



LEGAL ANALYSIS

COULD A UN TREATY MAKE TRANSNATIONAL CORPORATIONS ACCOUNTABLE?

THE CRIMES OF VALE INC. IN BRUMADINHO, BRAZIL



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This infographic summarizes a detailed legal analysis of the crimes of VALE Inc. in Brumadinho, Brazil, available at: www.fian.org

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ACRONYMS

ANM

Brazil's National Mining Agency

Feam

State Environmental Foundation

MAB

Brazilian Movement of People Affected by Dams

PAEBM

Dam Safety Plan and an Emergency Action Plan for Mining Dams

PCI

Parliamentary Committee of Inquiry

PNSB

National Dam Safety Policy

Semad

State's Secretary for the Environment and Sustainable Development

SIGBM

National Registry of Mining Dams and the Integrated Mining Dam Safety Management System

Sisema

State System for the Environment and Water Resources

Sisnama

National Environment System

LESSONS FROM THE 2019 BRUMADINHO DAM COLLAPSE CASE FOR A STRENGTHENED TREATY ON TNCS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

THE DISASTER

The Córrego do Feijão iron ore mine is located by the Ferro-Carvão River, tributary of the upper Paraopeba River, in the rural zone of the municipality of Brumadinho, Brazil. Since April 2001, the mine has been under the control of Vale S.A (Vale).¹ Vale is a publicly listed Brazilian multinational mining company with operations in every continent of the world.² In 2018, the company declared net operating revenues of over US\$ 36.5 billion,³ making it the fourth largest mining company in the world that year.⁴

To contain mining tailings, the Córrego do Feijão mine had two dams (Dam 1 and Dam 6). Between 1982 and 2013, Dam 1 underwent 10 rises, reaching a height of 87 meters, the majority of these elevations being carried out by what is called the “upstream method”.

On 25 January 2019, Dam 1 broke, sending approximately 12 million cubic meters of mining waste down the Ferro-Carvão River. The waste buried the river along with more than 130 hectares of vegetation, houses, plantations, animals and a hotel. The sludge advanced 220 km along the Paraopeba River, irreversibly damaging aquatic life, affecting local municipalities’ ability to supply water to residents and leading to a ban in the use of water including for irriga-

tion and cattle. The consequences on the human rights of workers and the local community were devastating. As of September 2019, 272 people, including employees, contractors and community members, had been confirmed or were presumed dead. Many more people were injured. Many families lost their only source of income and saw their way of life and economic stability totally disrupted.⁵

This was not the first time that Vale found itself at the centre of an environmental and social disaster. In November 2015, the Vale-BHP owned Fundão tailings dam in Mariana failed, killing 19 people and causing devastating environmental destruction which has seriously affected local people’s lives to this day.⁶

1 | Minas Gerais’ Parliamentary Committee of Inquiry into the causes of the tailings dam rapture, in the Municipality of Brumadinho. Final Report of September 2019 (from now on, PCI), p 57-58.

2 | Movimento dos Atingidos por Barragens: O Lucro Nao Vale a Vida (February 2019), p. 14.

3 | http://www.vale.com/EN/investors/information-market/quarterly-results/QuarterlyResultsDocs/Vale_IFRS_4Q18_i%20final.pdf

4 | <https://www.statista.com/statistics/274241/revenue-and-net-income-of-mining-company-vale-since-2006/>

5 | PCI, p. 153.

6 | <https://www.business-humanrights.org/en/brazil-government-to-sue-bhp-and-vale-over-dam-disaster-that-caused-deaths-environmental-destruction>

THE CAUSES

Type of tailings dam: Dam 1 used the “upstream method” (“Método de Alçamento”) due to its lower cost and shorter construction time compared to other techniques.⁷ While cheaper, this technique is less safe than other available techniques. Unless adequately constructed and maintained, this method can lead to the “liquefaction” of the waste and the dam wall itself, making a catastrophe more likely.⁸ Because of its risks, the “upstream method” has now been suspended in the country.⁹

Risk identification: In November 2017, Brazilian engineering company Potamos (which was advising Vale jointly with Tüv-Süd Bureau de Projetos e Consultoria Ltda, a subsidiary of German company Tüv-Süd), informed Vale and Tüv-Süd that its studies had revealed a worrying value for the dam’s “safety factor”. This was found to be at 1.06 (for the peak or highest point) while national and international best practice standards as well as Vale’s own standards determine that this value must be at a minimum of 1.30.¹⁰ Under this value, a “Declaration of Stability Condition” necessary for the mine to remain in operation could not be issued.¹¹

Risk mitigation: Vale was required by law to submit its next “Periodic Dam Safety Review” and “Declaration of Stability Condition” by June 2018. To obtain the “Declaration of Stability Condition” Vale had to bring the dam’s safety

factor to the expected minimum of 1.30 by taking a number of risk mitigation measures. Vale asked Potamos to advise on these measures.¹² However, the company later discarded some of the options recommended by Potamos, such as building a reinforcement shoulder at the foot of the dam.¹³ While providing greater protection, this measure was more expensive and slower than other alternatives.¹⁴ The company chose instead to implant 30 “Deep Horizontal Drains”, a cheaper measure advised by Tüv-Süd.¹⁵ These had to be operational by June 2018.¹⁶ The deadline was so tight that Vale started installing the drains without preliminary studies recommended by Potamos (these studies were never completed).¹⁷ In its advisory role, Tüv-Süd actively recommended or was at least fully aware of all of Vale’s decisions.

