



***Permanent Mission of Brazil to the United Nations Office
and other international organizations in Geneva***

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Nº 557 / 2016

The Permanent Mission of Brazil to the United Nations Office and other international organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights (OHCHR) and has the honor to forward attached herewith answers to the joint urgent appeal sent from Special Procedures regarding the collapse of the Fundão tailing dam in Mariana (AL BRA 3/2016).

The Permanent Mission of Brazil in Geneva avails itself of this opportunity to renew to the OHCHR the assurances of its highest consideration.

Geneva, 30 August 2016.



Office of the High Commissioner for Human Rights (OHCHR)

Joint Urgent Appeal from Special Procedures

Information from the Government of Brazil

Shortly after the rupture of the Fundão dam in Mariana/MG, the Federal Attorney General (AGU) reaffirmed the federal jurisdiction over issues related to the damage caused to the river Doce (since it is a river that runs through more than one state). His statement addressed the objective responsibility of Samarco. In an unprecedented move, the AGU and the states of Minas Gerais and Espírito Santo acted together and filed a joint public lawsuit against Samarco, Vale S/A and BHP Billiton. The lawsuit calls for the allocation of R\$ 20 billion for measures to be carried out over the next 20 years.

In a preliminary decision, the court ordered Samarco to deposit R\$ 2 billion in a judicial account for implementing actions to curb the impacts of the accident, to revitalize the river Doce and to compensate those affected by the incident. In addition, the companies' licenses to operate were suspended. In order to repair the damage, the companies should develop a comprehensive plan for environmental recovery of the river Doce's basin and other affected areas and present a general plan for the socio-economic recovery of the region.

Following the court decision, negotiation between the companies and federal and state governments were launched. The negotiation culminated in the Samarco Transaction Term and Conduct Adjustment (TTAC), signed on February 3, 2016.

The Transaction Term and Conduct Adjustment is based on 4 basic principles:

1. The creation of a private Foundation (called Renova) maintained by Samarco and supervised by an Inter-Federative Committee (Comitê Interfederativo – CIF);
2. Samarco, VALE and BHP will be responsible for the Foundation's funding;
3. Socio-economic reparation;
4. Environmental reparation.

In this agreement, the companies recognized their full responsibility for the environmental and social damage caused by the rupture of the Fundão

dam. The agreement provides a quicker and more efficient vehicle for individual remedy and social and environmental reparation when compared to other traditional judicial means foreseen in the Brazilian legislation. If there was no agreement, the legal discussion of corporate responsibility and compensation figures could take years in the Judiciary system.

The TTAC establishes reparative and compensatory measures related to the social, economic and environmental impacts of the event. The TTAC proposes the development of a variety of programs by the Renova Foundation with the aim to recover both the environment and the socioeconomic conditions of the affected area, restoring the situation prior to the event. Clause 6 of the TTAC states that, within 60 days of its creation, the Renova Foundation shall present an initial plan of the programs, activities, actions and measures to the CIF, in charge of approving them. Each program must contain specific information on its budget, goals and schedule and must take into consideration the guidelines of the TTAC and applicable technical criteria.

The socioeconomic thematic lines within the scope of the TTAC are the following: a) social organization; b) infrastructure; c) education, culture and leisure; d) health; e) innovation; f) economy; g) management of the action plan. The social and environmental thematic lines are: i) management of the mining waste and restoration of water quality; ii) restoration of the forest and of water production; iii) conservation of biodiversity; iv) water safety and water quality; v) education, communication and information; vi) environmental preservation and environmental safety; vii) management and sustainable use of the land; viii) management of the action plan.

The CIF is responsible for monitoring the Renova Foundation and its programs. Its members represent the federal, state and municipal governments. The Office of the Federal Attorney General (Advocacia Geral da União - AGU) is a cosigner of the TTAC and also plays an important role in monitoring reparation actions.

Clauses 247 and 252 of the TTAC prescribe fines and sanctions in case of breaches. Clause 249 states that the CIF may fine the contracting party that fails to meet its obligations under the TTAC in cases of exclusive fault of the Renova Foundation, Samarco, Vale or BHP Billiton.

Periodic reports on the state of the programs, including an assessment of the effectiveness of the reparatory and compensatory actions will be

submitted to the CIF for evaluation (clauses 204 and 205 of the TTAC). In addition, all activities performed by the Renova Foundation will be audited by Ernst & Young, an independent firm hired for this purpose.

