agency to avoid the occurrence of acts of corruption or of malpractice of state companies or misuse of resources. One way to contain those conflicts that has been adopted by the aforementioned law is the imposition of practices of com-

mandate was extended recently by Decree 9.203/2017 to include the federal public administration, autarkic and foundational, in accordance with Ordinance 57/2019 of the General Counsel of the Union (Controladoria Geral da União (CGU)).

These integrity programmes of — which comprise a “set of rules, standards and procedures that shall guide an institution in the market in which it operates, as well as its staff, controlling their activities and warning them about the legal risks of certain actions”³ — are associated with the concept of compliance adopted in this article. Integrity programmes constitute an extension of typical compliance programmes because, in addition to establishing systematic guidelines for the fulfilment of internal and external rules, they have clear norms dealing with combating corruption (in addition to other irregularities). Therefore, integrity programmes meet the specificities of public administration, which allows them to be labelled *public compliance*.

The goal of this article is to conduct an analysis on the use of the tool of compliance by the public administration of Brazil and to examine what the adoption of this tool by the National Agency of Mining (ANM) — a federal government agency linked to the Ministry of Mines and Energy — entails for the agency concerning the improvement of its capacity to promote social and environmental sustainability. From this perspective, one can assume that the full implementation of compliance consists of a tool of promotion and realization of more efficient and

pliance and corporative governance as a way to assure that state companies are properly inspected by internal agents and by agents external to the administration of the state society. In: *Revista de Direito Administrativo*, Rio de Janeiro: FGV, 277/1 (jan./abr. 2018) 255.

³ Ana Clara Viana SOARES / Kamila Vieira da SILVA. “A aplicação da Constituição Federal ao estudo do compliance: contextualização, aspectos relevantes e corrupção”. *Revista Fórum Administrativo. Direito Público*. Belo Horizonte: Fórum, 18/2012 (out. 2018) 12.

honest management, befitting the interests of the collectivity.

This article contains two parts. The first part addresses the policy of integrity applied to public administration and the role of the CGU. The second part deals with the federal government's integrity programme applied by the ANM. Regarding the methodology adopted, this article consults legal doctrines and Brazilian norms and laws on the topic of compliance.

PART I — The Policy of Integrity Applied to Public Administration: The Role of the General Counsel of the Union (Controladoria Geral da União (CGU))

Access to information on cases of corruption involving Brazilian public administration in all Federation units (Union, states and municipalities) — including joint stock companies, public enterprises, government agencies and foundations — has given rise to a strong sentiment of indignation within Brazilian society and a yearning for the restoration of the republican principles laid down in CFRB/88 (legality, impersonality, morality, publicity and efficiency). For this purpose, it became essential to invest in “the formation of a process of dis-corruption, in order to ensure the integrity of public resources used to address the needs of the collectivity”⁴. From that emerged, *public compliance*⁵, which is broader and

⁴ Grace Maria Fernandes MENDONÇA. “Protocolos de compliance na administração pública e a necessária descorrupção”. *Boletim de Notícias Conjur*. Available in: <<https://www.conjur.com.br/2019-fev-20/grace-mendonca-protocolos-compliance-administracao-publica>>. Last accessed in: June 24, 2019.

⁵ Term used by Cláudio C. B. Pinto Coelho in an article entitled “Compliance na administração pública: uma necessidade para o Brasil”, in which he claims that in spite of the fact that the 1988 Constitution already expresses the principles that govern public administration in the caput of Article 37, there are other principles (such as ethics, transparency and integrity) that — directly or indirectly — influence the government to bring the “integrity programme”

more specific than traditional compliance.

Through Decree 9.203/2017 and under the conditions of CGU Ordinance 57/2019, the mandatory implementation of integrity programmes has been expanded to encompass all agencies and entities of direct federal public administration, both autarkic and foundational, to comply with the Constitution regarding obedience to administrative principles.

Consonant with the stipulations in Article 19 of the aforementioned decree, the agencies and entities of public administration shall institute integrity programmes to promote the adoption of measures and institutional actions aimed at the prevention, detection, punishment⁶ and remedy of frauds and acts of corruption. Each integrity programme shall be organized based on the following guidelines: the commitment and support of the high-level administration; the existence of a department responsible for the programme implementation within the public agency or entity; analysis, evaluation and management of the risks related to the theme of integrity; and the continuous monitoring of the integrity programme attributes. For the latter guideline, it is up to the CGU to establish the necessary procedures for structuring, executing and monitoring the integrity programme.