Vale was under an additional pressure. While Dam 1 had stopped receiving waste in 2016 and was no longer operational,¹⁸ the company intended to mine its waste. For this purpose, it needed to obtain an environmental licence for decommissioning the dam and mining its tailings. To obtain this licence Vale also needed the “Periodic Dam Safety Review” and accompanying “Declaration of Stability Condition”.¹⁹

As well as taking less effective steps to improve the safety condition of the dam, the company also failed to take action to minimise the risk to people by maintaining, immediately downstream of the dam, administrative structures

7 | PCI, p.32.

8 | The other construction methods are the “downstream” and “centre-line elevation” techniques which are developed as the mine is in operation. An alternative is to build a dam in one unique full phase, but this is commercially unattractive as it does not permit the company to build the dam as the waste is generated and therefore as profits begin to be made. PCI, p. 30.

9 | PCI, p. 41-43 and 187.

10 | This is a technical safety measurement used within the industry. 1.30 is an industry-wide accepted minimum safety factor for a dam of the characteristics and at the stage of Dam 1. See e.g. <https://www.ontario.ca/page/geotechnical-design-and-factors-safety#return>

11 | PCI, p. 92-93. Also, PCI, p. 157, explaining the discussion around the safety factor in more detail.

12 | PCI, p. 93-96, and 157.

13 | PCI, p. 106 and 157.

14 | PCI, p. 156.

15 | PCI, p. 157-158.

16 | PCI, p. 102

17 | PCI, p. 96.

18 | Dam 1 reached its maximum elevation in 2013 and stopped receiving tailings in mid-2016 (under license granted in 2011).

19 | PCI, p. 96.

with a constant presence of people who the company knew would have no chance of surviving in the event of an abrupt collapse.²⁰ The company even failed to ensure that the most basic of warning systems, a siren, worked on the day.²¹

Between June 2018 and the date of the dam failure in January 2019, there were many more signs of increasing risk which the company chose to ignore or addressed inadequately. For example, the company disregarded information provided by piezometers²² and a radar which indicated growing risks (e.g. increasing water levels, and water movement, within the tailings) in the period immediately preceding the collapse. The company also minimised the potential aggravating effects of additional water flowing into the dam from an upstream spring.²³ In fact, the company performed detonations which it knew could increase the risk of liquefaction, including on the day of the dam rapture itself.²⁴

Role of the auditors: The German auditing company Tüv-Süd, through its Brazilian subsidiary Tüv-Süd Bureau de Projetos e Consultoria Ltda., was contracted by Vale as an external technical advisor. Tüv-Süd is a multinational technical inspection and certification company with operations in over 1000 locations across the globe and annual revenues of over 2.5 billion Euros.²⁵

While Tüv-Süd initially operated in a consortium with Brazilian engineering company Potamos, inquiries by the Parliamentary Committee of Inquiry of the Minas Gerais legislature (PCI) revealed that following disagreements between Vale and Potamos in March 2018, it was decided that only Tüv Süd would continue to oversee Vale's actions to increase the safety of the dam.²⁶

Tüv-Süd Bureau de Projetos e Consultoria Ltda was at the time also working for Vale as an internal consultant.²⁷ In internal communications made public in February 2019 by Jornal Estado de Minas, a Tüv Süd expert, Makoto Namba, admits to Tüv-Süd colleagues that the dam had failed to achieve the safety factor of 1.3 and that, as a result, they could not sign the dam's "Declaration of Stability Condition". He goes on to say that they would have a meeting with Vale managers the next day and that these people would, as always, pressure them to sign the declaration. In June 2018, Tüv Süd signed the declaration. While Tüv Süd only reached a safety factor of 1.09, the company explained that it deemed this factor satisfactory as it would be above 1.05, which it now understood to be an acceptable minimum safety factor for the dam.²⁸ This action would later give rise to criminal charges against the relevant employees for "ideological falsehood" (a form of "misrepresentation" - see below).

Disclosure failures: Reports previously produced by the Tüv Süd-Potamos consortium that contained information about the poor safety condition of Dam 1 were not referenced in the

²⁰ | The company knew this because it was expressly indicated in the company's latest Emergency Action Plan for Mining Dams (PAEBM). PCI, p. 120. While evidently irresponsible, human structures in the way Vale was maintaining downstream of the mine were not forbidden by the law at the time.

²¹ | The siren system had already failed in at least two emergency simulations performed by the company just months before the collapse, indicating that the company both knew the system was not working and did nothing to fix it. PCI, p. 121-122.

²² | Devices for monitoring stability of earth fill dams and embankments.

²³ | PCI, p. 91, 105 and 129.

²⁴ | Detonations were expressly discouraged in the June 2018 Periodic Dam Safety Review. PCI, p. 122. See also comments on this in the Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 50.

²⁵ | In 2019, the company declared revenues of 2.6 billion Euros, 41 per cent of which were made outside of Germany <https://www.tuvsud.com/en/about-us/why-choose-tuv-sud>

²⁶ | PCI, p. 92 and 95-96.

²⁷ | Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 40. Also, Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020.