The TTAC has specific programs to ensure participation of the affected communities, specially the “Program on Communication, Participation, Dialogue and Social Control”, under subsection I.6, whose clause 59 states that:

“The Foundation shall ensure social participation in the processes of identifying and detailing the programs and projects, including accountability for the actions related to socioeconomic programs”.

In addition, clause 60 states that:

“The affected population and indirectly affected individuals will have access to broad, transparent, full and public information in accessible and adequate language that can be understood by all interested people, as a necessary condition to enlightened social participation”.

The obligations of the parties to the agreement are goals that the Renova Foundation must comply with. The Government monitors and guarantees the results. The Foundation has a strong dialogue with the Inter-federative Committee (CIF), the Federal Public Prosecutor Office (MPF) and the civil society.

It is also important to emphasize clause 4 of the TTAC which states that

"The obligations established by this Agreement do not limit or replace the prerogatives legally attributed to governmental bodies and entities and to the bodies and entities responsible for monitoring, licensing and authorizing Samarco's activities."

Moreover, regardless of the TTAC, IBAMA issued six infraction reports to Samarco Mineração S.A. from November 2015 to July 2016, amounting to R\$ 291.800.000,00, equivalent to the maximum amount that can be charged for environmental violations according to the Brazilian legislation. Besides, it issued sixty-six notifications in the same period, prescribing several actions to be taken by the company.

No monetary limit has been established for the reparation of this tragedy, including for the payment of damages and compensation. There are limits only for environmental compensation, although the provisions in this

regard are very strict and involve, for example, the reforestation of an area more than 5 times larger than the affected area and the allocation of R\$ 500 million for water sanitation in the affected villages, among others actions.

It should be noted that the Foundation allows for wide participation of the civil society and provides for social assistance programs for the local population. There are specific programs for affected fishermen, indigenous people, ranchers, traditional communities and farmers. The agreement expressly guarantees that people who have been affected by the accident can also, if they so prefer, access the normal legal channels to defend their interests and file lawsuits for compensation.

Samarco has had many meetings with the local communities and the CIF. The Renova Foundation will have a Consultation Committee with representation of the civil society: 3 representatives from the state of Minas Gerais, 2 from the state of Espírito Santo and 5 from Doce River Basin Committee – CBH-DOCE. The Consultation Committee will voice its opinion on all plans, programs and projects, as well as indicate alternative courses of action to deal with the problem at hand. The Consultation Committee will liaise directly with the affected communities in Mariana and Barra Longa.

The Renova Foundation will consider each affected person's claim individually and allocate compensation in accordance with the damage caused. This process will involve representatives of different levels of the Brazilian government, technical specialists, members of the Public Attorney's Office and the Public Defender's Office, representatives of the affected community and of social movements in specific discussion forums.

The Renova Foundation has already been officially registered. The companies have allocated R\$ 420 million for the start of its work and a board of directors has been appointed. The CIF is already in place and running and is presided over by the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA).

The TTAC establishes that R\$ 8 billion should be allocated to the victims in the first 6 years. From 2022 onwards, compensation values will be updated by the Inter-federative Committee (CIF). Besides this amount, R\$ 240 million per year has been put aside to carry out infrastructure works such as water sanitation, for the next 15 years.

In accordance with the AGU legal opinion n. 00020.000668/2016-94 (July 2016), "it is impossible to define the total value of damage; in this sense, there are no limits for the remediation and compensation for this tragedy."

The Federal Public Prosecutor Office (MPF) did not propose any scientific methodology in their estimation of damages up to R\$ 115 billion; they have simply quoted the value of damages from the Deepwater Horizon incident to estimate damages in Mariana. The direct comparison of the Deepwater Horizon accident, a British Petroleum company, with the Samarco accident is inappropriate, due to the distinct nature of both episodes. Also, the value quoted by the MPF was based on a newspaper article. The Deepwater Horizon official documents, available on their website, show that the agreement between the US government, the federal states and the company have actually allocated US\$ 20,8 billion for total damages, US\$ 4,9 billion for damages to the economic activities of each state affected and up to US\$ 1 billion for cities which present claims.

