

TRANSPARENCY, PARTICIPATION,
ACCOUNTABILITY AND FULL REMEDIATION:

A proposal of governance reform to remedy the Doce River disaster

Conectas Human Rights
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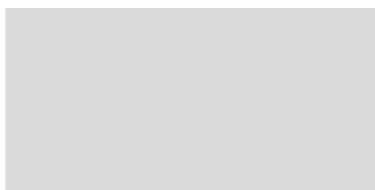
Transparency, participation, accountability and full remediation: a proposal of governance reform to remedy the Doce River disaster
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TRANSPARENCY, PARTICIPATION, ACCOUNTABILITY AND FULL REMEDIATION: A PROPOSAL OF GOVERNANCE REFORM TO REMEDY THE DOCE RIVER DISASTER

APRIL, 2018

ABSTRACT

The goal of this Policy Paper is to conduct a propositional analysis of the mechanism created to remedy the damage caused by the collapse of the Fundão tailings dam, established in the settlement agreement for the recovery of the Doce River basin. This agreement was signed in March 2016 between the government and the involved companies (Samarco, Vale and BHP Billiton). Following an analysis of the mechanism based on international standards for the right to an effective remedy, a number of shortcomings were found that make it difficult or impossible for the affected communities to gain access to fair remedies.

These are: the lack of meaningful participation by the affected communities; the repeated non-performance, by the companies, of the obligations set out in the agreement; and the flaws in the design and implementation of the remedy programs, which are not compatible with the experienced harms and with the affected communities' livelihoods. These problems undermine the legitimacy of the governance structure and the effectiveness of the remediation measures. This paper presents recommendations for possible adjustments to the current remedy mechanism that would enable the effective remediation for the damages caused. These adjustments are based on four key principles: transparency, participation, accountability and full remediation. It is expected that the affected communities will have the opportunity to decide, in a free and informed manner, which measures are adequate for remedying the full range of experienced harms, as well as that such measures are correctly implemented by the entities that are in charge of them.

Keywords: Doce River; Mariana; Renova Foundation; settlement agreement; business and human rights; effective remedy.



I. INTRODUCTION

This Policy Paper addresses the governance of the Renova Foundation and the Interfederative Committee, which are responsible, respectively, for the implementation and oversight of the programs to recover the Doce River basin following the collapse of the Fundão tailings dam, on November 5, 2015¹. The goal is to provide inputs and to draft proposals for the necessary adjustments in the governance of the two organizations, as well as to the remedy programs developed by them, in light of international standards on the right to an effective remedy.

The Renova Foundation and the Interfederative Committee were created by the Settlement Agreement – officially known as the Transaction Term of Conduct Adjustment – signed in March 2016 between the three companies (Samarco, Vale and BHP Billiton), the federal government, the state governments of Minas Gerais and Espírito Santo and a number of other federal and state-level bodies and agencies.² The Settlement Agreement also established the socioeconomic and socioenvironmental approaches to the recovery of the Doce River basin, within which the remedy programs are developed. The socioeconomic approach includes, among other things, the socioeconomic registry, in which the Renova Foundation recognizes the affected people and identifies the damages they have suffered; and the Mediated Compensation Program, in which the people already registered as affected may seek out-of-court monetary reparations.

The parties in the agreement made a choice for an extrajudicial remedy mechanism to solve the disputes between the affected people and the companies involved. On the one hand, this choice is

justified because of the numerous barriers to access to justice in Brazil, particularly when it comes to human rights violations by companies. Some of the main problems faced are the sluggishness of the Brazilian justice system, the lack of knowledge by the affected communities about their rights, and the difficulty of measuring the damage caused.³ On the other hand, several measures need to be adopted to guarantee that extrajudicial remedy mechanisms effectively protect the rights of the parties in dispute.⁴ The effectiveness of these mechanisms depends not only on their institutional framework, which needs to provide the right instruments for the affected people to receive reparations for all the experienced harms. There also needs to be an effective oversight of compliance, as well as judicial channels that can ensure the provision of these remedies if the mechanisms in question are flawed or incomplete. In this respect, extrajudicial remedy mechanisms involving human rights violations cannot create barriers to access to justice by the affected people, as it would impair its functioning.

Since the Settlement Agreement was signed, civil society organizations, scholars, members of the Public Prosecutor's Office and the Public Defender's Office, as well as representatives from social movements and the affected communities have identified a number of problems and issues that need adjustment in the structure of the two entities and in the remedy programs. More specifically, they have criticized (i) the lack of participation by the affected people in the negotiating process of the Settlement Agreement and in the structure of the Renova Foundation and the Interfederative Committee; (ii) the establishment of a ceiling to be disbursed by the companies in the first years of reparations for damages, even before the complete assessment of the disaster; and (iii) the lack of concrete targets and



clear standards for determining compliance with the obligations set forth in the agreement.⁵

As a result, two other agreements were signed over the course of 2017 with the objective of (i) assessing the efficiency of the programs developed thus far, (ii) conducting a complete assessment of the damages caused by the disaster, and (iii) creating technical assistance committees to advise the affected people throughout the remedy process. Those agreements are the Preliminary Adjustment Agreement, signed in January 2017, and its first protocol, signed in November of the same year. The involved companies and the Federal and Minas Gerais and Espírito Santo States Prosecutor's Offices are currently negotiating a final agreement that will adjust the governance of the Renova Foundation and the Interfederative Committee.

This Policy Paper intends to take advantage of the current review of the governance created by the Settlement Agreement to outline proposals on how to adapt it to international standards on the right to an effective remedy. In light of international human rights law, we will make a propositional analysis of three shortcomings that have been hindering the protection affected communities' rights. These shortcomings are: (i) the lack of meaningful participation, with decision-making power, by the affected communities within the structure of the Renova Foundation and the Interfederative Committee; (ii) Renova Foundation's repeated non-compliance with the obligations set forth in the Settlement Agreement and with the determinations of the Interfederative Committee; and (iii) the shortcomings in the design and implementation of the remedy programs, in particular the socioeconomic registry and the Mediated Compensation Program.



