

URGENT APPEAL

**FEDERAL COURT RATIFICATION OF THE SETTLEMENT AGREEMENT BETWEEN
SAMARCO/VALE/BHP BILLITON AND BRAZILIAN PUBLIC AUTHORITIES VIOLATES
THE UN GUIDING PRINCIPLES ON BUSINESS AND INTERNATIONAL HUMAN RIGHTS
AND ENVIRONMENTAL LAW**

May 13th, 2016.

To the UN Special Procedures:

Mr. Dante Pesce

Chairperson of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises

Mr. Baskut Tunkac

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

Mr. John Knox

Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Ms. Victoria Lucia Tauli-Corpuz

Special Rapporteur on the rights of indigenous peoples

Mr. Leo Heller

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

Contact Persons:

Juana Kweitel, Programs Director
Conectas Human Rights
juana.kweitel@conectas.org

Bruno Toledo, Coordinator
Fórum Capixaba de Entidades em Defesa da Bacia do Rio Doce
brunoalvestoledo@gmail.com

Raphaela Lopes, Attorney
Justiça Global
raphaela@global.org.br

SUMMARY

This **URGENT APPEAL**, submitted by the undersigned organizations, addresses the human rights violations perpetrated by the Brazilian State and Samarco, Vale and BHP Billiton resulting from the signature and ratification, by the Brazilian federal courts, of a settlement agreement related to the burst of a tailing dam in Mariana (state of Minas Gerais). **The agreement was negotiated, signed and ratified without any consultation with the communities adversely impacted by the disaster**, violating their rights to effective administrative and judicial remedies and to participation in decisions concerning environmental issues.

An analysis of the agreement demonstrates that it lacks credible enforcement and accountability mechanisms, creates significant obstacles for victims to seek redress and vests the business enterprises who are ultimately responsible for the disaster with disproportionate powers, while simultaneously discharging the state authorities from its own responsibilities for the violations caused by the dam failure. In addition to the impairment of the enjoyment of the fundamental right of the victims to participation during the negotiation and ratification stages, **the implementation of the agreement will result in further irreparable harms to the rights of the affected communities and to the environment**.

The entities make the following requests to the Special Procedures:

- **To urge the Brazilian State and the three companies to immediately suspend the implementation of the settlement agreement**, to safeguard the rights of the affected communities to be consulted in any remediation process and to establish a participatory, human rights-compatible process of remediation;
- **That the Special Procedures assess the terms of the settlement agreement in order to determine its compatibility with the rights and guarantees enshrined in international human rights and environmental law and with the UN Guiding Principles on Business and Human Rights**.

The organizations declare that they have reliable knowledge of the facts and/or represent directly and indirectly affected communities of the Doce River basin.

I. INTRODUCTION

This Urgent Appeal requests that the UN Special Procedures use their prerogatives to prevent the aggravation and further irreparable environmental harms and violations to the rights of the individuals, communities and populations affected by the collapse of a tailing dam owned by Samarco (a joint venture between Vale and BHP Billiton). The damages to the environment and violations to the rights of individuals and communities are at the risk of becoming irreversible as a result of the ratification, by the Brazilian federal courts, of a settlement agreement signed between Brazil public authorities and Samarco, Vale and BHP Billiton.

The settlement agreement, originally signed on March 02, 2016, was ratified by the Brazilian judiciary on May 05, 2016. Ignoring repeated claims from civil society groups and social movements to have their right to participation in the remediation process respected, and in clear defiance with the opinion of the federal and state public prosecutors, the Brazilian public authorities and the three involved companies negotiated and signed the settlement agreement without holding any meaningful consultation with the victims of the disaster and the directly or indirectly affected communities, groups and populations. Neither the process of negotiation between the public administration and the companies nor the ratification by the Brazilian judiciary included any type of consultation whatsoever with the affected individuals and communities. The lack of participation of the affected communities is, as

demonstrated further in this Urgent Appeal, just one out of several condemnable elements of the settlement agreement.

Samarco's dam burst, which occurred on 05th November, 2015, is considered the worst ecological disaster in Brazil's history. It claimed 17 lives, left 2 disappeared, hundreds homeless and polluted with heavy metals one of the main Brazilian rivers, the Rio Doce¹. The tailing dam failure unleashed approximately 50 million tons of iron ore rejects, sweeping the district of Bento Rodrigues and causing severe damage the livelihoods of millions of people living in villages and cities throughout the Rio Doce basin. Once it entered the Doce river, the mud travelled more than 500 km until it finally reached the Atlantic Ocean, two weeks after the collapse, contaminating the marine life with heavy metals. Wherever it passed, the mud left a trace of destruction and contaminated the soil, the riverbanks and vital sources of water supply. Communities that rely on the Doce river for their subsistence are still suffering the impacts of the disaster as they had to interrupt their traditional and/or commercial activities, such as fishing, farming and ecotourism. The indigenous population of the Krenak ethnicity, who live about 300 km downstream from the disaster site, were particularly affected, as the Doce river, now contaminated with heavy metals, was their only source of drinking water and an essential element of their cultural patrimony. Thus, the disaster threatens their very survival.

