

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; 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 rights of indigenous peoples; and the Special Rapporteur on the human right to safe drinking water and sanitation

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Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human right to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 26/22, 27/23, 24/9 and 24/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the process and substance of the agreement that Samarco Mining S.A. and its parent companies Vale S.A. and BHP Billiton Brazil Ltda signed with the Federal Government and the State Governments of Minas Gerais and Espírito Santo on 2 March 2016, ratified by the Brazilian Federal Court of Appeal on 5 May 2016, concerning the restoration of the environment and communities affected by the collapse, on 5 November 2015, of the Fundão tailing dam in Mariana in the state of Minas Gerais, which released an estimated 62 million tons of iron ore waste into the Rio Doce.

According to the information received:

On 2 March 2016, Samarco Mining S.A. and its parent companies Vale S.A. and BHP Billiton Brazil Ltda (henceforth "the Companies") signed a 15-year agreement (henceforth "the Agreement") with the Brazilian Federal Government and State Governments of Minas Gerais and Espírito Santo (henceforth the "Public Authorities"), creating a private foundation (henceforth "the Foundation") governed by Samarco through which the responsible company is bound to coordinate and fund reparatory and compensatory programmes to repair and remedy damages caused by the collapse of the Fundão tailing dam. The Agreement determines that the Companies are liable to pay an estimated total of BRL 20 billion (approximately USD 5.6 bn) over the next 15 years. Organized in five three-year periods between 2016 and 2031, the Agreement binds the company

to developing and executing a total of 17 socio-environmental and 21 socio-economic programmes.

In the first three-year period culminating in 2018, Samarco is bound to paying a total of BRL 4.4 billion (USD 1.55 billion) via three yearly contributions: BRL 2 billion in 2016, BRL 1.2 billion in 2017 and BRL 1.2 billion in 2018. For this period, the Agreement provides that the amount of more than BRL 1 billion paid by Samarco between the date of the initial disaster and the date at which the Agreement was completed, disbursed in pursuance to several initial emergency settlements, are to be discounted from the amount of BRL 2 billion which Samarco is liable to pay in 2016. The amount of annual contributions for each of the years 2019, 2020 and 2021 is set to vary between a minimum of BRL 800 million (USD 282 million), and a maximum amount of BRL 1.6 billion (USD 550 million), depending on the remediation and compensation projects which are to be undertaken in the particular year. Beyond 2021, the amounts to be disbursed will be determined depending on future assessments of the remaining damages to be remedied or compensated. The Agreement establishes a fixed variation of annual programme funding that limits the amount of yearly disbursements within 30% of the average funds disbursed in the last two years of every three-year period. Regarding the possible insufficiency of resources to fund reparatory or compensatory programmes, it is provided that the Foundation must, in such cases: revise and reassess the terms, goals and indicators of these programmes; reallocate resources between the different programmes; and/or solicit supplementary resources. The Agreement possesses no explicit clause designating the implicated companies as the responsible parties for all costs necessary to provide reparation and compensation to all affected parties by the disaster, including after the 15-year period contemplated in said Agreement.

Several stakeholders in Brazil, including federal prosecutors and the National Council for Human Rights, claim that the amounts determined in the Agreement are insufficient to provide complete reparation and compensation. Various stakeholders highlight disasters of similarly catastrophic proportions, such as the 2010 Deepwater Horizon disaster, and the fact that the evaluation of reparatory costs in such cases has been undertaken as a continuous process spanning several years. Nevertheless, the Agreement determines fixed amounts that shall be allocated to specific projects, such as the allocation of BRL 500 million (USD 148 million) in compensatory measures destined to improve the sanitation sectors (municipal programmes and infrastructure) of the cities located along the Doce River. For this reason, the Agreement appears to only guarantee a role of partial accountability for the implicated companies. Indeed, according to Federal Prosecutor José Adércio Sampaio, the total cost of damages may be more accurately estimated to amount to BRL 155 billion. Accordingly, a new public interest lawsuit was filed on 3 May 2016 by the Federal Public Prosecution Service demanding a minimum of BRL 155 billion (approximately USD 44.35 bn) in damages.

