

**Mandates of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; the Special Rapporteur on the human rights to safe drinking water and sanitation; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the rights of indigenous peoples; and the Working Group on the issue of human rights and transnational corporations and other business enterprises**

REFERENCE:  
AL BRA 11/2018

5 September 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the human rights to safe drinking water and sanitation; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; and Working Group on the issue of human rights and transnational corporations and other business enterprises, pursuant to Human Rights Council resolutions 36/15, 33/10, 37/8, 33/9, 33/12 and 35/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the renewed agreement of 25 June 2018 that Samarco Mining S.A., Vale S.A. and BHP Billiton signed with the Federal Government and the State Governments of Minas Gerais and Espírito Santo regarding socioeconomic and environmental reparations necessitated by the 2015 Doce River disaster. In particular, we would like to bring to your attention information regarding some provisions of the agreement and the manner in which it was negotiated and prepared as well as more generally the persistent difficulties faced by affected communities.

The consequences faced by communities affected by the 2015 Doce River disaster, in particular violations of their rights, including the right to health, drinking water, housing and environment, were subject of previous communications sent to your Excellency's Government on 30 June 2016, case no. BRA 2/2016 (Report A/HRC/34/75) and 24 November 2015, case no. BRA 10/2015 (Report A/HRC/31/79). We thank your Excellency's Government for the response provided, dated 30 August 2016. The reply contained information about the joint public lawsuit against Samarco, Vale SA and BHP Billiton that called for the allocation of R\$20 billion for the next 20 years. We also took note of information on the negotiation between companies, and federal and state governments that resulted in agreements on funding and socioeconomic and environmental reparations. However, we regret that the reply did not provide more

detailed information on how affected communities have been engaged in a meaningful process of participation and how they had been consulted in the remedy process.

According to the information received:

On 5 November 2015, an iron tailing dam named Fundão in the district of Mariana in the state of Minas Gerais, belonging to Samarco Mining S.A. (a joint venture between Vale and BHP Billiton), burst its walls and released 35 million cubic meters of iron ore waste. 19 persons died in what is considered to be the worst socio-environmental disaster in Brazil's history. Thousands of persons were displaced and one of the main Brazilian rivers, the Doce River was polluted with heavy metals. The tailing dam failure caused severe damage to the livelihoods of millions of people living throughout the river basin. The mud eventually reached the Atlantic Ocean, contaminating the marine life with heavy metals.

More than two and half years after the disaster, there is still no complete assessment of the socio-environmental and socio-economic damages suffered by the affected communities as well as health-related impact. Some communities and individuals are still struggling to be recognized as affected by the disaster and did not receive any type of remedy. Many of the problems faced by the affected communities persist. The Renova Foundation claims that the Doce River water meets the standards set out by the Brazilian National Water Agency. However, this analysis contradicts independent studies in the matter. According to the research conducted by the SOS Mata Atlântica Foundation, the water is contaminated with heavy metals, which may impact human health if consumed as well through as other uses. Particular concerns exist in some municipalities where the Doce River is their main source of water supply. It is reported that some persons who live at the watershed have increased rates of gastrointestinal diseases, respiratory disorders, rashes, and other skin allergies, which could be linked to the ingestion of and contact with heavy metals.

The resettlement of the communities who were forcibly displaced from their homes is far from complete. The Renova Foundation estimated that it would conclude the construction of the new districts of Bento Rodrigues, Paracatu de Baixo, and Gesteira to house forcibly displaced persons in March 2019. As of February 2018, the Renova Foundation had not even started the construction of the new districts. Therefore, the resettlement process could take longer than foreseen. Multiple indigenous and traditional communities used to live off fishing and farming in the margins of the Doce River. They have had to completely change their dietary patterns with adverse consequences on their health.

On 2 March 2016, the Brazilian Federal Union, joined by 13 public law entities, including the state governments of Minas Gerais and Espírito Santo and environmental agencies from both federal and state levels as well as the three responsible companies, Vale, Samarco, and BHP Billiton, signed a settlement agreement, under which the signatory parties committed to develop socio-

environmental and socio-economic remedy programs. It created a governance structure composed of two legal entities: the Renova Foundation and the Interfederative Committee. According to the provisions of the agreement, the Renova Foundation is responsible for developing and implementing the remedy programs. The Interfederative Committee is an independent body composed mainly of representatives of the federal and state governments with authority to monitor the activities of the Foundation.

The Brazilian public authorities and the three involved companies allegedly negotiated and signed the initial settlement agreement without holding consultations with the affected communities, civil society organizations, and social movements. Although the agreement contained provisions related to the transparency and involvement of the communities in its implementation, the mechanisms for their proper enforcement were not clearly stated. The agreement did not discipline the process of the appointment of the representatives of the affected communities within the Renova Foundation and the Interfederative Committee. Community representatives had no decision-making power within the two entities.

Many communities and individuals are still struggling to be recognized as affected by the disaster, which is the first step toward receiving any remedies. Under the provisions of the previous settlement, the affected communities bore the burden of proving the damages they suffered and the means of evidence. The obligation to produce evidence about the material losses was particularly burdensome to those whose homes were destroyed since they barely had time to save themselves from the mud.