It should be noted that the CGU is an internal agency of control of the federal government, responsible for activities related to the defence of public property and to increasing

closer to the “system of management of compliance”. In: *RDFG: Revista de Direito da Faculdade de Guanambi* 3/1 (julho - dezembro 2016) 77.

⁶ It should be highlighted that, in view of compliance’s preventive nature, its application is also regarded as an expression of “legal risk” in which the company can suffer as a result of the failure or non-fulfillment of ethical guidelines (Ana Clara Viana SOARES / Kamila Vieira da SILVA. “A aplicação da Constituição Federal ao estudo do compliance”, 12). In this sense, Law 12.846/2013 addresses the administrative accountability of juridical persons for the practice of actions against public administration, national or foreign.

management transparency (through public audits; corruption correction, prevention and combating; and an ombudsman). In addition to those functions, the CGU also practises the technical supervision of agencies that integrate the internal system of control, the correction system, and the system of auditor units of the federal executive branch, providing the necessary legal orientation⁷.

The CGU's plan of integrity is a tool of governance so that all actions can be aligned with the agency strategy and a sustainable culture of institutional integrity can be maintained. Its purpose is to further measures of prevention, detection and punishment of corruption and misconduct that might hinder the public body from providing its services to society efficiently and effectively⁸.

To allow access to information about the organization, execution and monitoring of integrity programmes within agencies and entities of the federal government (ministries, autarchies and public foundations), the CGU has created the panel "Integridade Pública" (Public Integrity), which allows its users (any people) to filter and compare the development indexes about the Government's actions and goals⁹.

It can thus be confirmed that the integrity programmes¹⁰ established by the federal government of Brazil to rule its public

⁷ CGU. Institucional. Available at: <<https://www.cgu.gov.br/sobre/institucional>>. Last accessed in: June 25, 2019.

⁸ CGU. Programa de integridade da cgu. Objetivos, estrutura e fundamentos. Available at: <<https://www.cgu.gov.br/sobre/governanca/programa-de-integridade-da-cgu>>. Last accessed in: June 24, 2019.

⁹ CGU. Painel Integridade Pública. Available at: <<http://painéis.cgu.gov.br/integridadepublica/index.htm>>. Last accessed in: June 24, 2019.

¹⁰ CGU. CGU concede novo prazo para criação de programas anticorrupção nos órgãos federais. Available in: <<https://www.cgu.gov.br/noticias/2019/01/cgu-concede-novo-prazo-para-criacao-de-programas-anticorrupcao-nos-orgaos-federais>>. Last accessed in: June 25, 2019.

administration (direct and indirect) are an extension of typical compliance programmes that, owing to their specificities and broadness, are designated *public compliance*.

PART II — Applying the Federal Government’s Integrity Programme within the National Agency of Mining (Agência Nacional de Mineração (ANM))

This second part is dedicated to examining what the federal government integrity programme should apply within the National Agency of Mining inner structure as well as how that application might benefit the sustainability of mining activities.

The ANM is a government agency tied to the Ministry of Mines and Energy (MME) within the indirect section of Brazil’s federal public administration¹¹. Among its attributes, the ANM is assigned the responsibility of observing and executing the orientations and guidelines set by Decree-law 227/1967 (Mining Code) and policies set by the MME. Additional purposes of the ANM are to promote the management of the Union’s mineral resources and to regulate and inspect the mining activities of such Union resources in the country.

It is worth mentioning that the ANM was created only in 2017 (by Law 13.575/2017), which resulted in the dissolution of the older National Department of Mineral Production¹² (created in 1934). For that reason, the *modus operandi* of how the neoliberal model of the 1990s guided Brazil’s economic

¹¹ AGÊNCIA NACIONAL DE MINERAÇÃO. INSTITUCIONAL (ANM). Disponível em: <<http://www.dnpm.gov.br/acesso-a-informacao/institucional>>, acessado em 03 jun 2019.

¹² The National Department of Mineral Production (dnpm) had been created in 1934, but the Law 8876/94 elevated it to the condition of federal autarchy in 1994.

development has been criticized, especially in relation to activities of mineral extraction and production. Although the Vale do Rio Doce Company (the major Brazilian state-owned mining company) had been privatized in 1997, such mining activities were being performed without proper planning, without following a regulation that enabled them to adapt to the constitutional framework of environmental protection, and without the operation of a regulatory agency capable of controlling and inspecting the mining activities taking place.