II. THE SECONDARY ROLE OF THE AFFECTED COMMUNITIES WITHIN THE STRUCTURE OF THE RENOVA FOUNDATION AND THE INTERFEDERATIVE COMMITTEE

According to international human rights law, rights holders who suffer gross human rights violations should not be treated merely as recipients of remedies. They should also actively participate in the set-up, assessment and operation of remedy mechanisms.⁶ This is particularly important in cases of human rights violations committed by business enterprises, given the need to level the playing field between them and the affected people.⁷ The participation should occur before the implementation of the remedy mechanism, so the parties can co-create and jointly design it.⁸ In other words, the affected people should be given the opportunity to effectively influence the design and implementation of the remedy process and to decide which measures are most suitable for remedying the full range of damages they suffered. For this participation to be free and informed, the affected communities should also have full access to relevant material information on the violations, the remedy mechanisms that are available to them, and all the existing legal, medical and psychological resources.⁹

In the Doce River case, the affected communities did not meaningfully participate in the design of the remedy measures and they have been left out of the implementation and oversight processes. According to the Settlement Agreement and its own bylaws, the Renova Foundation is the organization responsible for

the development and implementation of the programs for the recovery of the Doce River basin and for the management of the funds allocated to these programs. Four internal bodies compose the Foundation: (i) an Executive Board, which develops, proposes and executes the remedy programs; (ii) a Board of Trustees, which approves the programs proposed by the Executive Board; (iii) an Advisory Board, which advises the Foundation and issues opinions on the remedy programs, which are not binding; and (iv) an Audit Committee, which conducts the financial and accounting oversight of the Renova Foundation.

Of all these, the only body with members appointed by the affected communities is the Advisory Board, which has seventeen members, of which five are representatives of the affected communities. Seven members form the Board of Trustees - six appointed by the three involved companies, in the proportion of two per company, and one member appointed by the Interfederative Committee. The Board of Trustees appoints the members of the Executive Board and they must be individuals with technical qualifications and notorious professional experience in their field. Finally, the Audit Committee consists of members appointed by the Board of Trustees, by each of the involved companies, by the federal government and by the state governments of Minas Gerais and Espírito Santo.

The Interfederative Committee, in turn, is an external body for dialogue between the Renova Foundation and the government. Its responsibilities include, among others, the validation of the remedy programs and the imposition of penalties to the Renova Foundation and the three companies in the event of non-compliance with any of the obligations they assumed in the Settlement Agreement. The



Interfederative Committee is exclusively composed of government representatives. Of its twelve members, two are representatives of the municipalities of Minas Gerais affected by the disaster and one is a representative of the affected municipalities in Espírito Santo. These representatives, however, are municipal administrations' employees and do not necessarily represent the interests of the affected communities. In addition to its members, the Committee may also set up Technical Commissions to advise it in the analysis of the proposed remedy programs and their results. Although affected people may serve on these Technical Commissions, their role is limited and, as a rule, they do not have any decision-making power.

This demonstrates the first shortcoming in the governance of the Renova Foundation and the Interfederative Committee: the affected communities have no decision-making power in these two entities. Neither the Advisory Board of the Renova Foundation nor the Technical Commissions of the Interfederative Committee, on which the affected communities can participate, issue binding recommendations or opinions. Moreover, in the case of the Advisory Board of the Renova Foundation, the representatives of the affected communities are a small minority – just five out of seventeen members. Only equal representation and decision-making power shared between the affected communities and the other parties involved – including companies and government – will guarantee meaningful participation. Any proposal for the participation of the affected communities that is below the number necessary for them to determine the course of the remedy programs would be incompatible with international human rights law. Such proposal would also disregard the requests made by the affected communities over the course of the negotiations for the new agreement.¹⁰

Meaningful participation by the affected people is also undermined by the lack of standards for their participation and for the appointment of their representatives. Neither the Settlement Agreement, the bylaws of the Renova Foundation nor the Internal Regulations of the Interfederative Committee contain clear rules on the process for selecting these representatives. As an example, the Interfederative Committee, in the Deliberation No. 155/2018, determined that the Renova Foundation would cover the costs of participation by affected traditional communities in the meetings of the Technical Commission on Indigenous and Traditional Peoples and Communities (CT-IPCT). The same deliberation provides that this participation will follow standards to be defined by the CT-IPCT and the Renova Foundation, observing the preliminary guidelines of the Interfederative Committee. There is no mention, therefore, to the obligation to hold consultation processes pursuant to Convention 169 of the International Labor Organization or of any protocols for prior consultation that these communities may have developed.¹¹ In order to ensure the compliance of this participation with the cultural practices of the affected traditional communities, the Interfederative Committee should include this in its preliminary guidelines and guarantee that these guidelines are respected.

The lack of meaningful participation also undermines the very legitimacy of the two organizations. The Renova Foundation was intended to be independent from the companies and to have the autonomy to manage the funds and execute the remedy programs. However, in practice, it is not independent from the involved companies, since they are responsible for appointing, whether directly or indirectly, the members of the Foundation who



will develop, approve and execute the reparation programs. Given this flawed governance, the affected communities are now demanding that discussions on the remedy programs take place in local decision-making spheres, enabling their participation in the decision-making process. An example of this is the Working Group on the issue of Redress for the Right to Housing, which was set up in Mariana. One of the meetings of the Working Group was attended by more than 150 people, the majority of whom were affected people, in addition to representatives of the Minas Gerais state and Mariana municipal governments, the Renova Foundation, the involved companies and the Public Prosecutor's Office. This proximity between the decision-making bodies and the affected territories makes it easier for the communities to take part in the discussions, which can thus factor in the specifics of each community, thereby allowing their meaningful participation in the decision-making process.