²⁸ | This new safety factor had already been indicated by Potamos after conducting additional studies in May 2018. Based on this value, Potamos had placed Dam 1 in the "orange zone" of the risk graph (next to the "red zone"), with a possibility of rapture far above what was previously accepted by international best practice standards and Vale itself. PCI, p. 96-97 and 161. Tüv Süd issued this declaration again in September 2018. PCI, p. 90.

“Periodic Dam Safety Review” submitted in June 2018. From evidence collected by the PCI, it appears that this information was withheld on Vale’s request, with the express purpose of concealing that information from Brazil’s National Mining Agency (ANM) and the State’s Secretary for the Environment and Sustainable Development (Semad).²⁹

The installation of the 15th deep drain caused a hydraulic fracturing accident that led to the overflow of mud and pressurized water which, despite its seriousness, the company chose not to declare to ANM. According to the PCI, at least four Vale engineers aware of the incident should have triggered a protocol on the basis of which the incident should have been reported immediately to ANM and Civil Defence.³⁰ From that moment on, the company abandoned the installation of the remaining drains (which were part of Vale’s chosen course of action for improving the safety of the dam).

Vale did not inform its employees and contractors that those who were in the administrative areas of the mine would have less than a minute to escape. Even worse, the company did not reveal that, based on the latest Emergency Action Plan for Mining Dams (PAEBM), this time would not even be enough to escape the sludge in the event of an abrupt dam rupture.³¹

The larger population had never been informed about the risks either. The PCI heard how only in December 2018 (just a month before the rupture), the company delivered to the local residents of Córrego do Feijão instructions on an escape route.³²

LESSONS FOR THE TREATY

Cost was a paramount criteria in Vale’s choice of risk mitigation measures. In its decision-making, the company was guided by a desire to keep costs to a minimum while still striving to obtain the necessary certificates to further its economic interest. Vale did not consider preservation of human life, safety and protection of the environment, as overriding priorities and, as a result, failed to put in place risk mitigation measures that were commensurate with the severity of the potential harm. The case illustrates how companies typically choose risk mitigation measures that are cheaper than other more effective options to prevent harm in their quest to maximise profit. Even worse, in weighing up the cost of reparation against the cost of prevention, companies often decide that it is cheaper to pay out compensation in the case of harm (an event that is nonetheless uncertain) than to prevent it (a certain cost).³³ This is contrary to a human rights due diligence approach that 1. Sets a minimum expected standard of conduct that corporate profit-making calculations cannot compromise and; 2. Establishes prevention of harm as its paramount function and goal.

German company Tüv Süd and its Brazilian subsidiary, on their part, also failed to prevent the disaster when they could have and had a professional responsibility to do so. Company employees knew the dam was unsafe but nevertheless signed the

²⁹ | PCI, p. 97-98.

³⁰ | PCI, p. 98. See also Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 48.

³¹ | Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 51.

³² | PCI, p. 198.

³³ | See analysis in 270 Deaths Foretold: Report of the International Independent Commission of Inquiry on the Impact of the January 25, 2019 Brumadinho Dam Collapse (from now on, International Independent Commission of Inquiry), p. 16, 32, 34.

“Declaration of Security Condition” giving in to the pressure from Vale.³⁴ This case demonstrates the serious consequences for human safety of an auditing industry that lacks independence from its corporate clients and puts its business interests ahead of professional integrity.³⁵ At the same time, it shows very clearly that having a licence or permit from government authorities does not always guarantee responsible behaviour, and should therefore not be used to automatically exempt a company from liability.³⁶

Finally, the case also serves to show the importance of ensuring timely disclosure of information to people at risk of harm. This is critical to both reduce risks through the necessary awareness raising and emergency preparedness and to allow people to raise concerns with the company itself or relevant regulatory authorities at a time when it still matters.

In light of the above account, the treaty should:

- Retain provisions in **Art 6.1** and **6.2(b)** that entrench a corporate duty to prevent and make prevention the main goal of human rights due diligence.

- Retain provisions in **Art 6.1** and **6.2** concerning mandatory human rights due diligence and make sure it is clear that the obligation to conduct human rights due diligence extends to a business enterprise’s global operations and entire value chain.
- Incorporate a new provision under **Art 6**, which requires States Parties to ensure that technical risk assessments of specific high-risk activities or products are done by qualified and independent third parties with no conflicts of interest.
- Make clear in a relevant part of the treaty (which could be **Art 6** or a new article of the treaty dealing specifically with public monitoring and enforcement) that a finding of compliance by a public authority will not in and of itself absolve a company of liability.
- Incorporate a new provision under **Art 6**, which requires States Parties to ensure individuals and communities at risk of harm from certain hazardous products, processes and activities are made aware of the risks, have full and timely access to all relevant information concerning these risks and the means of protecting themselves in the event of imminent harm.³⁷

³⁴ | A conclusion that is shared in the Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 39 and 51.

³⁵ | ECCHR: The Safety Business: Tüv Süd’s role in the Brumadinho Dam Failure in Brazil. Case Report (October 2019). According to Brazilian prosecutor, Vale operated a “whip and carrot” system with external experts. Anyone who opposed the pressure to certify dams was excluded from future contracts. Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020. Concerns over Tüv Süd’s business interests trumping professional integrity were also raised by the National Congress’ Chamber of Deputies Parliamentary Commission of Inquiry. See Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 39.