This situation, in addition to the fact that the Mining Code of 1967— a code that had as its most important goal the achievement of economic growth with little concern about the environment — was in force meant that more than enough elements existed to hamper the sustainable development of mining activities in Brazil.

Moreover, the TCU pointed to the ANM as the second most vulnerable federal agency in the country, exposed to fraud and corruption due to its great regulatory powers and its few internal mechanisms of control aimed at combating irregularities. In short, there is a series of factors that can partially explain the unfolding of many social and environmental tragedies related to mining activities in Brazil.

However, according to research coordinator Renata Normando, TCU's external control federal auditor, the ANM's poor audit results do not necessarily mean that the ANM is involved in irregularities. In her view, what the study reveals is the ANM's lack of internal control mechanisms capable of preventing and discovering cases of fraud and corruption, yet this means not that corruption exists within the ANM but rather that it is more exposed to the risk of such problems¹³.

¹³ BBC NEWS. *Fiscalização de barragens: órgão federal de controle é o 2º mais exposto a fraudes e corrupção, diz TCU*. Disponível em: <<https://www.bbc.com/portuguese/brasil-47211131>>.

Incidentally, in a decision delivered by a court proceeding on the survey of risks inherent to Financial Compensation for Mineral Exploitation (Process TC 017.199/2018-2, tried February 20, 2019), the TCU addressed many questions related to the ANM and issued a series of caveats regarding ANM functions¹⁴. On the issue of risk management, the TCU believed that the National Department of Mineral Production (DNPM) did not have a policy of identification, evaluation, reduction and control of risks but that the installation of the agency could lead to a change in this reality. The TCU claimed that despite its creation, the ANM had not yet been fully implemented, and the transition from the DNPM to the ANM had negatively interfered in the evaluation of aspects intrinsic to accountability, mainly owing to the absence of an internal statute and a collegial board of properly nominated directors. In his vote¹⁵, the rapporteur of the case (Minister Aroldo Cedraz) pointed out that in spite of all inspections, for at least 10 years, the TCU had repeatedly issued warnings to the appropriate public agencies regarding serious problems, weaknesses, nonconformities and difficulties faced by the old DNPM (succeeded by the ANM) in many of its performance areas. Such problems are owing to a shortage of qualified human resources and information technology resources, to problems related to the grant of mining rights, to the inspection of the collection of Financial Compensation for Mineral Exploitation (CFEM), and to the inspection of tailing

¹⁴ TCU. Processo tc 017.199/2018-2. Relatório de levantamento de riscos cfem. 2019, p.46-47. Available in: <https://portal.tcu.gov.br/data/files/0d/e3/b3/54/c2b29610dcee6196f18818a8/017.199-2018-2-ac%20-%20levantamento%20cfem_anm.pdf>. Last accessed in June 10, 2019.

¹⁵ TCU. Processo tc 017.199/2018-2. Voto. 2019, p.5. Available in: <https://portal.tcu.gov.br/data/files/0d/e3/b3/54/c2b29610dcee6196f18818a8/017.199-2018-2-ac%20-%20levantamento%20cfem_anm.pdf>. Last accessed in June 10, 2019.

dams. One should remember the tragedies triggered by the disruption of mining tailing dams in the municipalities of Mariana and Brumadinho (both in the state of Minas Gerais) — tragedies that compelled public agencies and their government supervisors to recognize the necessity for change in their operations.

In the latter regard, the opinion issued by the Senate's Parliamentary Commission of Inquiry (CPI) — held to investigate the causes and those responsible for the disruption of the tailing dam “Mina Córrego do Feijão” in Brumadinho (MG) — also warned that the ANM needed to create a new inspection pattern to prevent any direct economic ties between the auditing company and the mining company being inspected. Similar to what the TCU said in its decision, the Senate CPI opinion also recommended that the ANM should have a capacitation plan to “quickly raise the quantity and quality of its technical body”¹⁶.

Thereby, the application of compliance protocols is indispensable to the ANM so that it can have an adequate structure and, consequently, more efficient performance in inspecting and monitoring economic activities as well as combating irregularities, goal deviations, illegalities and corruption.

