



Case review: the Rio Doce mining disaster in Brazil – *Samarco vs Environment Council of Minas Gerais*

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INTRODUCTION

In 2015, two iron ore tailing dams operated by Samarco Mineração SA, a joint venture of Brazilian transnational mining company Vale SA and the Anglo-Australian BHP Billiton (now BHP), collapsed in Brazil. The dam rupture poured roughly 40 million cubic metres of mining waste into communities, the Rio Doce valley, and the Atlantic Ocean, across 650 km. It is considered to be an industrial disaster that has caused the greatest environmental impact in Brazilian history and the largest in the world involving tailing dams. This led to multiple lawsuits being filed in Brazil, Australia and the United Kingdom, including allegations for negligence and a claim for damages by the victims of the dam rupture and their families.¹

In this paper, I aim to analyse the decision of the Environment Council of Minas Gerais, Brazil, which authorised the return of Samarco SA's operations four years after the disaster. In the period between the crime and the authorisation to return to activity, the lack of remedial measures is noteworthy, as several civil and labour lawsuits are still ongoing, and there is yet much controversy and conflict between the company and the victims. The decision demonstrates how, in times of economic crisis, the legal system responds in favour of corporate interests, rather than the people whose human rights have been violated.

I start by providing a summary of the facts, contextualising the elements of the disaster and later focus on the environmental licensing process of the case in review. Finally, my conclusion highlights the limits of the existing legal framework under the neoliberal discourse, particularly in the extractive sector.

1 Business and Human Rights Resource Centre, 'BHP & Vale lawsuit (re dam collapse in Brazil)' (2018).

OPENING REMARKS: CONTEXTUALISING MINING AND ENVIRONMENTAL REGULATION IN BRAZIL

In Brazil, due to historical factors, mining is symbolically linked to development and to expectations of employment and well-being. But, since colonisation, the exploitation of mining is marked by processes of deterritorialisation, geopolitical dependence and power asymmetry.

The Federal Constitution of 1988 represents an important milestone in the consolidation of diffuse rights and forms of judicial control to promote these rights. The environment was one of the first issue areas to be affected by this regulation, with the creation of mechanisms for social participation. Despite that, its implementation remained insufficient, and corruption, lack of financial resources, constant restructuring of environmental agencies and low levels of environmental consciousness are well recognised as factors inhibiting environmental capacity in Brazil.² Currently, the growth of investments in primary mineral extraction for export in the country has resulted in the increase of social and environmental conflict, and the tendency for this scenario is to expand further in the context of the ongoing flexibilisation of environmental licensing regulations at all levels.

For example, there is a New Mining Code proposed by the Ministry of Mines and Energy and Decree 47.137/2017, in which the Governor of the State of Minas Gerais, to streamline the licensing processes, facilitates environmental norms so that companies may request, simultaneously, two or three required licences. In this sense, it is a fact that state government policy in recent years has been responsible for the scrapping of governmental agencies, thereby making it unlikely that these agencies can effectively carry out functions prescribed in new legislation.³ In effect, the rupture of the Fundão tailings dam was a frightening example of this critical context but is far from being an isolated case.⁴

2 Kathryn Hochstetler, 'Brazil' in: Helmut Weidner and Martin Jänicke (eds), *Capacity Building in National Environmental Policy: A Comparative Study of 17 Countries* 1st edn (Springer 2002).

3 Andréa Zhouri at al, 'The Rio Doce mining disaster in Brazil: between policies of reparation and the politics of affectations' (2017) 14(2) *Vibrant: Virtual Brazilian Anthropology*.

4 Haruf Salmen Espindola, Eunice Sueli Nodari and Mauro Augusto dos Santos, 'Rio Doce: risks and uncertainties of the Mariana disaster (MG)' (2019) 39(81) *Revista Brasileira de História*.

THE DAM RUPTURE OF SAMARCO IN THE RIO DOCE BASIN

Samarco Mineração SA is a privately held company, founded in 1973. The company's operations range from mineral extraction, through secondary processing, to the transoceanic transport of pellet feed and, mainly, iron ore pellets, directed to markets in Africa and the Middle East (23.1 per cent), Asia – except China – (22.4 per cent), Europe (21 per cent), Americas (17 per cent) and China (16.5 per cent).⁵ Samarco is organised as a corporate joint venture – an association between two independent companies with a legal personality. Since 2000, it has been divided equally between Vale (50 per cent) and BHP Billiton Brasil Ltda (50 per cent), the Brazilian subsidiary of the Anglo-Australian group. However, the specific organisational format assumed by Samarco is that of a non-operated joint venture, so that operational responsibility falls to Vale.

