



INFOGRAPHIC

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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INTRODUCTION

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). Vale is a publicly listed Brazilian multinational mining company with operations in every continent of the world. In 2018, the company declared net operating revenues of over US\$ 36.5 billion, making it the fourth largest mining company in the world that year.

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”.

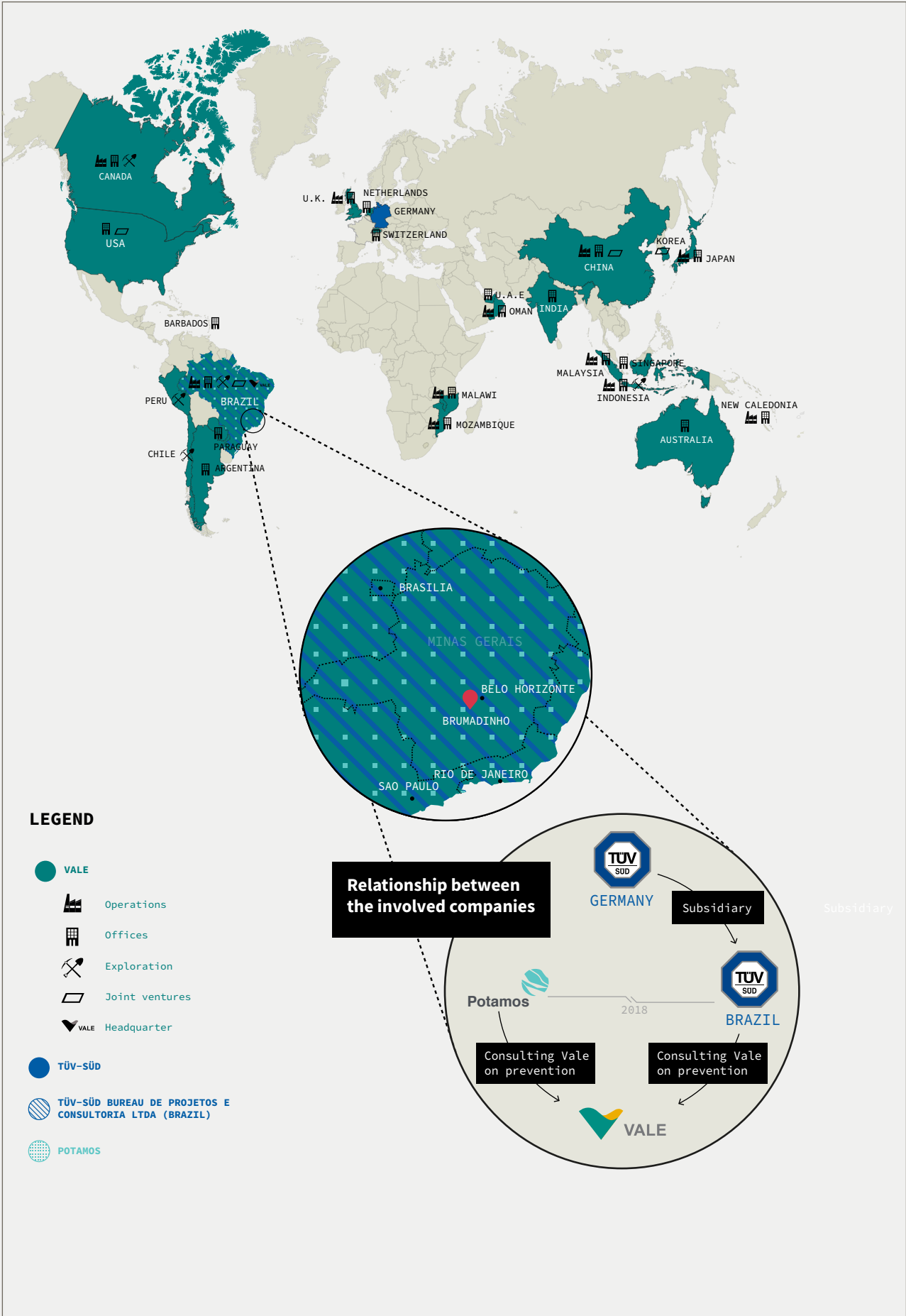
On 25 January 2019, Dam 1 broke, sending approximately 12 million cubic meters of mining waste down the Ferro-Carvão River. The waste buried the river along with more than 130 hectares of vegetation, houses, plantations, animals and a hotel. The sludge advanced 220 km along the Paraopeba River, irreversibly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

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.

This infographic aims to analyse the second revised draft of the legally binding instrument on transnational corporations and other business enterprises with respect to human rights in light of the Brumadinho case. It aims at highlighting how the second revised draft would serve this case or what additional provisions would need to be added.

CASE MAP



PREVENTION



RISK IDENTIFICATION:

In November 2017, Brazilian engineering company Potamos informs Vale of worrying value for the dam's "safety factor" of 1.06 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. Under this value, a "Declaration of Stability Condition" necessary for the mine to remain in operation could not be issued. The company decided to ignore many signs of increasing risk, such as information provided by piezometers and a radar indicating greater risks.