³⁶ | As the PCI expressly states: “The existence of valid environmental licensing or the performance of a legitimate activity does not exempt the perpetrator of environmental degradation from the duty to repair”. PCI, p. 180 (author’s translation).

³⁷ | Based on its experience supporting victims of dam ruptures in Brazil, Movimento dos Atingidos por Barragens recommends that both the alert and evacuation plan and rescue plan be jointly elaborated with the local population. Movimento dos Atingidos por Barragens: O Lucro Nao Vale a Vida (February 2019), p26.

REGULATORY DEFICIENCIES

Regulatory Framework: State-level Normative Resolution (DN) No 1 of March 22, 1990, requires that mining projects and dams, tailings piles and the reuse of mineral goods disposed in dams are subject to environmental licensing.

State-level law 15,056 establishes dam safety verification rules. DN No. 62 regulates the categorisation of dams, responsibilities of the operator and the licensing process.³⁸ This rule was modified in 2005 by a new DN ordering independent technical safety audits of all dams and regular submission of reports to the regulator. A new DN later established a requirement to submit to the State Environmental Foundation (Feam) a “Declaration of Stability Condition” based on each Technical Safety Audit Report.

Federal Law No. 12,334 of 2010 established the National Dam Safety Policy (PNSB) and created the National Dam Safety Information System. This had the aim of putting in place a more centralised system of dam oversight across the country. The law also established an obligation to produce a Dam Safety Plan and an Emergency Action Plan for Mining Dams (PAEBM), which was mandatory only to high associated potential damage dams.³⁹ The law has been amended on September 30, 2020, extending this obligation to medium associated potential damage dams, high risks dams and to all dams projected for the accumulation or disposal of mining tailings.⁴⁰ Inspection of mining dams was placed under the responsibility of Brazil’s National Mining Agency (ANM) alongside inspection responsibilities of environmental bodies that form part

of the country’s National Environment System (Sisnama).⁴¹

Safety requirements for mining dams that use the “upstream method” were tightened after the 2015 collapse of the Vale/BHP-owned dam in Mariana.⁴² In May 2017, the National Registry of Mining Dams and the Integrated Mining Dam Safety Management System (SIGBM) were created. Many subsequent norms were passed aimed at strengthening regulatory conditions for tailings dams.⁴³

Historical irregularities: On examining the licensing history of Córrego do Feijão mine, the PCI found a number of irregularities, including information gaps, leading it to believe that the mine may have operated at times without a proper licence.⁴⁴ The PCI refers to a complaint filed by a national MP against Vale and Semad alleging a series of irregularities that could have contributed to the January 2019 dam rupture. These include: the lack of environmental licences of four dam elevations between 2001 and 2007 (despite the fact that from 2000 each elevation required specific approval⁴⁵), the lack of environmental licence for the Dam structure itself during the years 2006 and 2007, and the signature of a corrective licence to address these anomalies by a government official who was subsequently hired by Vale to act in the area of environmental licensing.⁴⁶ The PCI concluded that the licensing history of Dam 1 and the Córrego do Feijão mine was concerning and required further investigation by the competent bodies.

³⁸ | PCI, p.34.

³⁹ | PCI, p. 37. It is important to note that, at the time, the plan was not mandatory for the entire dam and it was measured according to the high associated potential damage of the dam.

⁴⁰ | Via law n. 14,066/2020.

⁴¹ | PCI, p.36.

⁴² | PCI, p.38.

⁴³ | PCI, p. 39-40.

⁴⁴ | PCI, p. 65-70.

⁴⁵ | According to DN Copam No 43 of 2000. Vale accepted this irregularity, and explained that it sought to address it by submitting a “corrective licensing request” to Semad. See PCI, p.

⁴⁶ | PCI, p. 73-74.

Irregularities immediately before the disaster:

In 2015, Vale applied to Semad for an environmental licence to, in addition to expanding the Córrego do Feijão Mine, decommissioning Dam 1 with the recovery of iron ore from the tailings. This licence was granted on 11 December 2018 by the Specialized Technical Chamber of Mining Activities of the State Council for Environmental Policy (Copam). After investigating this process, the PCI noted a series of anomalies which included the apparent downgrading of the project, for licensing purposes, from a category 6 to a category 4 (which carried less stringent requirements); the lack of participation in the process of civil society groups and the holding of a pre-meeting between the company and members of the licensing body ahead of the latter's decision. The PCI concluded that the process of granting the decommissioning licence raised sufficient concerns to warrant further investigations.

Regulatory incapacity: Dam 1's last environmental licence was issued in 2011. The last inspection carried out by State-level delegates of the ANM on the dam structure took place in 2016 (three years before the disaster). After that, the controls were carried out through the technical declarations of stability and biweekly inspection extracts compiled and submitted by the company itself. According to an official interviewed by the PCI, none of these extracts alerted to any type of problem.⁴⁷

ANM employees told the PCI that the agency did not have the capacity to meet the scale of its mandate. They explained that the body was underfunded, had only 3 to 4 inspectors to oversee more than 300 dams and lacked capacity to verify information submitted by the companies. Vacancies had not been filled since 2010 and mining fees supposed to fund their ac-

tivities had not been adequately allocated to them.⁴⁸ While SIGBM was a good tool, they explained that it relied on information inputted by the dam operator itself and its effectiveness was therefore fully dependent on the extent of corporate transparency.⁴⁹

The PCI found that other agencies responsible for environmental control in the country had not received their due share of funding from mining fees.⁵⁰ The PCI heard how Sisema (State System for the Environment and Water Resources), suffered from severe structural and staff shortages and was incapable of carrying out its mandate in relation to the control, monitoring and inspection of mining activities, including dam safety checks.⁵¹

⁴⁷ | PCI, p.63.