On 5 November 2015, 35 kilometres from the municipality of Mariana, in the state of Minas Gerais, two mining tailing dams operated by Samarco collapsed, releasing toxic iron-ore residue into communities, affecting an extensive area of the states of Minas Gerais and Espírito Santo.⁶ The residue destroyed the nearby district of Bento Rodrigues killing 19 people immediately and polluting the water supply of hundreds of thousands of residents. The arrival of the toxic mud in Rio Doce and its tributaries, whose watershed covers 230 municipalities, and then the ocean, destroyed hundreds of dwellings, caused major losses to the productive activities of hundreds of riverine communities, disrupted the supply of water for the population, and caused wide-ranging damage to human and non-human lives in the area.⁷

After many criticisms, on 2 March 2016, Samarco reached a settlement to restore the severely damaged environment and indemnify the affected communities. However, the Brazilian Federal Prosecutor Office insisted that the deal did not guarantee proper clean-up and damages because the affected populations were not included in settlement talks. In the same year, Brazilian federal prosecutors also filed homicide charges against 21 people, including top executives

5 Rodrigo Salles Pereira dos Santos and Bruno Milanez, 'The construction of the disaster and the "privatization" of mining regulation: reflections on the tragedy of the Rio Doce Basin, Brazil' (2017) 14(2) *Vibrant: Virtual Brazilian Anthropology* 127.

6 Kirstin Ridley, 'BHP faces first step in \$6.3 billion UK claim over Brazil dam failure' (Reuters, 14 July 2020).

7 Cristiana Losekann, Thais Henrique Dias and Ana Valéria Magalhães Camargo, 'The Rio Doce mining disaster: legal framing in the Brazilian justice system' (2020) 7(1) *The Extractive Industries and Society* 199.

of BHP, Vale and Samarco, for the 19 deaths resulting from the dam rupture, but the federal court suspended the criminal case.

Only in October 2018 did Brazilian prosecutors announce that they had reached a final compensation deal with Samarco, Vale and BHP, which included compensation payments for the relatives of the 19 people killed in the disaster and for those who lost their properties. The amount has not been disclosed.

However, many claimants are still seeking compensation for physical and psychological injury, property damage, moving costs, loss of earnings, loss of water supply and lost fishing income. The victims allege that the reparation for the disaster was not guaranteed because Renova Foundation, a redress scheme established in 2016 by the three mining companies to manage the disaster recovery, lacks independence and its compensation scheme is slow, bureaucratic, inadequate and has not properly involved victims in decision-making.

THE CASE OF SAMARCO VS ENVIRONMENT COUNCIL OF MINAS GERAIS

The Fundão dam was part of the infrastructure necessary for making Samarco's mining complex operational. Soon after the disaster, the company had its operating licences suspended by the authorities, when the state government determined new conditions for returning: a new plan for disposal of the tailing. In the specific case of Minas Gerais, the body responsible for environmental policy is the Minas Gerais State Environmental Policy Council (COPAM), whose purpose is to deliberate on guidelines, policies, regulatory and technical norms, standards and other measures of an operational nature, being responsible for environmental licensing.

The option, then designed by Samarco, was to use a pit, a huge hole where the company extracted iron ore, located in its production complex in the mining town of Mariana. In 2017 Samarco obtained an environmental licence from the state of Minas Gerais to carry out the works to adapt this pit. In parallel, Samarco also submitted to the environmental authorities a licensing request for corrective operations for the entire project.

In Brazil, in a tight summary, environmental licensing takes place by granting three types of licences, which are: Preliminary Licence, Installation Licence and Operation Licence.⁸ These can be issued separately or successively. The Preliminary Licence is the first stage of environmental licensing, a stage in which the environmental feasibility of the project is attested and its conception approved. It is at this stage

8 Lei No 21.972/2016, Provisions for the State System of Environment and Water Resources, arts 16, 17, 18.

that there are public consultations, through hearings. The second phase is the Installation Licence, which authorises the installation of the enterprise in accordance with the specifications contained in the approved plans, programmes and projects, including the conditions. The Operation Licence is the last phase, which authorises the project operation and the performance of the impacting activity. This happens after verifying the effective fulfilment of what is stated in the Preliminary and Installation Licences.

In addition, article 225 of the Federal Constitution guarantees the right to a healthy and balanced environment, as well as requiring, for the installation of a project or activity that potentially causes significant degradation of the environment, a previous study of environmental impact. It is also foreseen in the Federal Constitution that anyone who exploits mineral resources is obliged to recover the degraded environment, according to the technical solution required by the competent public body (article 225, paragraph 2) and that the conduct and activities considered harmful to the environment will subject offenders, individuals, or legal entities to criminal and administrative sanctions, regardless of the obligation to repair the damage caused (article 225, paragraph 3).⁹

New requests for licences and a return to the company's operations were underway while investigations into the causes of the disaster were ongoing. These indicated that the managers of the mining company were aware of the risks that the dam was taking and did not take adequate safety measures, with indications that the licensing of the dam was done in a hurry, without the company fulfilling fundamental requirements for obtaining the licences. In doing so, the mining disaster that hit the Rio Doce valley had great repercussions on the justice system.