Regarding access to information, affected people do not have access to documents that directly affect their rights, such as the reports appraising their property and the justifications for decisions denying them some form of assistance.¹² Moreover, the latest agreement signed between the companies and the Public Prosecutor's Office, from November 2017, provides for the creation of technical support services to help the affected people throughout the remedy process. These services need to be completely independent from the Renova Foundation and the companies involved, and to be formed by professionals that are qualified to assist the affected communities in defending their own interests. The technical support services have already started operating in the municipalities of Mariana and Barra Longa and their proper implementation in all the communities affected by the disaster is essential to guarantee that the participation of the affected people is free and informed.

RECOMMENDATIONS:

- The affected communities should have an egalitarian representation on the internal bodies with decision-making power within the Renova Foundation and the Interfederative Committee. This is essential not only to guarantee respect for the rights of these communities, but also to ensure the legitimacy of the work of the two organizations.
- The appointment of these representatives should be made using a transparent and equitable procedure that observes the cultural and social dynamics of each community.
- Without affecting their participation in the internal bodies of the Renova Foundation and the Interfederative Committee, local decision-making spheres should be set up to decide on the remedies for the harms. Discussions at the local level enable the affected people's presence and ensure that the specifics of each community are considered in the decision-making process.
- Their participation should be accompanied by a rigorous process of training and dissemination of material information for the affected communities by the technical support services, as provided for in the Preliminary Adjustment Agreement and its protocol.



III. NON-COMPLIANCE WITH THE DETERMINATIONS OF THE INTERFEDERATIVE COMMITTEE BY THE COMPANIES AND THE RENOVA FOUNDATION

Best practices and definitions of good governance vary depending on the objectives of each institutional framework. However, some key elements of a good governance are: transparency, responsibility, accountability, participation, and responsiveness.¹³ Furthermore, according to international human rights law, the cessation of ongoing violations and the investigation and punishment of offenders are essential to guarantee an effective remedy.¹⁴

In the Doce River case, however, the Settlement Agreement expressly provides that the act of signing the agreement does not imply the assumption of responsibility for the collapse of the Fundão tailings dam. Instead, the companies allegedly assume the obligation to remedy the damage caused through a voluntary act. The agreement established the procedure through which the Interfederative Committee can apply the appropriate penalties for non-compliance with these obligations. According to the Settlement Agreement, the Interfederative Committee must send a formal notification to the Renova Foundation and the three companies giving notice of their non-compliance and establishing a suitable deadline for proper compliance (Clause 247). Within this period, the Foundation and the companies must comply in full with the specified obligation, justify the non-compliance or request an extension of the deadline. The agreement does not establish a time

frame for the Interfederative Committee to review the justifications submitted by the Renova Foundation or by the companies. It determines only that, if the non-compliance persists, the Committee will apply the appropriate fines.

In spite of this system of penalties that has been created, on several occasions there have been cases of non-compliance not only with the obligations assumed by the companies and the Renova Foundation, but also with the decisions of the Interfederative Committee over the course of the aforementioned disciplinary procedure. In Deliberation No. 152 of February 26, 2018, for example, the Committee fully rejected an appeal submitted by the Renova Foundation and upheld the reasoning of the three other previous deliberations. The first, Deliberation No. 58/2017 of March 31, 2017, set a deadline of 30 days for starting the implementation of the socioeconomic registry program in communities located between Nova Almeida and Conceição da Barra, north of the mouth of the Doce River in the state of Espírito Santo.

The socioeconomic registry is the program through which the Renova Foundation identifies and recognizes the affected people and the damages they have suffered, so it can implement the first reparation measures. Under the Settlement Agreement, the Renova Foundation should have completed the registration procedure within eight months from signing the agreement, i.e. by November 2016. However, the example above illustrates that, two years after signing the agreement and two and a half years after the collapse of the dam, there are still several affected communities that have not been recognized, preventing them from accessing any type of remedy. Note, also, that the first deliberation by the Interfederative Committee on the matter was issued



in March 2017 and, by February 2018, the Renova Foundation had still not complied with its obligation to register these communities.

Therefore, the repeated non-compliance by the Renova Foundation with the obligations contracted in the Settlement Agreement and with the decisions of the Interfederative Committee is the second shortcoming in the governance created by the agreement that has delayed the entire remedy process. This shortcoming is particularly serious when it comes to the recognition of affected communities and the inclusion of people in the socioeconomic registry, since this is the very first step of the remedy process, without which they have no access to remedies. Accordingly, decisions on the legitimacy and eligibility of affected people to participate in the remedy mechanism should be reviewed by an external, impartial organization that is independent from the involved companies.

Indeed, human rights experts already recognized such practice as an important way to guarantee the rights of victims of human rights violations who are seeking reparations through extrajudicial remedy mechanisms. In 2012, the mining company Barrick Gold created an internal mechanism to set reparations for women victims of sexual violence committed by private security guards at its Porgera mine in Papua New Guinea. This was one of the first extrajudicial remedy mechanisms for human rights violations developed after the adoption of the UN Guiding Principles on Business and Human Rights. Experts in international human rights law from the universities of Harvard and Columbia studied the case to learn lessons that could apply to future mechanisms. One of the practices they identified as positive was letting an independent organization decide on the legitimacy and eligibility of the claimants. The study

also pointed out some of the flaws of the mechanism, namely the lack of participation by the victims and the creation of barriers to access to justice.¹⁵

RECOMMENDATIONS

- New penalties should be established for non-compliance with the obligations contracted in the Settlement Agreement to discourage disrespect for the determinations of the Interfederative Committee by the Renova Foundation and the involved companies. The application of increased fines and even personal liability for the people responsible for the decision-making and the execution of remedy programs are some of the measures that could help change this situation.
- Concerning the socioeconomic registry program, the revision of the registry should be conducted by an external, impartial organization that is independent from the Renova Foundation and the companies, to ensure that this program is implemented in a timely, transparent, and effective manner.