The appropriate method for assessing damages in situations like this is called "contingent valuation". The accident that happened at the Exxon Valdez ship, for example – oil leakage –, used this valuation method and estimated the total damage in US\$ 3 billion. This value was accepted by Exxon at the time in a similar agreement with the US government, which allowed compensation to be paid swiftly instead of the long litigation that this kind of lawsuit can trigger. The Samarco TTAC has also incorporated more recent methodology of impact evaluation developed by the scientists at the US National Oceanic and Atmospheric Administration (NOAA) and by the economists at the Habitat Equivalency Analysis (HEA).

The period of 15 years, set by clause 232 of the TTAC, is only applied for compensatory measures. Environmental damage reparation doesn't have a time limit and should continue until the environment is restored:

"Clause 7: the elaboration and execution of the programs foreseen in the present Agreement should consider the following principles:
a.environment recovery to the stage that it was before the accident;
b.recover, mitigate, relieve, repair, provide financial compensation and, if it is impossible to reach these results, compensate for the environmental and social impacts caused by the event, according to this agreement."

"Clause 232: the Foundation shall allocate the amount of R\$ 240.000.000,00 (two hundred forty millions reais) per year, revised according to the parameters of Clause 257, for a period of 15 years from 2016 onwards, for the execution of compensatory projects and compensatory measures. Sums not used in a certain period shall be added to the total amount available for the next period".

The annual limits of disbursement were planned as a way to guarantee the existence of financial conditions to execute the programs defined by the Agreement. Moreover, the companies (Samarco, Vale and BHP) are responsible for the damage repair, as established by the Brazilian Constitution:

"Art. 225...

§ 2º Those who explore mineral resources will be obliged to recover the affected environment, in agreement with the technical solution required by a qualified public institution, in accordance with the law.

§ 3º Activities considered harmful to the environment will subject violators to penal and administrative sanctions, irrespective of the obligation to repair the damage inflicted".

The Brazilian government sees no reason that justifies the claim that the definitive TTAC Agreement has not been made available to the public. The TTAC Agreement has always been freely available online, at the IBAMA's website:

https://www.ibama.gov.br/phocadownload/noticias_ambientais/termo_de_transacao_e_de_ajustamento_de_conduta.pdf

The CIF was established on April 11th 2016. The Committee's Internal Regulation was made public through an IBAMA's decree published on July 8th 2016, and is available for public consultation at the following link:

https://www.ibama.gov.br/phocadownload/noticias_ambientais/regimento_cif.pdf

The Regulation defined that the Committee will be composed by:

- 2 members of the Ministry of the Environment.
- 2 members of the Federal Government, appointed by the Office of the Chief of Staff of the President.
- 2 representatives of Minas Gerais state.
- 2 representatives of Espírito Santo state.

- 2 representatives of cities of Minas Gerais state affected by the accident.
- 2 representatives of cities of Espírito Santo state affected by the accident.
- 1 member of the Doce River Basin Committee (CBH-Doce).

The rupture of the dam has also affected the indigenous land of the Krenak people (6 villages in total, with a population of 320 people). Emergency assistance to these communities was agreed upon between Samarco and the indigenous community, with the mediation of the National Foundation for Indigenous Peoples-FUNAI. Under the terms of the agreement, arrangements were made relating to the water supply for human and animal consumption (drinking water supply, water storage tanks installation, drilling wells, reservoirs installation, drinking fountains, etc.); the delivery of animal food for cattle and flock; the payment of 9 times the minimum wage (R\$ 7,092.00) per family (126 families in total) for 4 months; the allocation of resources for health related activities; the acquisition of 2 speedboats and the installation of a fence along the riverbanks to inhibit animal access to the river.

It was decided that a representative of the Krenak indigenous community should be appointed to the Advisory Council of the Renova Foundation. The TTAC states that a specific program, which will be designed together with the indigenous people in negotiations with FUNAI, will provide assistance to the indigenous communities of Krenak, Comboios, Tupiniquim and Caieiras Velhas II.

According to clauses 39 to 45 of the TTAC, the social organization, custom and traditions of the Krenak, Tupiniquim and Guarani indigenous peoples will be respected. In addition, consultation mechanisms must be in place and indigenous peoples will take part in all phases of the program.

The TTAC states that emergency support will be provided according to the agreement signed by Vale S.A. on November 16, 2015. It also establishes the continuous monitoring of water supply and water quality, cattle farming, monthly financial support to families, health services and reviewing and updating the needs of the Krenak people. Furthermore, the TTAC states that an independent consulting firm will be hired to make a study on the social, environmental and economic impacts of the disaster upon the Krenak people..