On December 12, 2015, two members of Working Group on Business and Human Rights, Mr. Dante Pesce and Mr. Pavel Sulyandziga, met with representatives of the affected communities in Mariana and in Belo Horizonte. The Group listened to the stories of the persons whose human rights were violated as a result of the tailing dam's collapse. The victims testified on the absence of an emergence system to warn them about the disaster, on how the dwellers of municipalities beyond Bento Rodrigues were, for the next ten hours after the collapse, misled to believe that the mud would not reach their homes, on the problems of the process of negotiation of individual emergency relief and on the lack of assistance by the part of the federal government. Taken together, these and other facts demonstrate that Samarco, Vale, BHP and the Brazilian public entities are failing to take the appropriate measures to safeguard the rights of the affected communities in accordance with the applicable international human rights standards.

The disaster has reached the Brazilian judiciary in the form of hundreds of individual and collective lawsuits. One of the legal claims against the three companies was filed by the Federal Union, joined by 13 other public law entities, including the state governments of Minas Gerais and Espírito Santo and environmental agencies from both federal and state levels. The Brazilian authorities sued the three companies for 20 billion reais in damages (approximately US\$ 5.6 bn) caused by the burst of the tailing dam².

¹ See: **SOS MATA ATLÂNTICA**. Analysis of the Doce River water, 2016 (which found levels of heavy metals in 18 different parts of the Doce river above what is permitted by Brazilian legislation). Available in: <https://drive.google.com/folderview?id=0B-WoskHwwEXCbEtrdlh6MFIxSfk&usp=drive_web>. Last Access: May 10 2016; **FENAM – NATIONAL FEDERATION OF DOCTORS**, 2016 (levels of mercury, aluminium, lead and other heavy metals in the water collected in December 16-17th much higher than permitted by legislation). Available in: <<http://www.fenam.org.br/noticia/4713>>. Last access: May 10th 2016; **GIAIA – INDEPENDENT GROUP ON THE EVALUATION OF THE ENVIRONMENTAL IMPACTS** (reports on the levels of toxicity, turbidity and suspension of particles of the Doce River, collected in November, December and March (2016)). Available in: <<http://giaia.eco.br/materialdesuporte/>>. Last access: May 10 2016; See also: **MARINHA DO BRASIL (BRAZILIAN NAVY)**, 2016 (levels of arsenic, manganese and selenium in the river mouth of the Doce River above the limits established in the legislation). Available in: <http://www.ibama.gov.br/phocadownload/noticias_ambientais/levantamento-ambiental-da-marinha.pdf>. Last access: May 10th 2016.

² The full text of the legal claim is available in (Portuguese only): <<http://s.conjur.com.br/dl/inicial-agu-samarco.pdf>>. Last access: May 10th 2016.

On December 18th 2015, a federal court ruling³ froze assets of Vale and BHP Billiton and requested Samarco to make an initial deposit of 2 billion reais (approximately US\$ 570 million) to cover the initial expenses of the clean-up process. The federal judge also requested Samarco to adopt the following measures: i) to conduct an extensive assessment of the impacts of the dam burst, ii) to adopt measures to contain the leakage of the mud from the site of the collapse, iii) to evaluate the risks of contamination to fish caused by the mud slide, and the potential risk to human health and safety caused by the consumption of the Rio Doce water, iv) to elaborate and submit to the court socio-economic and socio-environmental plans for the revitalization of the Rio Doce basin and the mitigation and compensation of the impacts to the affected communities. The federal court suspended the licenses of the three companies for the extraction of minerals.

II. THE SETTLEMENT AGREEMENT

After the court ruling, the public authorities announced their intention to enter into an extrajudicial agreement with the three companies. Immediately, civil society groups demanded the involvement of the affected groups and the populations of the Doce river in the negotiations. Despite the repeated requests for public consultations and participation of the affected communities, the negotiations advanced behind closed doors, without any engagement with the victims and the people that live along the Doce river. Since its inception, the Federal Public Prosecutors and the state prosecutors of Minas Gerais and Espírito Santo opposed to the process of negotiation of the agreement because of the lack of public participation and transparency on the design of its terms. The prosecutors withdrew from the negotiation process arguing that it prioritizes the property of the companies in detriment of the protection of the affected population and the environment⁴. The prosecutors publicly announced that they will challenge the validity and legality of the settlement agreement in the courts⁵. They have declared that the settlement agreement resembles an “intention letter” and⁶. A new public interest lawsuit has been filed by the Federal Prosecutors demanding a minimum of 155 billion reais (approximately US\$ 44.35 bn) in damages⁷.