Regarding the institutional makeup of the Foundation, it is to be governed by an Executive Board, Interfederative Committee, Fiscal Council, Board of Directors, and Advisory Board. The Foundation is responsible for managing the resources allocated for the reparation of damages and implementing the environmental, social and economic programmes. Among these different governing and consultative bodies, there are allegedly insufficient mechanisms or provisions aimed at ensuring the effective participation of the affected communities in the decision-making process of the design and execution of the programmes envisioned in the Agreement.

The Interfederative Committee will reportedly be dominated by representatives of the municipal, federal and state governments¹, which will determine the objectives, validate projects and programmes, and review progress and achievements against the objectives of the remediation and compensation programmes. It will have twelve members, of which three will be representatives of the affected communities (2 from Minas Gerais and 1 from Espírito Santo). However, the agreement has not set out the appointment process of these three members. Moreover, the available information suggests that there is no clear methodology for determining how key issues shall be identified and given priority for action, or whether consensus or non-consensus decision-making shall apply.

The Board of Directors will reportedly approve the plans, projects and programmes necessary to implement the agreement, following recommendations from the Executive Board and consultation with the Advisory Council. The Board of Directors is composed of seven members, of which six will be appointed by the three companies (each company has two seats) and one by the Interfederative Committee.

The Advisory Council will reportedly have seventeen members, five of which will be assigned to the affected communities (three from the state of Minas Gerais and two from the state of Espírito Santo). The Advisory Council can only issue “non-binding recommendations” (clause 218), unlike the Board of Directors. Furthermore, like the Interfederative Committee, decision-making and other processes and procedures of the Advisory Council are not clearly defined, notably the participation of the affected individuals and groups.

Moreover, it is alleged that the governance structure established by the Agreement lacks a mechanism to prevent and mitigate conflicts of interest and to ensure the independence and impartiality of remediation processes.

Furthermore, it is understood that a non-judicial grievance mechanism is in development. It is unclear to what extent the Judiciary or Government are

¹ <http://agenciabrasil.ebc.com.br/geral/noticia/2016-02/samarco-pagara-r-44-bi-nos-proximos-quatro-anos-para-recuperar-rio-doce>

engaged in the design of the non-judicial grievance mechanism, as well as the level of engagement by the affected communities and their legal representatives.

Inadequate transparency, participation and access to information in the elaboration of the Agreement

Regarding the process by which the Agreement was negotiated between the Public Authorities and the Companies, it is alleged that there occurred minimal consultation with those impacted or affected by the catastrophe, in particular the communities living near the tailing dam rupture, those located downstream, and the indigenous peoples living near the Rio Doce riverside. Indeed, it is alleged that several federal and state prosecutors of the task force investigating the initial spill were opposed to the negotiation process of the agreement due to a lack of public participation and transparency in the determination of the terms.

Based on information received, the Agreement was reached in less than eight weeks, an extremely short time frame for an environmental disaster of this magnitude. As an example, it took five years to reach a settlement in the case of the “Deepwater Horizon” disaster in the Gulf of Mexico. Federal prosecutor Sampaio reportedly informed that the available studies have yet to reflect the full extent of the damages and that diagnostics are required “for at least two water years in order to be certain of the damages.”² The companies BHP and Vale acknowledged the limited extent of the consultation carried out, citing the considerable pressure exerted by the Government of Brazil to settle the public civil suit filed in November 2015, in which Brazilian authorities sought up to BRL 20 billion for remediation and compensation³. It is unclear what legal representation those affected by the collapse of the tailing dams were afforded during the negotiations. In addition, information regarding the development of the Agreement’s terms was also not made publicly available to those adversely affected by the Samarco Disaster or to the international community.

In spite of the public interest lawsuit submitted by the Federal Public Prosecution on 3 May 2016, the Agreement received judicial approval on 5 May 2016. The process of ratification by the Brazilian judiciary also reportedly did not include a participative and effective consultation process with the affected individuals and communities, in particular the indigenous populations (especially the Krenak indigenous peoples), the traditional groups (fishermen, small farmers, among others) and the urban population of the villages and cities affected by the disaster, who expressed interest in participating in the final judicial process regarding the Agreement’s approval.

² Ibid.