The fact that the agreement did not foresee meaningful participation mechanisms for the affected communities seriously undermined the remedies that companies provided to them. The Renova Foundation was in charge of determining the damages that are entitled to remedy, the type of remedy and the amount of monetary compensation. Under the remedy programs, the Renova Foundation mainly offers the affected communities monetary compensations, failing to effectively address the concerns of the victims and return their lives to the *status quo ante*.

The Foundation has so far recognized a very limited list of intangible losses as entitled to remedies. Indigenous, fishing and other traditional communities, which depended on the Doce River, inter alia, for their cultural, religious, and leisure activities were not entitled to receive remedies for specific types of losses. Thus, persons who were recognized as affected by the disaster were not receiving an effective remedy and they had to choose between adhering to the Mediated Compensation Program or seeking judicial remedies. Within the mediation program, the affected people were offered values far below what was due. The criteria used to establish such values being unclear, there was no room for negotiation. Individuals were also required to waive any right to future claims.

In early 2016, Federal and State Public Defenders started to file individual lawsuits on behalf of those who had their request for recognition denied. Later the Public Defenders started to act collectively to seek the recognition of entire communities.

In May 2016 the Federal Public Prosecutors Office filed a lawsuit against the three companies and the Brazilian authorities who signed the settlement agreement, seeking its annulment. In August 2016, the Regional Federal Court of the First Region annulled the settlement agreement reasoning its decision on the lack of meaningful consultation with the affected communities. Despite the annulment by the Brazilian judiciary of the decision that ratified the settlement agreement, the companies and the Brazilian authorities, the Renova Foundation and the Interfederative Committee continued to operate according to the Agreement's provisions.

Following the annulment, the parties in the lawsuit initiated the negotiation of a new agreement, which provides for the creation of technical assistance committees to advise the affected people throughout the remedy process, as well as for the conduction of an assessment of the socio-environmental and socio-economic damages in the affected region. The negotiation process of this new agreement reportedly lacked meaningful participation and consultation with the affected communities and civil society organizations. The communities did not participate to a sufficient extent in the design of the participatory mechanism. At the meantime, the effective implementation of this agreement, particularly the creation of technical assistance committees is seen as critical to protect the rights of the affected communities and to avoid further irreparable harm, as it may guarantee the access to relevant information and to technical assistance by the affected communities.

On 25 June 2018, the three involved companies and the Brazilian State<sup>1</sup> signed this new settlement agreement seeking to adjust the governance of the Renova Foundation and the Interfederative Committee. This new agreement is intended to enhance the participation of the affected communities within the structure of the two entities, as well as to create local commissions composed by representatives of the affected communities to discuss the remedy programs at a local level and recommend adjustments. It also aims to reform the governance of the mechanism that was created to remedy the harm caused by the disaster and increase the participation of the affected communities in the development and implementation of the remedy programs.

However, the new participatory mechanism has allegedly been conceived in a top-down approach, despite the need of adjusting to the cultural and social dynamics

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<sup>1</sup> Brazilian Federal Union, the state governments of Minas Gerais and Espírito Santo, environmental agencies from both federal and state levels, the Public Prosecutors' Office and the Public Defense Office.

of the affected communities. The representatives of the affected communities are reportedly not sufficiently represented in the body entrusted with a decision-making power within the structure of the Renova Foundation. Only two out of nine members in the decision-making body shall represent the affected communities, six members shall be appointed by the three companies and a ninth member is to be appointed by the Interfederative Committee. A draft version of the agreement had not been made available to the general public, the same applies to other relevant records, including records of meetings between the actors involved in the negotiation process.

We wish to express our general concern regarding the lack of notable progress in remedying the situation of communities affected by the disaster, which is the result, to some extent, of the lack of a robust assessment of the socio-environmental and socio-economic damages, including health consequences. We are concerned at the alleged continued violations of the human rights of communities affected by the Doce River basin.