On March 2nd 2016, an agreement was finally reached between the three companies and the Brazilian authorities under the aforementioned legal proceedings⁸. A “Term of Adjustment of Conduct” (“TAC”) was signed between the parties to the original lawsuit and submitted for the court ratification. The TAC is an extrajudicial dispute settlement mechanism through which public bodies (such as the federal and state-level governments, the environmental agencies and the public prosecutors) can impose “do-no-harm” or other types of obligations on persons or legal entities that have violated, or can

³ The decision is available in (Portuguese only): <<http://s.conjur.com.br/dl/decisao-agu-samarco.pdf>>. Last access: May 10th 2016.

⁴ EPOCA. Os 5 pontos considerados injustificáveis pelo MPF no acordo entre Dilma e Samarco (In English: The 5 aspects that the Federal Prosecutors deemed unjustifiable in the agreement between Dilma and Samarco). Available in: <<http://epoca.globo.com/colunas-e-blogs/blog-do-planeta/noticia/2016/03/os-5-pontos-considerados-injustificaveis-pelo-mpf-no-acordo-entre-dilma-e-samarco.html>>. Last access: May 10th 2016.

⁵ G1 GLOBO. 02/03/2016 20h23 - Atualizado em 03/03/2016 08h42

MPF quer impugnar acordo firmado entre poder público e Samarco (In English: Federal Prosecutors to Contest the Agreement between Public Authorities and Samarco). Available in: <<http://g1.globo.com/minas-gerais/desastre-ambiental-em-mariana/noticia/2016/03/mpf-vai-impugnar-acordo-firmado-entre-poder-publico-e-samarco.html>>. Last access: May 10th, 2016.

⁶ *Idem*.

⁷ BBC. Brazil files \$ 43.5bn claim over fatal disaster. Available in: <<http://www.bbc.com/news/business-36199607>>. Last access: May 12th, 2016.

⁸ The full text of the final version of the Settlement Agreement is available in (Portuguese only): <http://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2016/05/acordo_rio_doce.pdf>. Last access: May 10th 2016.

potentially violate, fundamental rights and the environmental legislation. On May 5th, the federal justice approved the agreement⁹.

The settlement provides that Samarco will pay 4.4 billion reais through 2018 and a minimum of 20 billion reais (approximately US\$ 5.6 bn) in the next 15 years to cover and repair damages. The company has committed to develop and execute 17 socio-environmental and 21 socio-economic programmes. Additionally, the agreement determines that Samarco will pay 500 million reais in compensatory measures destined to improve the sanitation infrastructure of the cities located along the Doce river.

The settlement creates a two-tier governance structure composed by a private foundation and an “interfederative” committee. In both governance bodies, there is little or no room for 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 is an independent body composed mainly by representatives of the federal and state governments. It has seven 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 disciplined the process of appointment of these three members.

The foundation is the entity responsible for managing the resources allocated for the reparation of damages and implementing the environmental, social and economic programmes. The governance bodies of the foundation are the Curators’ Council, the Executive Board, the Consultative Council and the Fiscal Council. The Curators Council’s main attribution is to approve the plans, projects and programmes necessary to the implementation of the agreement, after recommendations by the Executive Board and in consultation with the Consultative Council. The Curators Council is composed by seven members, of which six will be appointed by the three companies (each company has two seats) and one by the interfederative committee. The Consultative Council has seventeen seats, of which five were allocated to the affected communities. The main difference between the powers of the Curators and the Consultative councils is that the latter can only issue “non-binding recommendations” (Article 218).

III. THE HUMAN RIGHTS VIOLATIONS CAUSED BY THE RATIFICATION OF THE SETTLEMENT AGREEMENT

An analysis of the settlement agreement by two experts in the social and environmental impacts of the mining activity concluded that it is “flawed both in terms of elaboration and conception”¹⁰. The experts assessed the settlement agreement in terms of i) the involvement of different groups in the negotiation process, ii) the structure of monitoring and control of implementation, iii) the definition of objectives and deadlines. The analysis concluded that, for each of these basic aspects of efficacy of an agreement of this nature, it contains severe limitations and inherent weaknesses that render it “incapable of producing the real remediation and compensation for the impacts caused by the disaster”.