⁴⁸ | As declared by an ANM official interviewed by the PCI, who explained that in 2019, the agency should have had a budget of R \$ 250,000,000.00 annually, due to the payment of Cfem. What was transferred in 2018 was R \$ 65,000,000.00. That is, a quarter of what should be transferred by law. See PCI, p.52.

⁴⁹ | PCI, p.51-52.

⁵⁰ | A fee for Control, Monitoring and Inspection of Research, Mining, Exploration and Use of Mining Resources Activities (TFRM instituted by Law 19,976, of December 27, 2011), which according to a reform of 2018 should have been allocated exclusively to Semad, IEF, Feam and Igam, were found to have been used in 2018/19 by the State Secretariat of Finance - SEF -, which is not the recipient of TFRM. In addition, it appears that while Semad was the recipient of just over 20% of fee resources, no amount was executed by the other entities of Sisema - Feam, IEF and Igam. See PCI, p.55.

⁵¹ | PCI, p.55-56.

LESSONS FOR THE TREATY

The mine's licensing history seems to be plagued with regulatory irregularities for which nobody appears to have been held accountable. Brazil's automatic response to dam disasters is to pass new laws.⁵² While there is a need to strengthen applicable normative frameworks, much of the problem still relates to the incapacity or unwillingness of government bodies to enforce existing regulations. The Brazilian Movement of People Affected by Dams (Movimento dos Atingidos por Barragens or MAB) explains that Brazil does not have a public oversight system over dam safety capable of working with independence.⁵³ Partly as a result of this, the system overly relies on corporate self-monitoring and information. However, regulatory bodies do not have the capacity to verify this information.⁵⁴

Even after the Brumadinho disaster and the passing of Law No. 23,291 to deal more vigorously with dam safety, government officials were pointing out that they lacked the necessary number of technicians to perform the functions that the new law required.⁵⁵ Brazil's National Human Rights Council also pointed out in a report on the

Brumadinho dam collapse that in the time between the Mariana and the Brumadinho disasters the state actually devoted less resources to the inspection of dams and weakened the legislative framework for environmental licensing.⁵⁶

In light of the above account, the treaty should:

- Include provisions requiring States Parties to establish robust regulatory bodies that are capable of overseeing corporate activities effectively and independently, including by providing them with sufficient levels of financial and technical resources. This could be included in **Art 6** or preferably in a new article on State Monitoring and Enforcement.
- Require States Parties to investigate irregularities and allegations of misconduct by public servants tasked with regulating, monitoring and overseeing corporate activity, sanction instances of misconduct that led or could have led to human rights violations or abuses and repair the harm resulting from any violations or abuses. This could be included in **Art 4** and a reference to sanctions could also be included under **Art 6** or a new article on State Monitoring and Enforcement (in relation to failures of regulatory agencies to perform their duties in contexts such as licensing).

⁵² | There have been six dam bursts in the past 10 years, causing deaths of workers and others. International Independent Commission of Inquiry, p. 10. As a response to the disaster, a number of additional laws and regulations were passed, including Law No. 23,291 of 25 February 2019 which institutes the National Dam Safety Policy (Pesb). The law deals with environmental licensing and inspection of dams in a rigorous and detailed manner. ANM also passed a resolution in February 2019 banning the use of the "upstream method" in the entire country. It also prohibited the presence of facilities that involve human presence in the areas directly downstream from tailings dams. See PCI, p. 40-41.

⁵³ | Movimento dos Atingidos por Barragens: O Lucro Nao Vale a Vida (February 2019), p.25.

⁵⁴ | Movimento dos Atingidos por Barragens: O Lucro Nao Vale a Vida (February 2019), p.25. See also, ECCHR: The Safety Business: Tüv Süd's role in the Brumadinho Dam Failure in Brazil. Case Report (October 2019).

⁵⁵ | PCI, p. 56.

⁵⁶ | National Human Rights Council. Emergency Mission Report to Brumadinho following Vale S.A.'s B1 Dam collapse (February 2019), p. 21.

- Highlight the importance of guarantees of non-repetition as an essential form of reparation, which must go beyond changes in the law, to include changes in policies and practices. This could be added as a new paragraph under **Art 4**.