Cost was a paramount criteria in Vale's choice of risk mitigation measures. As mitigation can be more cost-effective for business enterprises, the corporate duty to prevent must remain the main goal of human rights due diligence in **Arts. 6.1 and 6.2**.

Retain provisions in **Art 6.1 and 6.2** on the obligation to conduct human rights due diligence throughout a business enterprise's global operations and entire value chain.



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 discarded some of the options recommended by Potamos providing greater protection, although more expensive and slower than other alternatives. The company chose instead to implant 30 Deep Horizontal Drains, a cheaper measure advised by Tüv-Süd.

This case demonstrates the serious consequences of an auditing industry that lacks independence from its corporate clients and puts its business interests ahead of professional integrity.



ROLE OF THE AUDITORS:

While Tüv Süd initially operated in a consortium with Brazilian engineering company Potamos, 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. Giving in to the pressure from Vale, Tüv Süd signed the declaration whilst only reaching a safety factor of 1.09.

Art. 6 should include a new provision ensuring that impact assessments are undertaken by independent third parties with no conflicts of interest and guarantee the full participation of possible affected communities, including their right **to say no**.





ACCESS TO INFORMATION:

Reports by the Tüv Süd-Potamos consortium about the poor safety condition of Dam 1 were not referenced in the “Periodic Dam Safety Review” submitted in June 2018 and were withheld on Vale’s request to conceal information from Brazil’s National Mining Agency (ANM) and the State’s Secretary for the Environment and Sustainable Development. The larger population had neither been informed about the risks. Only in December 2018, the company delivered to the local residents of Córrego do Feijão instructions on an escape route.

The timely disclosure of all information to people 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 before it is too late.

Arts. 4.2(f) and 6.3(e) on access to information are important and must be strengthened to make aware of any risks and also to facilitate access to justice.



REGULATION



REGULATORY AND MONITORING BODIES:

Employees from Brazil’s National Mining Agency did not have sufficient funds nor capacity to fulfil their mandate, with 3 to 4 inspectors having to oversee over 300 dams and unable to verify information submitted by the companies.

This case demonstrates the importance of having robust, properly funded and independent regulatory and monitoring bodies.

Arts. 6 on Prevention and **16.1** on Implementation should clearly outline this.



REMEDIES



DISPROPORTIONATE IMPACT ON CERTAIN GROUPS:

- Abrupt interruption of social, educational and cultural activities particularly affected **children** at a sensitive stage of their development.
- The devastation of the Paraopeba River affected the **Indigenous people** of the Pataxó Naô Xohã village for whom the river is sacred. This special relationship with the river was not initially taken into account in the reparation process.
- The **peasant community** of the Pátria Livre camp was not recognized as affected because they were unable to provide evidence of their address, as they do not hold formal land titles. The community was therefore denied access to the court-ordered emergency assistance.
- Five **Quilombola communities** (runaway slave communities) were affected by the disaster. One of them was not recognized by the company that denies their dependency on the river.



The case highlights the importance of responding to specific differentiated impacts and needs in reparation processes. **Art. 4.2c** on remedies and reparation should therefore provide for reparation processes to respond adequately to these differentiated impacts and needs.



Given the broad range of human rights abuses resulting from the Brumadinho disaster, **Art. 4.2(c)** should better reflect the range of immediate and long-term remedy measures needed to redress harm, such as comprehensive emergency assistance and long-term health (both physical and psychological) monitoring.