IV. FLAWS IN THE DESIGN AND IMPLEMENTATION OF THE SOCIOECONOMIC AND SOCIOENVIRONMENTAL REMEDY PROGRAMS

a. Integration between the socioenvironmental and socioeconomic approaches

The protection of human rights and the environment are inseparable.¹⁶ An ecologically balanced environment is a prerequisite for the exercise of other human rights, such as the right to health and the right to life. Furthermore, the right to a healthy environment is, in itself, a human right of the highest order that is recognized by the Brazilian Constitution of 1988¹⁷ and by various international instruments.¹⁸ Recently, a new binding regional treaty signed within the Economic Commission for Latin America and the Caribbean (ECLAC), reaffirmed the indivisibility between environmental and human rights protection. The treaty establishes that States Parties should guarantee to all people the right to live in a healthy environment and the right to informed participation in decision-making processes on environmental matters.¹⁹

The remedy mechanism established by the Settlement Agreement, however, prevents a common and integrated approach to human rights and environmental issues.²⁰ In addition to creating the Renova Foundation and the Interfederative Committee, the settlement agreement also established the socioeconomic and socioenvironmental approaches to the recovery of the Doce River basin. An analysis of the programs developed in each of these approaches reveals that matters related to the recovery of the

environment are not present in the programs intended to remedy the impacts on human rights. Similarly, human rights issues are not properly taken into account in the design of programs geared towards environmental recovery.

The intrinsic connection between the two approaches is evident in practice. Fisherfolks whose only source of income was fishing are dependent on the recovery of the Doce River to exercise their right to work and to generate income. The same can be said about the affected communities where the local economy was based primarily on commercial activities related to tourism, which suffered severe losses on account of the environmental damage caused by the collapse of the Fundão tailings dam. Cultural practices and traditional livelihoods are also intimately connected to the environment and, without the recovery of the Doce River, any program that proposes to protect the quality of life of indigenous peoples and other traditional communities are likely to be futile. Likewise, affected communities that depend on the Doce River as their sole or primary source of water supply will only have their rights to health and to water protected when the environment is recovered.

Until the environmental recovery has been completed, the affected people will continue to face obstacles to the enjoyment of various rights, such as the right to water and the right to work. As a result, there is also an ongoing duty for the Renova Foundation to provide assistance to the affected people, in order to remedy or mitigate these damages. In the case of the right to water, there is an obligation to provide bottled water, for example; in the case of the right to work, there is an obligation to provide emergency financial assistance to those people who suffered losses to their source of income. The goal of



the socioeconomic remedy programs is precisely to implement these types of measures, to the extent that they may only be terminated once the environmental recovery is complete. Therefore, the separation of the socioeconomic and socioenvironmental programs, without a common and coherent approach that unites them, is a methodological flaw that needs to be corrected if the damages suffered by the affected people are to be effectively remedied.

RECOMMENDATIONS:

- A complete and integrated assessment should be conducted of the socioeconomic and socioenvironmental damage caused by the collapse of the Fundão tailings dam. An understanding of the extent of the damage and the interrelation between the socioeconomic and socioenvironmental approaches will enable the coordinated and orderly development of the programs developed within each approach.

- The remedy measures for the socioenvironmental damage should support the goals of the socioeconomic approach, and vice versa. Participation by the affected communities should be ongoing throughout the whole process of assessment and implementation of the recovery programs for both approaches.

- A review of the remedy programs developed to date to make human rights and environmental reparations compatible is essential for these programs to be successful and to provide appropriate remedies to the affected communities. Ongoing and participatory monitoring should be assured.

b. Socioeconomic registry and Mediated Compensation Program

In the specific case of the socioeconomic registry program and the Mediated Compensation Program, other structural weaknesses were identified and merit attention during the assessment of the damages caused by the disaster. According to international standards on the right to an effective remedy, the reparations available to affected people should be proportional to the severity of the damages they have suffered.²¹ Moreover, in order to deter the occurrence of new violations and to ensure adequate reparations for different types of violations, different forms of remedies should be made available, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²²

The choice of the most adequate reparations for each situation should be made by the affected communities, which, as already mentioned, should have the opportunity to meaningfully participate and influence the remedy process for the damages they suffered. Without affecting the ability of affected communities to make their own decision, best practices on the right to an effective remedy dictate that, whenever possible, priority should be given to restitution. That is, reparation measures that can restore the affected people to at least the same state, if not a better one, than they were in before the violation.²³



Traditional forms of remedy

Restitution: measures that restore the victims to their original situation before the violation;

Compensation: monetary reparation for damages that have financial consequences;

Rehabilitation: includes the provision of medical and psychological care and social services to people who have suffered violations;

Satisfaction: depending on the circumstances, satisfaction measures include the cessation of violations, public apologies, investigation and public disclosure of the facts, etc.

Guarantees of non-repetition: measures to prevent similar future violations, such as changes in legislation.

However, as already mentioned, the Renova Foundation is in charge of designing and implementing all the programs for the recovery of the Doce River basin and the affected people have no decision-making power within its structure. Instead, the body that approves the programs is formed by seven members, six of whom are appointed by the companies involved. In other words, the companies are ultimately responsible for determining (i) who the affected people are; (ii) which damages are entitled to remedy; (iii) what form of remedy will be granted for each type of damage; (iv) what means of proof will be accepted to support these damages; and (v) what procedure will be adopted for the inclusion of the affected people in the registry.