THE STRUGGLE FOR REMEDY

Broad range of harms: Those affected by the mine rupture suffered a multiplicity of harms, including physical, moral, economic, social, cultural and environmental harms, for which a broad range of short and long-term reparation measures should be provided.⁵⁷ The State's involvement in relief efforts, including rescue operations, health monitoring and water testing, also significantly impacted and will continue to impact public finances and the ability of public bodies to provide essential services to other sections of the population.⁵⁸

Differentiated impacts: Many of these impacts affected certain groups disproportionately. For example, the abrupt and severe interruption of traditional social, educational and cultural activities particularly affected **children** at a sensitive stage of their emotional, cognitive and behavioural development. The devastation of the Paraopeba River also affected the **Indigenous people** of the Pataxó Naô Xohã village for whom the river is sacred. The PCI noted how the particular needs of the indigenous community were initially not contemplated for purposes of reparation, including not acknowledging their special relationship with the river.⁵⁹ The **peasant community** of the Pátria Livre camp who were also affected by the dam rupture found that they could not obtain recognition as affected, and therefore access the court-ordered emergency assistance, because they could not show evidence of their address, since they do not possess formal land titles.⁶⁰ Besides, five **Quilombola communities**

⁵⁷ | PCI, p.129 onwards.

⁵⁸ | PCI, p. 148 onwards.

⁵⁹ | An agreement reached between the State Attorney General and the company in the context of a legal action initiated by the former determined a specific package of measures to redress the harm caused to the Indigenous community, which includes certain particularities such as an enhancement in the health care provision, the technical support of an anthropologist and the implementation of a specific impact assessment. PCI, p. 211-12.

⁶⁰ | PCI, p. 208.

(runaway slaves communities) were affected by the mine rapture, and one of them has not even been recognized by the company that denies their dependency from the river.⁶¹

Civil Liability: Given the nature of the wrongs committed by Vale, the PCI reached the conclusion that the company is **absolutely liable**. This means that there is no need to prove guilt, fault or a lack of due diligence on the part of the company. Evidence of the damage and that the damage was caused by the company is sufficient for a finding of liability. Vale is also liable for compensation to its workers and their families under occupational accidents legislation. Since the day the dam broke, many different public bodies and unions filed civil actions seeking reparations on behalf of those affected by the disaster, or a sub-set of those affected such as the workers. These actions resulted in a number of out of court agreements with Vale, comprising a variety of reparation measures and payments.

Participation of affected people: The PCI warned against replicating some of the serious shortfalls of the reparation system set in place to address the harms resulting from the 2015 Mariana disaster. These included Vale attempting to control all reparation actions,⁶² affected people having no say in the design and establishment of the body created to administer the reparations process (the Renova Foundation) and the reparation proposals themselves and the lack of independence of the Renova Foundation which was managed by the companies

who perpetrated the abuses.⁶³ These shortcomings led to widespread dissatisfaction, delays and the need to continuously adjust the system to improve independence and participation. In this regard, while praising an agreement reached in July 2019 between the Minas Gerais' Public Defender and Vale as a useful instrument to assist people in their individual negotiations, the PCI also noted criticisms about a lack of consultation with MAB (which includes representatives of people affected by the Brumadinho crime).⁶⁴ As explained by one of MAB's lawyers, Vale pursued a strategy of individual negotiation and settlement to bypass collective processes and impacts.⁶⁵

Civil action in Germany: Shortly after the disaster, a German lawyer filed a legal claim against Tüv Süd before the Munich Regional Court on behalf of 1,048 family members of victims and several Brazilian municipalities. The claim alleges a breach of Tüv Süd's duty of care and seeks damages for manslaughter, bribery and violation of the duty of supervision.⁶⁶

⁶¹ | In a technical report, the Federal Public Prosecutor's Office (MPF) defends the need of including Quilombola community Pontinha in all emergency actions carried out by the company. The document concludes that Vale, by not recognizing the traditional way the community uses the land, is violating their constitutional rights.

The document is available at: http://www.mpf.mp.br/mg/sala-de-imprensa/docs/2019/parecer-tecnico-1498_comunidade-quilombo-la-de-pontinha.pdf

⁶² | PCI, p. 194.

⁶³ | PCI, p. 202-203.

⁶⁴ | PCI, p. 125.

⁶⁵ | See, for example, the analysis on how Vale's economic power has historically influenced the socio-economic and political life in the region and how it has hindered the access to justice of the affected communities. <https://www.ufjf.br/poemas/files/2017/04/Milanez-2019-Minas-n%C3%A3o-h%C3%A1-mais-versos.pdf> The executive summary in English is available at: <http://www.ufjf.br/poemas/files/2019/04/Minas-is-no-more-executive-summary-final.pdf>

⁶⁶ | Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020. See also Queixa contra TÜV Süd avança na Alemanha, 18 Feb 2020. <https://www.dw.com/pt-br/queixa-contra-t%C3%BCv-s%C3%B-Cd-avan%C3%A7a-na-alemanha/a-52423606>

LESSONS FOR THE TREATY

The scope and nature of harms caused by the Brumadinho disaster demonstrate the broad range of human rights abuses that can result from corporate wrongdoing and the importance of the concept of adequate and effective reparation currently reflected in Art. 4.2(c) of the draft treaty (a reduced version of Art. 4.5 from the first draft). This was recognised by the PCI, which emphasised the importance of full reparation when analysing gaps in some of the out of court agreements.⁶⁷ The case also illustrates the impact on public finances of disasters of this nature and the repercussions on the delivery of other services essential for the realisation of human rights. The different and unique way in which the dam disaster impacted children, Indigenous peoples, Quilombola communities and the landless peasant community also underscores the importance of identifying and responding to specific, differentiated impacts and needs in reparation processes. Finally, the Mariana experience and some of the Brumadinho negotiations also show that a lack of independence and/or effective participation of affected people in reparation programs can lead to inadequate remedy as well as further victimisation and abuse.