³ “Brazil prosecutors could scupper Samarco dam settlement”, (18 February 2016), available at <http://www.ft.com/intl/cms/s/0/6e51b9dc-d641-11e5-969e-9d801cf5e15b.html#axzz47116krnz>

We express grave concern regarding the victims' right to an effective remedy given the provisions of the Agreement, notably in light of the very limited oversight and decision-making role for various levels of public authorities in the Foundation; the insufficient mechanism in the Foundation to ensure the affected populations' right to represent their needs and preferences regarding the reparatory and compensatory measures; the arbitrary and inappropriate determination of programmes and associated funds required to provide remedy and compensation for the damages caused. Serious concern is also expressed as to the time- and finance-related conditions that limit the execution of reparatory and compensatory programmes, creating the significant risk for many of the wide-reaching damages to become exacerbated throughout and after the 15-year period contemplated in the Agreement. Grave concern is also expressed regarding the process by which the Agreement was negotiated, which was approved in an expedited fashion and without definitive studies to evaluate the impacts of the disaster. Moreover, we express serious concern that the process of the Agreement's elaboration and approval undermined the right of relevant stakeholders – particularly the affected individuals and groups, including indigenous peoples – to participate in the process aimed at providing them with reparations and compensation. Furthermore, we express concern that the process of the Agreement's elaboration obstructed the affected victims' and general public's rights to have access to information.

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 mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to my attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above mentioned allegations.
2. Please provide further information on how and the extent to which affected communities were consulted during the negotiation process.
3. Please provide further information on how the amount for remediation and compensation was settled. Notably, please clarify what measures will be taken to provide comprehensive remediation and compensation if the sums required surpass the projected sum of BRL 20 billion.
4. Please explain the significant difference between the total estimated amount of the costs of reparatory and compensatory measures projected in

the Agreement – BRL 20 billion – and the estimated amount of BRL 155 billion estimated by the Federal Public Prosecutor.

5. Please explain how the period of 15 years was determined to be the limit within which the Foundation will aim to provide complete reparations and compensation to all parties affected. Notably, please clarify why the development of the projected programmes will be subject to a limited annual disbursement of funds. Also, please clarify what mechanisms guarantee that the Companies will remain accountable after this period of 15 years.
6. Please explain why the definitive Agreement has not been made available to the public.
7. Please provide further information on the constitution of the Inter-Federative Committee and more specifically on how the 12 governmental entities will be chosen.
8. Please indicate whether there is a representative of the Krenak indigenous peoples in the Samarco Foundation.
9. Please explain your Government's plans to ensure that Samarco, Vale and BHP be held fully accountable to the affected communities.
10. Please explain what measures are put in place to ensure that the Companies take into account the affected communities' views and needs related to the planning and decision-making of remediation and compensation programmes that affect them.

For the Foundation to be successful, its integrity cannot be compromised. The manner in which consultations were conducted, the composition of the board, and the expedited nature of the Foundation's operationalization raise serious concerns. While awaiting a reply, we call on you to halt the establishment of the Foundation to ensure it complies with international best practices, including human rights principles of transparency, public participation and accountability.

This urgent appeal fits into a broader objective of ensuring that we learn from past mistakes, and establish remedy mechanisms that do not consider rights-holders merely as passive recipients of remediation and compensation programs but instead as active participants in their decision-making and implementation⁴. Putting rights-holders at the center of the restoration and compensation process will enhance its legitimacy and will

⁴ Lessons from the Barrick remedy mechanism: "Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea", available at <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf>

ultimately allow the remedy mechanism itself to set a model for other businesses worldwide to follow.

We would be grateful if this letter could also be transmitted to the Ministry of Environment, the Ministry of Justice and Citizenship and the Public Prosecutors Office.

We would appreciate receiving a response within 60 days.

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 intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Dante Pesce

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

Baskut Tuncak

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

Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Léo Heller

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

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".

Furthermore, we 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 [...]".

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 highlight the State's duty to "take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means" that when business-related human rights abuses "occur within their territory or jurisdiction those affected have access to effective remedy" (Guiding Principle 25). 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". Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25). Guiding Principle 29 states that "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted" and the commentary to Guiding Principle 29 outlines that such mechanisms "provide a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted". Finally, we would like to refer to the Constitution of the Federal Republic of Brazil,

which asserts everyone's right to information (article 5.14 and article 5.33) and right to health (article 6).

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.