Among the main problems identified in the analysis, the following are worth a special attention:

1. **Effect on other legal claims:** The settlement agreement intends to “pre-empt” the work of other legitimate actors, such as the public prosecutors, by providing that the parties to the agreement wish to put an end not only to the legal lawsuit under which it was

⁹ The full text of the minutes of the conciliatory court hearing is available in: <<http://s.conjur.com.br/dl/ata-audiencia-homologacao-acordo.pdf>>. Last access: May 10th, 2016.

¹⁰ MILANEZ, Bruno; PINTO, Raquel G. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA. POEMAS – Política, Economia, Mineração, Ambiente e Sociedade. April, 2016. Available in: < <http://www.ufjf.br/poemas/files/2014/07/PoEMAS-2016-Coment%C3%A1rios-Acordo-Samarco.pdf>>. Last access: May 09th, 2016.

negotiated but also any proceedings that exhibit a “connexion” to the substance of the agreement. It was agreed that the public authorities party to the agreement will seek to intervene in other legal claims with the objective of ensuring the respect for the obligations set forth therein;

2. **Legitimacy of the process and participation:** The affected communities, groups and populations and their representatives were absent from the negotiation table. They were afforded no opportunity to influence in the design of the instrument and even the provisions related to the transparency and involvement of the communities in the implementation phase lack do not remedy this original shortcoming because they lack any parameter for their proper enforcement;
3. **Governance weaknesses:** The governance structure created by the agreement is incapable of overcoming structural problems that ultimately account for a disaster such as the collapse of the dam in Mariana. These problems include, among others, the low institutional capacity of oversight agencies (such as the environmental authorities) and the absence of mechanisms to prevent and mitigate conflicts of interest. These arise from a variety of sources, such as the fact that Vale is a major contributor to electoral campaigns. Politicians elected with funds from Vale and Samarco will be less likely to exert a true oversight over the implementation of the programmes and projects established in the agreement;
4. **Asymmetric decision-making process:** The foundation has great discretionary powers to set the eligibility criteria for those who wish to be recognized as directly or indirectly affected by the disaster and to define the form and amount of the financial compensation for the violations experienced as a result of the disaster¹¹. Public authorities’ participation in the bilateral or collective negotiations is by no means guaranteed, in a clear demonstration that the agreement fails to recognize the asymmetry of power between the business enterprises and the affected communities, especially vulnerable groups such as riverside communities, indigenous peoples and traditional groups. Additionally, victims will have to go through cumbersome, bureaucratic procedures to get recognition of their economic situation before the dam burst in order to be materially compensated by the foundation.
5. **Enforcement flaws:** The agreement presents several inconsistencies in what refers to the definition of targets and deadlines. Especially the socio-economic programmes lack clear indicators and qualitative and quantitative objectives and clear expected outcomes. There is a risk that the mere existence of the programme, irrespective of its efficacy, will be enough for a recognition of compliance with the obligations set forth in the agreement. The timeline of the several programmes of the agreement is confusing and will possibly create obstacles for future social control and oversight.

The ratification of the settlement agreement has been strongly criticized by civil society organizations and representatives of the affected communities. A coalition of more than 100 civil society organizations and social movements condemned the ratification of the agreement for its procedural and substantial shortcomings. The organizations declared that the business enterprises should not have the final word on the reparation of the diffuse and collective rights harmed by their actions and omissions, especially the compensation to the families whose lives were destroyed as a result of the disaster¹².

¹¹ Clause 22 of the agreement provides that the foundation will define, based on technical studies, if the natural person, legal entity, families or communities, have satisfied the requisites and criteria to be qualified as an affected party.

¹² The letter is available in: <<http://ibase.br/pt/noticias/entidades-lancam-nota-contr-o-acordo-do-governo-com-a-samarco/>>. Last access: May 09 2016.

In an open letter, the Chair of the Human Rights and Minorities Committee of the Lower House, Mr. Padre João, expressed his opposition to the ratification of the agreement¹³. In his view, the perpetrators of the damages, business enterprises and state actors alike, should not decide, on their own, how victims and the environment will be repaired. He emphasized that an agreement sealed without meaningful participation of the affected people aggravates the human rights violations caused by the disaster. Mr. João demanded that a solution should be sought by ensuring participation of the affected communities and the involvement of the public prosecutors.