The online portal of the CGU Integrity Programme¹⁷ compiles 8 mandatory goals to be achieved by the members of the overall federal public administration, including (1) the appointment of a unit of integrity management; (2) the definition of an internal flow to identify any case of nepotism; (3) the establishment of

¹⁶ G1. Minas Gerais. *CPI de Brumadinho propõe indiciamento de 14 funcionários da Vale e da tuv sud*. Available in: <<https://g1.globo.com/mg/minas-gerais/noticia/2019/07/02/relator-da-cpi-de-brumadinho-pede-indiciamento-de-12-funcionarios-da-vale-e-da-tuv-sud.ghtml>>. Last accessed in July 2, 2019.

¹⁷ CGU. Paineis de Integridade. ANM. Available in: <<http://paineis.cgu.gov.br/integridadepublica/index.htm>>. Last accessed in June 24, 2019.

a commission of ethics; (4) the definition of an internal flow to analyse consultations concerning conflicts of interest; (5) the definition of an internal flow to deal with complaints or accusations; (6) the designation of a sector responsible for conducting disciplinary proceedings; (7) the performance of surveys about risks to integrity; and (8) the approval of a plan of integrity. Of those eight goals, as of the date of this article's completion, the ANM had fulfilled only the first, the third, the fourth and the sixth goals.

Therefore, the ANM must seek the effective and practical implementation of compliance protocols in accordance with CGU Ordinance 57/2019 so that the ANM can establish new conditions for its own internal administrative structure and for its managers, staff and collaborators to abide by. Unfortunately, one can receive the impression that some compliance programmes enacted by private companies are but a facade, as one could conclude after witnessing the recent social and environmental tragedies that took place in the counties of Mariana and Brumadinho in Minas Gerais¹⁸.

¹⁸ The disruption of the mining tailing dams in Mariana (2015) and in Brumadinho (2019) in the state of Minas Gerais caused widespread territorial devastation. Due to the violent impact of the wave of mining waste that came from the collapse of the Fundão Dam — controlled by Samarco Mineração S.A. in partnership with Vale s.a. and the Anglo-Australian company bhp Billiton — the district of Bento Rodrigues (within the municipality of Mariana) simply vanished in November 5, 2015. The mud of the mining waste killed 19 people, and all survivors were left homeless. After the tragedy in Brumadinho, 246 corpses were identified, 23 people are still missing, and the environmental damage was unprecedented, devastating native woodlands and contaminating the waters of the river Paraopeba, rendering it unusable for human or animal consumption. About this topic, read: Luciano M. N. LOPES. “O rompimento da barragem de Mariana e seus impactos socioambientais”. *Periódicos PUC Minas*. Sinapse Múltipla, 5/1 (jun 1-14, 2016); E. GONÇALVES / T. VESPA / N. FUSCO, “Tragédia Evitável”. *Revista Veja*. Minas Gerais, Edição 2.452, 48/46 (2015) 70-71; G1. *Brumadinho: bombeiros encontram mais um corpo em área atingida por lama*. Disponível em: <<https://g1.globo.com/mg/minas>

These two tragedies involved multinational companies of worldwide renown in the mining sector. The companies involved had compliance programmes, as required by law, but the programmes did not demonstrate the desirable efficacy in practical terms. The same inefficacy is not expected of a federal government agency such as the ANM.

Conclusion

In light of the problems that have been exposed, in spite of notable efforts currently underway to improve the ANM's internal structure, the current state of the National Agency of Mining is still fragile in terms of the necessary efficacy of its policies. The ANM seeks to enforce the sustainability of all the economic activities under its regulatory jurisdiction. For that reason, it is important that structural mechanisms be installed as soon as possible. The ANM must also be endowed with a larger amount of specialized professionals so that the government agency can at least work at the reasonable capacity required for the proper execution of its duties.

It is expected that once the setting, implementation and execution of the integrity programme (public compliance) are complete — including the management of risks in each public administration entity —, the ANM will obtain the capacity to fully exercise its powers. More specifically (but not only), it is expected that the ANM will enhance its power to inspect mines and mining waste dams, monitoring them appropriately to avoid or at least substantially mitigate the risks of new social and environmental tragedies.

Of course, this article does not presume to go beyond a succinct approach to the subject. It seeks only to call attention

to the need for Brazil's public administration to uninterruptedly seek to improve its compliance procedures, both in practical terms (through the performance of companies and regulatory agencies) and through incentives for academic research on the topic of compliance.

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