The legal grounds for Vale's liability under Brazilian law is absolute liability (which in civil law systems is generally called "objective" liability). Vale is also liable to its

workers under various labour law provisions. This demonstrates the importance for the treaty to ensure that while establishing new grounds for corporate liability based on due diligence failures, it also preserves existing liability regimes that may provide stricter or additional basis for liability, which may be fairer under the circumstances.

German-based auditing company TÜV Süd had control or supervision over the activities of Bureau de Projetos e Consultoria Ltda., knew that the dam was unsafe through its engineers who travelled to Brazil to supervise the company's Brazilian operations and could have taken action to prevent the disaster.⁶⁸ As argued in both the civil and criminal complaints against the company (see below), it also had a duty to prevent the disaster. This case illustrates how business enterprises in a position of control or supervision over the activities of others often fail to take action to prevent harm when they could have, while ripping off the benefits of those activities.

The role of German-based TÜV Süd in the disaster also demonstrates the importance of ensuring foreign entities involved in human rights abuses can also be held accountable. The possibility to sue them in their home state not only expands the avenues for reparations available to victims but also closes gaps in accountability that

⁶⁷ | The PCI highlighted the importance of the concept of full reparation throughout its report (e.g. at p.201 and 205), and raised concerns about a number of harms for which no reparations were being offered such as the lack of compensation in a July 2019 agreement between the Public Ministry for Labour and Vale for damages (particularly moral harm) suffered by surviving workers who were at the site at the time of the rupture (other than three years wage stability). PCI, p. 185.

⁶⁸ | Prosecutors in Brazil and Germany are investigating TÜV Süd. 15 Feb 2020. The Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies found that Mr. Christopher Meier, a TÜV Süd manager, travelled to Brazil to attend a meeting with Vale employees just weeks before the company's decision to sign the "Declaration of Stability Condition". The Commission concluded that the decision to sign the declaration was taken after this meeting and that the German manager played a decisive role in this decision. Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 52-53.

can derive from the fact that a company is located outside a jurisdiction (in this case, Brazil) and therefore beyond the reach of host state courts and other authorities.⁶⁹

In light of the above account, the treaty should:

- Incorporate a few more examples to the list of reparations under Art. 4.2(c) (former **Art 4.5(b)** has been suppressed from the current draft) to better reflect the range of immediate and long-term measures that are often needed to redress the harm caused by large-scale environmental and other corporate-induced disasters, such as comprehensive emergency assistance and long-term health (both physical and psychological) monitoring.
- Establish the principle that reparation measures must take into account the differentiated impacts of human rights abuses on specific groups of people and respond adequately to these impacts and their particular needs. This could be inserted as a stand-alone provision under **Art 4**.
- Ensuring that any provisions on liability based on due diligence failures are in addition, and without prejudice, to existing liability regimes that may impose stricter or alternative forms of liability.

- Establish the principle under **Art 4** (or in the Preamble) that victims, and victims' needs, must remain at the centre of all reparation processes.
- Include a new provision under **Art 4** that lays out human rights-based principles for mass reparation processes and mechanisms, which include full participation of those affected, transparency and independence. In the case funds for collective reparation are established, the affected communities and public institutions should be the ones in charge of co-managing them.
- Insert a line in **Art 4.2(f)** (which refers to access to information) to include information related to proposed reparation measures for human rights violations or abuses.
- Retain the provisions on liability of a business enterprise for its failure to prevent others from causing or contributing to human rights violations under **Art 6.6** (to capture relationships of control and supervision embodied by the Tüv Süd - Bureau de Projetos e Consultoria Ltda. relationship).
- Retain existing provisions under **Art 9 (former Art 7)** on adjudicative jurisdiction that establish the jurisdiction of the courts of a place where a company is domiciled (the company's home state) to hear civil claims against this company (to secure the possibility of bringing claims against foreign companies in their home states as is currently occurring with the legal claim against Tüv Süd in Germany).

⁶⁹ | This is a challenge that affected the investigations carried out by both the Federal Police and the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies. As explained by the Parliamentary Commission of Inquiry, Tüv Süd refused to collaborate with their investigations. The company's representative in Brazil, Chris-Peter Meier, left for Germany after the disaster and never returned, making it impossible for the Commission and the Federal Police to take his testimony, and forcing Commission members to travel to Germany. Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 47 and 52.

CRIMINAL LIABILITY

Criminal liability: Many of the actions and omissions at the core of the Brumadinho disaster amount to crimes under Brazilian legislation, including homicide, bodily injury, damage to property, “ideological falsehood” and use of false document under the Penal Code and qualified pollution under Law No. 9,605 (art. 54.2).⁷⁰

Vale employees, in connivance with Tüv Süd employees, knowingly omitted the adoption of measures to increase the level of safety of the dam and reduce the risk to people, and chose instead less effective responses.⁷¹ Vale also knowingly concealed information from the authorities and failed to trigger emergency procedures when they were due, all of which could have led to timely preventive interventions.⁷² Tüv Süd employees signed the “Declaration of Stability Condition” on a safety factor which was much lower than that prescribed by international best practice standards and manipulated the assessment methodology so they could reach the desired result.⁷³