Samarco submitted the licence request in September 2017 to COPAM.¹⁰ The corrective licence operation evaluated, in a single process, the 36 licences suspended in 2016 after the tragedy, and the 14 licences that were being processed at the same time of the breach. On 25 October 2019, despite the progress of the various processes for determining liability for the disaster and questions about the effectiveness of the remedial measures, COPAM authorised Samarco to resume operations in Minas Gerais. The licence is valid for 10 years, and the company resumed operations at the end of 2020.

COPAM's decision was made through a vote. As a Council, it is a mechanism created by environmental regulation to guarantee social participation within the licensing process. The main point to be questioned is the composition of the Chamber, formed by 12

9 *Constituição da República Federativa do Brasil de 1988.*

10 'Parecer n. 0603993/2019' – COPAM.

councillors. Of these, four are representatives of the state government; three are from the federal government and three from the business/mineral sector, with converging interests for the return of Samarco. The two remaining vacancies are filled by representatives from the Regional Council of Engineering and Agronomy (Crea-MG) and a non-governmental organisation, the National Civil Society Forum on Watershed Management (Fórum Nacional da Sociedade Civil nos Comitês de Bacias Hidrográficas – Fonasc-CBH, in Portuguese). Mayors from affected cities also pressured for the return of the company's operations. With such an unbalanced representation, it was not surprising that the voting score on the resumption of the company was 10 votes in favour, one abstention and one vote against, from Fonasc.

This decision put in question the transparency and efficiency of the licensing system of large enterprises in Brazil. Previously, Samarco had already failed to comply with environmental standards. Between 1996 and 2015, Samarco accumulated about 18 assessments for environmental reasons. However, the company was able to take advantage of the slowness of the legal and public administration systems and the lack of punishment, not changing its corporate practices. This fact highlights the disparity of forces and influences on the dispute: on the one hand, we have two of the three largest mining companies in the world with techniques, strategies and specialised knowledge; on the other, the affected population, urban and rural communities, traditional peoples, quilombolas, indigenous peoples, communities that live on fishing, among others. COPAM's authorisation may be related to insufficient control of environmental agencies, in what could be described as an appropriation of environmental agencies by an elite associated with the government and the business sector.¹¹

The United Nations Guiding Principles on Business and Human Rights of due diligence establish, on the duty to respect, that corporations must refrain from violating human rights and deal with the negative consequences of the activities in which they have some involvement, to ensure that their activities and relationships do not violate human rights. When we analyse the case of the Samarco disaster and the lack of significant responses regarding human rights violations, the issue of corporate capture of the government institutions cannot be ignored.

It should be noted that, given the severity of the disaster that occurred four years earlier, it would be expected that the licensing of resumption of operations would be much more rigorous, respecting the three-phase process again and allowing a broader discussion on

11 Bruno Milanez and Clarissa Reis Oliveira, 'Capacidade ambiental no nível subnacional: o caso do estado de Minas Gerais, Brasil' (2015) 44 *Planejamento e Políticas Públicas* 317.

the costs and benefits and the security requirements. However, the procedure labelled ‘corrective’ was dedicated solely to the re-evaluation of the final licence – the operational one. In theory, environmental licensing should guarantee public participation, transparency, and social control. But, as mentioned, not even the victims of the disaster have a seat in the Mining Chamber.

FINAL CONSIDERATIONS

The case of the Rio Doce Disaster illustrates negligence of business agents and public authorities. The collapse fuelled strong questions about the mining industry’s ability to maintain sufficiently secure structures. Nine months before Samarco’s licence was granted, another disaster affected the state of Minas Gerais, the mining industry, and Brazilian socio-environmental conditions – the Brumadinho disaster, in Paraoapeba river, in which over 200 people died in another dam rupture owned by Vale SA.¹² These two great mining related tragedies marked the 2010s in Brazil.

To date, there has been no condemnation in court of any of Samarco or Vale’s employees or executives. The Rio Doce disaster illustrates that state agencies responsible for public regulation have had very limited influence over corporate practices and technical options by mining companies in Brazil. These tragic events exemplify the pattern of human rights violations committed by corporations and the challenge to hold these companies accountable.

12 Katy Watson, ‘Vale ended our lives’: broken Brumadinho a year after dam collapse’ *BBC News* (25 January 2020).