The fundamental right of the individuals and affected communities to effective administrative and judicial remedies has been violated by the ratification of the settlement agreement (ICCPR¹⁴, Article 3, a, b; UDHR¹⁵, Article 8; UN GPs¹⁶, Principles 22, 25, 26; Rio Declaration, Principle 10). In its preamble, the agreement creates a “pre-emptive” effect over any other lawsuit related to the disaster, in the sense that any legal claim with same object or any “connexion” to the agreement filed by any “legitimate agent” is, by virtue of this provision, automatically terminated. This provision violates the Constitution in the sense that it aims to strip bodies such as the public prosecutors and the public from their constitutional powers to pursue public interest litigation on behalf of affected communities and the collective interest. The affected communities have not consented to forgo their right to an effective judicial remedy, as they have not been consulted in any phase of negotiation and ratification of the agreement. This right is, in fact, inalienable as it is enshrined in a constitutional provision. Article 5, XXV of the Brazilian Constitution provides that “no law should exclude any threat or infringement of a right from consideration of the Judicial Power”¹⁷. The agreement coerces the victims to accept the compensation and reparation proposals made under the agreement by stating that any person who “opts-out” from the negotiation proceedings is automatically excluded from the socio-economic remediation programmes scheduled therein (Article 36).

The settlement agreement eludes the duty of the Brazilian State to protect the human rights of the citizens within its territory against violations committed by business enterprises. In its preamble, the agreement states that its purpose is to end all the judicial proceedings relating to the disaster and explicitly eschews the responsibility of the three companies for the adverse consequences of the dam collapse¹⁸. It also unduly discharges the public authorities from its own responsibilities for the disaster.

A settlement agreement, especially one that aims to remediate the nefarious impacts of a disaster of this magnitude, is contrary to basic human rights principles if conducted without meaningful participation of the affected groups and communities and if it lacks appropriate accountability mechanisms to ensure that the implementation will effectively address the concerns of the victims and return their livelihoods to the *status quo ante*.

This settlement agreement violates the human rights of the affected communities, groups and populations by denying them the right to meaningful participation in measures that affect their lives, the right to an effective access to administrative and judicial remedies and the right to access to information concerning environmental issues. If allowed to be implemented as it is, the settlement agreement will represent no more than an illegitimate and illegal remediation solution that denies victims access to

¹³ Tragédia de Mariana: Comissão de Direitos Humanos repudia acordo entre Samarco e poder público. Available in: < <http://www.ptnacamara.org.br/index.php/manchetes/item/27470-tragedia-de-mariana-comissao-de-direitos-humanos-repudia-acordo-entre-samarco-e-poder-publico>>. Last access: May 09 2016.

¹⁴ International Covenant on Civil and Political Rights.

¹⁵ Universal Declaration of Human Rights

¹⁶ United Nations Guiding Principles on Business and Human Rights.

¹⁷ Brazilian Constitution of 1988. Available in (English): <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf>. Last access: May 11th 2016.

¹⁸ “**CONSIDERANDO** que a celebração deste acordo judicial visa por fim ao litígio por ato voluntário das partes, reconhecendo que a autocomposição é a forma mais célere e efetiva para resolução da controvérsia, não implicando assunção de responsabilidade pelo EVENTO” (Page 3).

justice and is absolutely incompatible with the human rights obligations set forth in international human rights law and in the UN Guiding Principles on Business and Human Rights.

IV. REQUESTS

The organizations make the following requests to the UN Special Procedures addressed in this Urgent Appeal:

- 1) The formal acknowledgment of receipt of this URGENT APPEAL and its processing in accordance with the applicable rules of the UN Special Procedures' communications;
- 2) That the Special Procedures urge the Brazilian state and the three companies involved in the dam burst to immediately suspend the implementation of the settlement agreement and to establish a participative and effective consultation process with the affected communities of all the Doce River basin aimed at the elaboration of a new agreement, one that incorporates the views and concerns of all the interested parties, especially of the indigenous populations (especially the Krenak tribe), the traditional groups (fishermen, small farmers, among others) and the urban population of the villages and cities affected by the disaster. This process should be guided by the foundational principles of international human rights law, which include transparency, accountability, participation and effective remediation.
- 3) An assessment of the governance structure and the obligations set forth in the settlement agreement related to the dam burst disaster against international human rights standards related to the independence and impartiality of remediation processes. It is crucial to have mechanisms to avoid the lack of enforcement of the terms of the agreement and the abuse of its use by economic and commercial interests of business enterprises involved in the violation.

Respectfully,

Ame a Verdade

Artigo 19

Colectivo Margarida Maria Alves de Assessoria Popular

Conectas Direitos Humanos

Fórum Capixaba de Entidades em Defesa da Bacia do Rio Doce

Grupo de Estudos e Pesquisas Socioambientais – Universidade Federal de Ouro Preto (UFOP)

Justiça Global

Movimento dos Atingidos por Barragens – MAB