We consider that the signature by concerned parties of a new settlement agreement is an overall positive development which is aimed to address the gaps formed by the previous arrangement and to readjust the provision of remedy programmes. The effective implementation of the agreement is bound to contribute to the protection of rights of the affected communities. We nevertheless express our concerns at the fact that the affected communities themselves were not sufficiently involved in the negotiation and design process of the agreement, lacked access to adequate information and should now form a minority in the decision making body of the Renova Foundation. We believe that the lack of participation, lack of transparency and meaningful involvement of these communities in the planning process may lead to considerable distortions and further delays in the development and implementation of the remedy programs. We are also convinced that it is of crucial importance that the recipients of remedies, who have suffered gross violations of their rights, are provided with an opportunity to actively participate in the design, establishment and day-to-day functioning of such mechanisms.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned person(s) in compliance with international instruments.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide details regarding the plans for a robust assessment of the socio-economic damages suffered by affected communities along the entire length of the Rio Doce River and watershed.
3. Please describe the measures which have been put in place to fully involve the affected communities in the consultation process aimed at adjusting the existing remedy mechanisms.
4. Please explain how the affected communities have been engaged in a meaningful process of participation and consultation on the participatory mechanism to be established by the new settlement agreement. Please elaborate whether Brazilian authorities, as a party to signature agreement, see an interest in and have the intention to increase the level of participation of the representatives of the affected communities in the bodies established by the new settlement agreement.
5. Please provide details regarding the delayed resettlement process, timeline for completion and plans to ensure those who continue to be displaced have access to appropriate and effective remedies during the protracted resettlement process.
6. Please provide information on mechanisms for those who were not recognized as affected by the disaster by your Excellency's Government or Renova Foundation to appeal such determination and corrective actions that would be available if improperly excluded from participation in the settlement agreement or subsequent remedies.
7. Please provide further information on whether Brazilian authorities intend to make the draft versions of the settlement agreement and any other relevant records, including records of meetings between the actors that are involved in the negotiation process, publicly available.
8. Please provide information regarding the alleged contamination of water with hazardous substances and efforts to ensure access to safe drinking water to concerned communities.
9. Please provide information regarding the health-related consequences that the disaster has had, is having and is expected to have on individuals and communities affected, as well as the measures developed to provide them with adequate related remedies.
10. Please describe the envisaged action and the revised timeline, according to which Brazilian authorities and the three companies involved intend to provide the affected populations with full remediation and, if possible, please elaborate on reparation measures for indigenous, fishing and other traditional communities in the affected area.

11. Please provide information on the measures taken by your Excellency's Government to ensure that the new settlement agreement complies with the effectiveness criteria stipulated in Principle 31 of the UN Guiding Principles on Business and Human Rights.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which a press release would be based is sufficiently reliable to indicate a matter warranting attention. The press release would indicate that we have been in contact with your Government to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Léo Heller

Special Rapporteur on the human rights to safe drinking water and sanitation

David Boyd

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Dainius Puras

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Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Anita Ramasastry

Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to recall the relevant international human rights obligations that your Excellency's Government has undertaken. In particular, the International Covenant on Civil and Political Rights (ICCPR), signed by your Excellency's government on 24 January 1992, recognizes the right of victims to an effective remedy. ICCPR Article 2(3)(a) provides that States are "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Under ICCPR Article 2(3)(b), states are "To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; [and] To ensure that the competent authorities shall enforce such remedies when granted."

We would also like to draw your attention to Article 10 of the American Convention on Human Rights, acceded to by your Government on 9 July 1992, which asserts States' obligation "to develop the possibilities of judicial remedy" and "to ensure that the competent authorities shall enforce such remedies when granted".

We also would like to draw your Excellency's attention to the right to meaningful participation and the right to information under ICCPR. Article 19 of ICCPR provides, *inter alia*, that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers [...]". Under article 25 (a) of the ICCPR, every citizen shall have the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives.

We also wish to refer to the Framework Principles on human rights and the environment of the Special Rapporteur on human rights and the environment (A/HRC/37/59, annex), which summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Namely, the Framework Principles 7, 9, and 10 obligate States to provide environmental information, enable public participation in decision-making, and ensure access to effective remedies in cases where human rights are violated.

Brazil acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 24 June 1992. Under article 12 of the Covenant, States parties are bound to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In its General Comment No. 14, the Committee on Economic, Social and Cultural Rights describes the normative content the article and the legal obligations of the States to respect, protect and fulfil the right to physical and mental health. The right to health is an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access

to safe drinking water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information. (para. 11). In addition, the Convention on the Rights of the Child (CRC) ratified by Brazil on 24 September 1990, also establishes States' responsibility to fully implement the right of the child to health through, inter alia, the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution. (CRC, Art.24 (c))

The human rights to water and sanitation are essential human rights set forth in the ICESCRs, the CRC, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. The UN Human Rights Council in its resolution 15/9 of 2010 and the UN General Assembly in its resolution 64/292 of 2010 explicitly recognized the human right to safe drinking water and sanitation.

Furthermore, the UN General Assembly in its resolution 70/169 of 2015 recognized that “the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use”, and that “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.

With regard to the right to adequate housing, we would like to refer your Excellency's Government to Article 11(1) of the ICESCR, which recognizes the right to an adequate standard of living, including housing, and to the continuous improvement of living conditions.

We would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in resolution A/HRC/RES/17/31 in 2011. The Guiding Principles have been established as the authoritative global standard for all States and businesses with regard to preventing and addressing adverse business-related human rights impacts. The Guiding Principle 1 provides: “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” The Guiding Principles 25 to 31 provide guidance to States and business enterprises on steps to be taken to ensure that victims of business-related human rights abuse have access to effective remedy.

The Guiding Principle 22 states that “where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”. In this connection, we recall that Guiding Principle 25 states that as part of their duty to protect against business-related human rights abuse, “States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory

and/or jurisdiction those affected have access to effective remedy”. As underlined in the commentary to Guiding Principle 25, “remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetitions. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome”.

Guiding Principle 31 clarifies that in order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms

Finally, we would also like to refer your Excellency’s Government to Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 with an affirmative vote of Brazil, which states that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. States should consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Furthermore, Article 28 of UNDRIP sets out that indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise

occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.