As a result, the process of inclusion in the socioeconomic registry is slow, bureaucratic, and incompatible with the livelihoods and with the losses suffered by the affected people.²⁴ With respect to the means of proof, representatives of the affected communities have reported that the Renova Foundation requires them - including those who lost everything in the disaster - to provide evidence of all the assets they lost, either by presenting receipts or photographs. It required fisherfolks - who often work informally and build their own boats and fishing equipment - to provide their professional identity, duly updated, and receipts for their fishing equipment for them to be included in the registry. In this regard, in Joint Recommendation No. 10 of March 26, 2018, the Federal Prosecutor's Office, the Public Prosecutor's Offices in the states of Minas Gerais and Espírito Santo, the Office of the Public Prosecutor for Labor Issues, the Federal Public Defender's Office and the Public Defender's Offices in the states of Minas Gerais and Espírito Santo stressed that a declaration by the affected people should be considered sufficient proof for confirming their situation, pursuant to clause 21 of the Settlement Agreement.



In addition to this, the affected people seeking recognition have to fill out a form that is difficult to understand, due to the language that is used and its length - nearly 600 pages.²⁵ There are also accounts that the Renova Foundation, under the justification of preventing fraud, has repeatedly revised the registry, even after the provision of sufficient evidence of the damages suffered by the affected people. The bureaucracy that pervades the whole registration program, including revisions of the registrations that have already been made, delays the remedy process and prevents the affected people from accessing other remedy programs. According to the UN Guiding Principles on Business and Human Rights, extrajudicial remedy mechanisms for human rights violations should be accessible, predictable and transparent.²⁶ In other words, these mechanisms need to cater to all the affected people by adopting a clear and pre-established procedure, thereby building confidence in their effectiveness. It is necessary, therefore, to close these gaps as soon as possible to prevent the human rights situation in the Doce River basin from deteriorating and to stop new and ongoing impacts from occurring.

With regard to the Mediated Compensation Program, one of the main distortions to be corrected concerns the damages inventory and the standards for setting the amounts of compensation offered to the affected communities. The damages inventory consists of a list of damages that are eligible for compensation and the respective amounts to be paid in reparation.²⁷ As already mentioned, the affected communities did not participate in the process of development of the list or setting the amounts, and they cannot negotiate the amounts during their appointments at the offices of the program. Taking as an example the amounts paid as reparation for the temporary interruption of the water supply, the damages inventory states that the Renova

Foundation pays between R\$880.00 and R\$1,000.00 to those who suffered this damage, depending on where they lived.²⁸ The Renova Foundation justifies these amounts claiming that the interruption of water supply only lasted for a few days after the disaster.²⁹ However, since the Doce River is still polluted, the reconnection of the water supply does not mean the affected people now have access to drinking water.

Indeed, the reports of independent experts state that, unlike what the Renova Foundation claims, the water of the Doce River is unfit for human consumption.³⁰ Those who can afford to are still paying for mineral water and building artesian wells to this day, over two years after the disaster. The affected people who cannot afford these expenses are forced to drink the river water, and they have already reported suffering various health impacts from their contact and consumption of this water.³¹ As a result, the affected communities do not have equitable access to drinking water, which conflicts with international standards for the right to water.³² This demonstrates that the damage recognized by the Renova Foundation and the amount offered as reparation are not commensurate with the real losses suffered by the affected people who, deprived of adequate remedies, end up experiencing new and continued damages.

Also with respect to the amounts paid, the use of discriminatory practices is a frequent complaint of the affected people, particularly with regard to the difference between the compensation offered to male fisherfolks and their female counterparts.³³ According to the damages inventory, the amounts offered to professional fisherfolk who own their own boats are significantly higher than the amounts offered to the so-called 'crew'. Very often, female fisherwomen who worked independently and owned their own boats were classified as crew. As a result, they received less than



what was paid to male fishermen – who were classified as owners – and were in a similar situation.³⁴

The provision of free legal counsel to the affected people who participate in the Mediated Compensation Program is also essential to ensure the proper functioning of the program and the effective remedy for the damages caused.³⁵ The affected people need to be fully aware of the legal consequences involved in signing the individual agreements of the program and to have information about other channels available for seeking reparations – such as the judicial channel. The lack of free legal assistance places the affected communities in an especially vulnerable situation, potentially exposing them to predatory practices used by legal professionals and law firms. There are several accounts indicating that affected people have been charged abusive attorney's fees. Since they do not have access to free legal counsel, they have been forced to hire private lawyers to help them claiming compensation without receiving proper guidance about their rights.

It is also important to mention the inclusion of confidentiality clauses and receipt and release clauses in the individual agreements signed as part of the Mediated Compensation Program. Article 46 of its Internal Regulations places limits on the use of information from the program outside the context of the socioeconomic recovery programs for the recovery of the Doce River basin, setting a fine of R\$10,000.00 for anyone who violates them. The requirement for confidentiality about the financial proposals received, among other information relevant to the program, violates the principles of transparency and equal treatment for the affected people who participate in the program.³⁶ Confidentiality clauses should only be included at the request of the affected people who may want to protect their privacy and safety, but never when imposed by the Renova Foundation.³⁷

Moreover, contrary to the guidelines of the Interfederative Committee and the Public Defender's Office, the Internal Regulations of the Mediated Compensation Program conditions participation in the program and the payment of compensation on a waiver, by the affected people, of their right to sue for damages caused by the collapse of the dam (article 26 of the Internal Regulations). In other words, once they have received compensation for damages listed on the program's damages inventory, the affected people are barred from seeking judicial compensation for any other damages related to the disaster. Full remediation for all the damages caused is indispensable for the realization of the rights of the affected people and any clauses that create barriers to access to justice or impose a waiver of unpaid compensation are illegal.³⁸