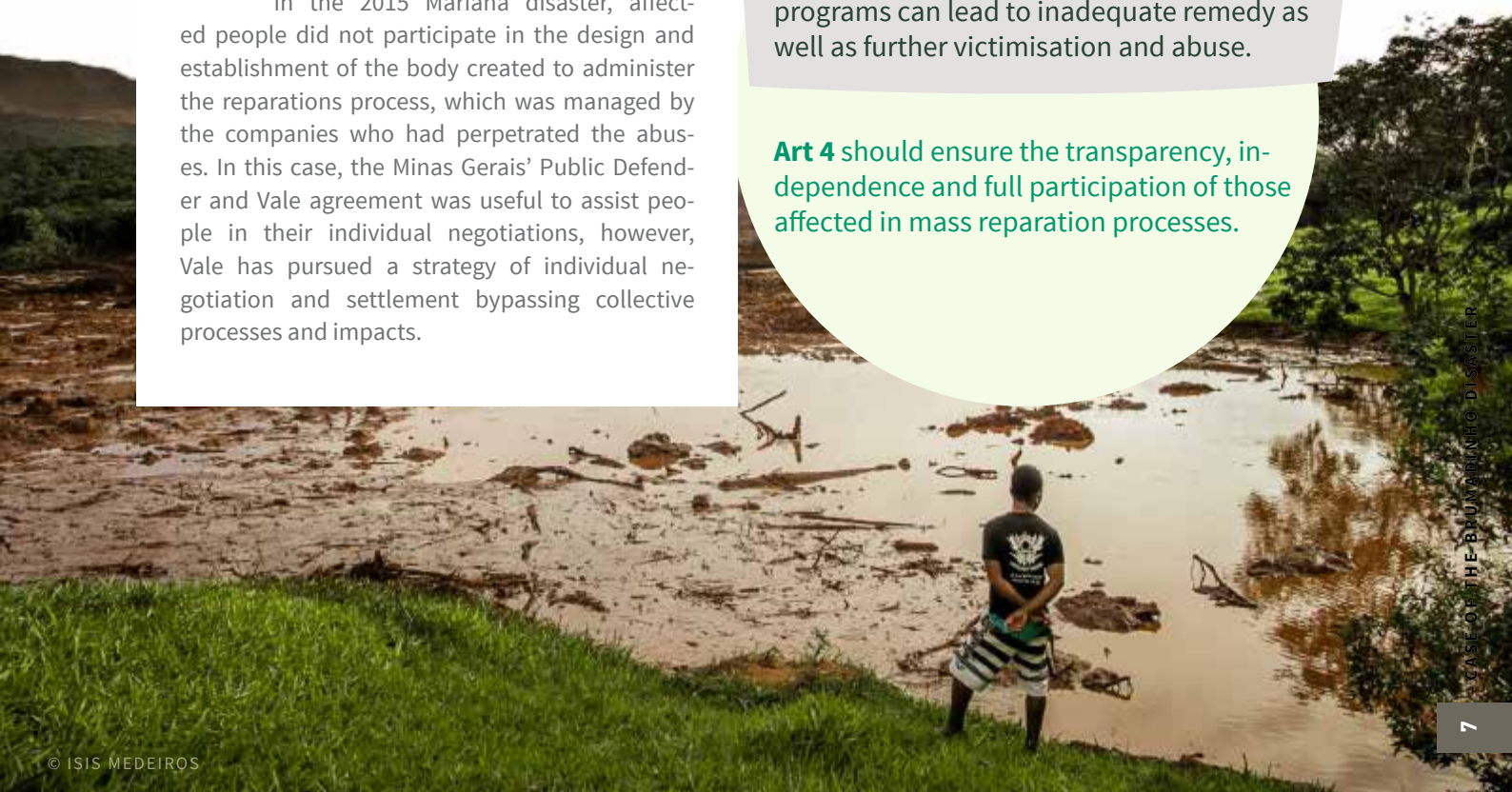


PARTICIPATION OF AFFECTED PEOPLE IN REMEDY AND REPARATION PROCESSES:

In the 2015 Mariana disaster, affected people did not participate in the design and establishment of the body created to administer the reparations process, which was managed by the companies who had perpetrated the abuses. In this case, the Minas Gerais' Public Defender and Vale agreement was useful to assist people in their individual negotiations, however, Vale has pursued a strategy of individual negotiation and settlement bypassing collective processes and impacts.

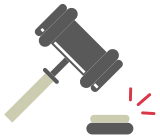
Some of the Brumadinho negotiations show that a lack of independence and/or effective participation of affected people in reparation programs can lead to inadequate remedy as well as further victimisation and abuse.

Art 4 should ensure the transparency, independence and full participation of those affected in mass reparation processes.



LIABILITY

The case highlights the importance of establishing the criminal or administrative liability of legal entities in relation to a broader list of crimes that includes, for instance, environmental crimes. An appendix to the treaty could draw a non-exclusive list of relevant crimes.



CIVIL LIABILITY:

The Minas Gerais Parliamentary Committee of Inquiry found that Vale was **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 determining liability. Vale is also liable for compensation to its workers and their families under occupational accidents legislation.

The “absolute liability” standard in Brazil demonstrates the importance for the treaty to ensure that while establishing new grounds for corporate liability based on due diligence failures, it should also preserve existing liability regimes that may provide stricter or additional basis for liability, which may be fairer under the circumstances. **Art. 14.3** is crucial in this sense.



Corporate criminal liability is not possible under both Brazil’s and Germany’s legal systems. Given the seriousness of the crimes potentially at stake, **art. 8.9** in the treaty clarifies that administrative sanctions must be of a nature and magnitude commensurate with the severity of the offence. If found guilty, Tüv Süd could be fined under the Administrative Offences Act in Germany, although the maximum fines that can result from this procedure are relatively small and therefore not sufficiently dissuasive.



CRIMINAL PROCEDURES IN BRAZIL:

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). 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.





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.



CRIMINAL PROCEDURES IN GERMANY:

Munich's public prosecutor is also investigating Munich-based Tüv Süd for its role in the Brumadinho disaster. Five Brazilian victims with the support of German organizations filed a criminal complaint against a top employee of Tüv Süd before the Munich prosecutor, accusing him 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.

Art. 9 on adjudicative jurisdiction is key, as this case highlights, by securing 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.

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. Provisions on Mutual Legal Assistance in **art. 10** should therefore be maintained.

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**).





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