After examining the facts of the case, the PCI reached the conclusion that key Vale and Tüv Süd employees intentionally committed the crimes mentioned above (on grounds of *dolus eventualis*).⁷⁴

Criminal procedures in Brazil: In February 2020 a Brazilian court charged 5 employees of Bureau de Projetos e Consultoria Ltda. and 11 Vale employees, including Vale’s former CEO, with wilful homicide and environmental crimes.⁷⁵

Criminal procedures in Germany: Munich’s public prosecutor is also investigating Munich-based Tüv Süd for its role in the Brumadinho disaster.⁷⁶ On 15 October 2019, five Brazilian victims and the organisations Misereor and ECCHR filed a criminal complaint (private prosecution) against a top employee of Tüv Süd before the Munich prosecutor.⁷⁷ The organisations accuse the Tüv Süd employee of negligence in “causing a flood”, negligent homicide and private bribery.

The organisations also filed administrative charges against the company Tüv Süd before the Public Prosecutor’s office in Munich. In Germany, companies have a supervisory duty to prevent criminal offences from being committed within a company. The organisations allege that despite obvious safety risks, Tüv Süd did not prevent its Brazilian subsidiary from issuing the dam stability declaration.⁷⁸ If found guilty, the company could be fined under the Administrative Offences Act,⁷⁹ although the maximum fines that can result from this procedure are relatively small and therefore not sufficiently dissuasive, especially for companies of the size and earnings of Tüv Süd.⁸⁰

⁷⁰ | PCI, p. 154-155.

⁷¹ | PCI, p. 154-161. See also Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 39-53.

⁷² | PCI, p. 154-161. See also Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 48.

⁷³ | PCI, p. 161-162. See also Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 39 and 51-53.

⁷⁴ | See PCI, p. 166-174.

⁷⁵ | Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020

⁷⁶ | See Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020

⁷⁷ | ECCHR, Misereor, Associaçao Comunitaria da Jangada and International Articulation of People Affected by Vale: “Deadly Dam Breach Near Brumadinho: Affected persons file Complaint against Tüv Süd in Germany”, 17 October 2019. See also Prosecutors in Brazil and Germany are investigating Tüv Süd. 15 Feb 2020

⁷⁸ | ECCHR: The Safety Business: Tüv Süd’s role in the Brumadinho Dam Failure in Brazil.

⁷⁹ | The key provision establishing the (non-criminal) liability of corporate entities is found here: https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0156. See further, ECCHR: The Safety Business: Tüv Süd’s role in the Brumadinho Dam Failure in Brazil. Case Report. (October 2019).

⁸⁰ | With 23,000 employees worldwide according to the Summary Report of the Parliamentary Commission of Inquiry of the National Congress’ Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p. 47.

LESSONS FOR THE TREATY

The seriousness of the corporate crimes involved in this case welcomes the new art. 8.9, which goes beyond a reduced set of crimes. The role of Tüv Süd in the disaster also demonstrates the importance of holding corporate entities criminally or administratively liable not just for the commission of a crime, but also for their participation or complicity in the commission of these crimes (art. 8.11).

German prosecutors have begun to investigate the case and this is welcome, but home states not always choose to investigate the alleged criminal conduct of their own companies abroad. As this case demonstrates, home state action is critical to avoid impunity of foreign companies who play a critical role in the commission of a crime in a host state. The case also highlights the importance of robust and agile cross-border legal assistance between Brazilian and German prosecutors and other officials as they advance procedures within their countries.

Under Brazilian law, companies as such cannot be held criminally liable. Only individuals can. The inability to hold legal entities as such criminally liable is a feature of many legal systems. Yet, this allows companies to “sacrifice” their own managers and employees and continue business as usual, or even worse to manipulate internal structures and systems so that no one individual appears responsible and nobody (neither company nor individual) can ultimately

be held criminally liable. The prospect of corporate criminal liability provides a level of deterrence, censure and condemnation that civil law cannot. It should work alongside (and not to the exclusion of) individual criminal liability and civil liability.

Corporate criminal liability is not possible in Germany either. To address legal systems such as Brazil’s and Germany’s whereby companies cannot be held criminally accountable, Art 6.7 of the draft treaty currently contemplates “administrative liability” as an acceptable alternative to criminal liability for the criminal conduct of legal entities. Germany’s Administrative Offences Act under which Tüv Süd is currently being investigated is a good example of this alternative. However, the maximum penalties that companies can expect through this system are very small and therefore neither proportionate nor effective as a deterrent. Given the seriousness of the crimes potentially at stake, the treaty must clarify that administrative sanctions – if this is the route some States take - must be of a nature and magnitude commensurate with the severity of the offence.

The above account points to the need for the treaty to:

- Require States Parties to establish the criminal or administrative liability of legal entities in relation to a broader list of crimes that goes beyond crimes under international law and includes, for example, environmental crimes. **Art 8.9** could also refer to human rights violations or

abuses that constitute crimes under international criminal law, and those connected to international labour law, international humanitarian law and international environmental law. An appendix to the treaty could draw a non-exclusive list of relevant crimes.

- Incorporate a new article to the draft treaty addressing criminal jurisdiction specifically and including, as one of the basis of criminal jurisdiction, the State where a transnational company is domiciled or headquartered (the home state).
- Retain, and strengthen where needed, provisions under **Art 10** on Mutual Legal Assistance.



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