Within the Mediated Compensation Program, the Renova Foundation has also entered into a cooperation agreement with the State Court of Minas Gerais wherein it undertakes to cover the costs of signing out-of-court settlements resulting from the individual cases in which the affected people seek reparations for the deprivation of drinking water. According to the terms of the agreement, the Renova Foundation covers the costs of hiring mediation professionals and the facilities where the mediation sessions take place. These facilities are often the same ones used in the Mediated Compensation Program. No free legal counsel is offered as part of the cooperation agreement and, in practice, the amounts paid are the same as those offered through the program. The flaws in its design have raised a series of doubts about the suitability of this model for this case. The cooperation agreement has no safeguards to guarantee the right to a full remedy. There is no obligation for Renova to be transparent about the criteria for reparation. The value of the compensation does not take into account the ongoing violation of the right to water resulting



from the lack of reliable information on the safety and quality of the water for human consumption. Therefore, a cooperation agreement such as this should only exist if the recommendations on meaningful and informed participation are implemented, the lack of which undermines the legitimacy of the Renova Foundation, as described above. Moreover, the State Court of Minas Gerais should certify that free legal counsel is offered to the affected people, that compensation is paid in amounts commensurate with the losses suffered, that there is a real possibility of negotiating these amounts and that no confidentiality clauses or receipt and release clauses are used.

Finally, it is important to mention that the Settlement Agreement places a limit on the amount of money the companies can transfer to the Renova Foundation in first years of the agreement, from 2016 and 2021 (Clauses 226 and 231, paragraph one). And this calculation includes not only what the companies actually transfer to the Renova Foundation, but also part of the judicially blocked or deposited funds, as well as the amounts paid to settle lawsuits brought by the affected people seeking damages. The agreement also limits the total amount that can be spent by the Renova Foundation in compensation to affected people. According to Clause 232 of the agreement, the Foundation will allocate a fixed annual amount of R\$240,000,000.00 (two hundred and forty million Brazilian reais) over a period of 15 years for the payment of compensatory measures as part of the recovery programs. The total fixed amount, therefore, will be R\$3,600,000,000.00 (three billion, six hundred million Brazilian reais) at the end of this period (Clause 232, paragraph two). As already mentioned, the right to an effective remedy requires that the affected people receive remedies that are adequate and proportional to all the damages they have suffered. Therefore, any limit

on the amounts to be spent on remedies is incompatible with international human rights safeguards and should be removed if the Settlement Agreement is revised.

RECOMMENDATIONS:

- In order to adapt the socioeconomic registry to the affected communities' way of life, their declarations should be accepted by the Renova Foundation as proof of the damages they suffered.
- The process for inclusion in the registry should be quicker and less bureaucratic, and any revision of the registry should only occur in exceptional circumstances and always be conducted by an external, independent and impartial organization.
- With regard to the Mediated Compensation Program, the damages inventory should be revised to incorporate the real losses suffered by the affected communities.
- The amounts offered as compensation, in both the Mediated Compensation Program and the cooperation agreement, should observe criteria that are objective, non-discriminatory and predetermined, but that can always be adapted and negotiated depending on the specifics of each affected person.
- Free legal counsel should be guaranteed to the affected people over the course of the entire reparation process, but in particular within the Mediated Compensation Program and the cooperation agreement between the Renova Foundation and the State Court of Minas Gerais, when individual settlements are signed that have a direct impact on their rights.
- All the damages suffered by the affected people should receive full remediation and any provision that exempts the Renova Foundation from paying compensation for unremedied damages, that creates obstacles to access to justice by the affected people or that limits the amount to be allocated for the payment of reparations should be declared null.



V. CONCLUSION AND RECOMMENDATIONS

In conclusion, the remedy mechanism created in March 2016 by the Settlement Agreement has a number of shortcomings that need adjustments. Extrajudicial remedy mechanisms for human rights violations need to contain internal and external control and monitoring instruments to ensure they are effective. Speed is an essential aspect of effective remedy, but full remediation cannot be denied on the pretext of providing a quick solution to the case.

In the Doce River case, meaningful and informed participation by the affected communities, accountability for non-performance with the obligations set out in the Settlement Agreement and structural changes in the design of the remedy programs are critical for the mechanism to fulfill its goal of remedying the environmental and human rights violations. Otherwise, the power imbalance between the companies and the affected people is further exacerbated and new and continued damages will occur during the remedy process, increasing the companies and the Renova Foundation's obligations towards the affected communities.

In order to achieve the goal of effectively remedying the people affected by the collapse of the Fundão tailings dam, the changes to the current remedy mechanism need to be based on four key principles: transparency, participation, accountability and full remediation.

1. Transparency: transparency implies the guarantee of access, by the affected communities, to material information on the human rights violations

suffered and on the possible reparations available. This is an essential aspect of the right to an effective remedy and a prerequisite for the exercise of other rights, such as the right to informed participation. Therefore, any proposed revision of the remedy mechanism created by the Settlement Agreement must start with the collection and broad disclosure of material information on the case. As a result, we recommend:

- A comprehensive assessment of the extent of the damage that was caused through an integrated approach to the socioeconomic and socioenvironmental impacts: it is known that many of the human rights impacts suffered by the communities affected by the collapse of the Fundão tailings dam can only be effectively remedied through environmental recovery. Therefore, a complete and integrated assessment of all the damage caused, followed by a broad dissemination of the information obtained and a revision and coordination of the socioeconomic and socioenvironmental programs developed by the Renova Foundation is essential for the full remedy of the affected people.

- The effective implementation of independent technical assistance committees to ensure that the affected people have a complete understanding of all the information that affects their rights. Specialized technical support, including legal counsel, is essential for the affected communities to be able to defend their own interests and fully grasp the implications of their decisions regarding the remedy mechanism to be adopted.

- Revision of the socioeconomic registry program by an external, independent and impartial



organization. Two years since the Settlement Agreement first started to be implemented, there are still whole communities that have not been included in the registry, which has prevented their access to all the other remedy programs. The registration process is slow, bureaucratic and non-transparent, and the Renova Foundation frequently revises the registration of the affected people for no apparent reason. The revision of this stage of the reparation process by an external, independent and impartial organization is essential to correctly identify the affected people and to ensure that all the stages of the process function properly.

2. Participation: the right to an effective remedy states that rights-holders should not be treated merely as recipients of remedies, but instead be included in the whole process of development and implementation of the reparation mechanisms. It reduces the power imbalance between the companies and the affected people by allowing the latter to decide what type of remedy is most suited to remedying the damages they have suffered. As a result, we recommend:

- The inclusion of representatives of the affected people in the decision-making bodies of the Renova Foundation and the Interfederative Committee in sufficient numbers to effectively influence the decision-making of the two organizations. The process of appointing the representatives should be based on objective and predetermined rules that respect the social dynamics of each community. Failure to do so undermines the effectiveness of the reparation mechanisms and the legitimacy of the Renova Foundation and the Interfederative Committee.

- The implementation of local decision-making spheres to agree on reparation measures for the damages caused. Discussions on the local level makes it easier for affected people to take part and ensures that the specifics of each community are taken into account in the decision-making.

3. Accountability: the ability to hold the relevant authorities accountable for not fulfilling their institutional responsibilities is an essential aspect of good governance. Moreover, repeated disrespect for the rules of the reparation mechanisms undermines the confidence of the affected people in their effectiveness, which affects their legitimacy and predictability. As a result, we recommend:

- The imposition of harsher penalties for non-performance of the obligations set out in the Settlement Agreement and subsequent agreements in order to avoid delays and flaws in the execution of the reparation programs. The Renova Foundation is responsible for the development and implementation of these programs and it responds to the Interfederative Committee for any flaws in the compliance with its obligations. However, the penalties provided for in the Settlement Agreement have proven insufficient to prevent repeated non-performance of the Renova Foundation's obligations. It is necessary, therefore, to reformulate the mechanism for the application of penalties, setting harsher fines and even establishing personal liability for the people responsible for executing the reparation programs, in order to guarantee the effective implementation of the reparation programs that are underway

4. Full remediation: the realization of the right to an effective remedy requires that



people who are subjected to human rights violations receive adequate remedies for all the damages they suffered. The affected people should be the ones to assess the suitability of the reparation measures, but, in principle, priority should be given to reparation measures that can restore the affected people to the same state they were in before the violation. Furthermore, no damages can remain unremedied. The reparations must be adequate and proportional to the damage caused. Any limitations on the access to justice by the affected communities, to reparations and to information are incompatible with the right to an effective remedy for the damages suffered. As a result, we recommend:

- The review of the means of proof that are accepted to support the damages in the socioeconomic registry. Currently, the Renova Foundation requires the provision of evidence of the damages suffered in a manner incompatible with the way of life of the affected people. As a result, many communities have still not been recognized as affected and many damages have not been recognized as being eligible for reparation, which has prevented the access of these communities to any remedy measures.

- The reformulation of the Mediated Compensation Program and the cooperation agreement between the Renova Foundation and the State Court of Minas Gerais to cater to the needs of the affected people. The inventory used by the Renova Foundation to list the damages that are eligible for reparation does not cover the whole range of damages caused by the disaster and offers amounts far below what is necessary to effectively remedy the violations suffered by the affected people. In order to ensure adequate reparations, it is essential to set the

amounts based on fair and objective criteria and to permit the affected people to negotiate these amounts so the compensation can cater to individual needs. In order to reduce the power imbalance between the companies and the affected people, it is also necessary to provide technical training to the human rights mediators and to develop ways to guarantee their impartiality. Moreover, any clause that creates barriers to access to justice for the affected people or to reparations for uncompensated damages should be declared null.

- The removal of any provisions that limit the amount to be spent by the companies in compensation. The extent of the damage caused by the collapse of the Fundão tailings dam is still unknown, so setting any such amount is incompatible with the right to an effective remedy for the affected communities. Even after the socioeconomic and socioenvironmental assessment, a cap on the amount that the companies can spend on compensation represents a cap on the amount that each affected person can receive individually. When setting amounts, the only reference should be the extent of the damages suffered by the affected people, in order to guarantee full remedy for all damages.

Footnotes:

- ¹ The collapse unleashed over million cubic meters of toxic mining waste into the Doce River, claiming 19 lives, destroying the districts of Bendo Rodrigues, Paracatu de Baio and Gersteira, and contaminating with heavy metals one of the main Brazilian river basins. The disaster caused severe damages to the environment and to the rights of millions of people living alongside the Doce River basin. For more information, see: BORGES, Caio; MASO, Tchenna. *The Collapse of the River Doce Dam: the use of international strategies as a way of reducing asymmetric distribution of power between human rights and business interests*. 2017. SUR 25. V. 14. N. 25. P. 71 – 87. Available at: <sur.conectas.org/wp-content/uploads/2017/06/sur-25-ingles-caio-borges-tchenna-fernandes-maso.pdf>. ZONTA, Marcio; TROCADE, Charles. (Orgs.). *Antes fosse mais leve a carga: reflexões sobre o desastre Samarco / Vale / BHP Billiton* (in unofficial translation to English: *If the Load was lighter: observations of the Samarco / Vale / BHP Billiton disaster*). Marabá: Editorial iGuana. Available in Portuguese at: <www.ufff.br/poemas/files/2016/11/Livro-Completo-com-capas.pdf>.
- ² Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA), Chico Mendes Institute for Biodiversity Conservation (ICMBIO), National Water Agency (ANA), National Department of Mineral Production (DNPM), National Indian Foundation (FUNAI), Forests State Institute of Minas Gerais (IEF), Institute of Water Management of Minas Gerais (IGAM), State of Minas Gerais Environment Foundation (FEAM), Espírito Santo Institute of Environment and Water Resources (IEMA), Espírito Santo Institute of Agriculture and Forest Defense (IDAF), and State Agency for Water Resources (AGERH).
- ³ INTERNATIONAL COMMISSION OF JURISTS. *Access to Justice: Human Rights Abuses Involving Corporations*. 2011. Available at: <<https://www.icj.org/wp-content/uploads/2012/05/Brazil-human-rights-abuses-corporations-report-2011-eng.pdf>>. Accessed on 12 April 2018.
- ⁴ See the UNGP 31, which sets out the criteria to measure the effectiveness of extrajudicial remedy mechanisms. Available at: <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.
- ⁵ For more information, see: the urgent appeal submitted by Conectas Human Rights and other partner organizations to the UN Special Procedures pointing out the gaps in the development of the settlement agreement. Available at: <www.conectas.org/arquivos/editor/files/Urgent%20Appeal%20-%20Settlement%20Agreement%20Mariana%20Doce%20River%2005_13_2016.pdf>. Accessed on 16 April 2018.
- ⁶ UN GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*. 18 July 2017. UN Document A/72/162.
- ⁷ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *UN Guiding Principles on Business and Human Rights. Principle 31*. Available at: <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>. Accessed on 12 April 2018.
- ⁸ HUMAN RIGHTS CLINIC (Columbia Law School); INTERNATIONAL HUMAN RIGHTS CLINIC (Harvard Law School). *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea*. Available at: <static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060c6b9c6c6/1448743629669/Righting+Wrongs.pdf>. Accessed on 12 April 2018.
- ⁹ UN GENERAL ASSEMBLY. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. UN-A/RES/60/147.
- ¹⁰ See the Letter n. 010/2018 of the Commission of the People Affected by the Fundão Dam (CABF).
- ¹¹ For example, the indigenous people Krenak, who are one of the indigenous peoples affected by the collapse of the Fundão dam, developed a protocol on the consultation procedure to be adopted. Available in Portuguese at: <www.mpf.mp.br/atuacao-tematica/ccr6/documentos-e-publicacoes/protocolo-de-consulta-dos-povos-indigenas/docs/ProtocoloConsultaKRENAK_.pdf>. Accessed on 16 April 2018.
- ¹² MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Joint Recommendation n. 10 of 26 March 2018*. Available in Portuguese at: <www.mpf.mp.br/mg/sala-de-imprensa/docs/recomendacao-conjunta-mpf-fundacao-renova>. Accessed on 16 April 2018.
- ¹³ UN COMMISSION ON HUMAN RIGHTS. *Resolution 2000/64*.
- ¹⁴ The failure to punish the perpetrators is itself a violation of the International Covenant on Civil and Political Rights (UN HUMAN RIGHTS COMMITTEE, General Comment n. 31).
- ¹⁵ HUMAN RIGHTS CLINIC (Columbia Law School); INTERNATIONAL HUMAN RIGHTS CLINIC (Harvard Law School). *Ibid*.
- ¹⁶ UN ENVIRONMENT PROGRAMM. *Fact sheet on human rights and the environment*. Available at: <wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed=y>. Accessed on 12 April 2018.
- ¹⁷ According to the article. 225 of the Brazilian constitution, everyone has the right to an ecologically balanced environment.
- ¹⁸ See article 11 of the Protocol of San Salvador: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment”.
- ¹⁹ Available at: <treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>. Accessed on 12 April 2018.
- ²⁰ More information available in Portuguese at: <www.fundacaorenova.org/conheca-os-programas/>. Accessed on 12 April 2018.
- ²¹ UN GENERAL ASSEMBLY. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. UN-A/RES/60/147.
- ²² UN GENERAL ASSEMBLY. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. UN-A/RES/60/147.
- ²³ UN GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*. 18 July 2017. UN Document A/72/162.
- ²⁴ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Joint Recommendation n. 10 of 26 March 2018*. Available in Portuguese at: <www.mpf.mp.br/mg/sala-de-imprensa/docs/recomendacao-conjunta-mpf-fundacao-renova>. Accessed on 16 April 2018.
- ²⁵ Available in Portuguese at: <www.fundacaorenova.org/wp-content/uploads/2017/07/2-formulario-de-cadastro-integrado_250717.pdf>. Accessed on: 12 April 2018.
- ²⁶ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Id*.
- ²⁷ RENOVA FOUNDATION. *Damage Inventory*. Available in Portuguese at: <www.fundacaorenova.org/wp-content/uploads/2017/11/588_dg_matrizdedanos_06022018.pdf>. Accessed on: 12 April 2018.
- ²⁸ RENOVA FOUNDATION. *Ibid*.
- ²⁹ RENOVA FOUNDATION. *Inscrições no Programa de Indenização Mediada para dano água encerram com 98% de adesão [Registrations in the Mediated Compensation Program for deprivation of water end with 98% of adhesion]*. Available in Portuguese at: <www.fundacaorenova.org/noticia/programa-de-indenizacao-mediada-para-dano-agua-encerra-com-98-de-adesao/>. Accessed on: 12 April 2018.
- ³⁰ See: SOS MATA ATLÂNTICA. *Observando os Rios 2017 – O retrato da qualidade da água na bacia do rio Doce após dois anos do rompimento da barragem de Fundão. Novembro de 2017 [Observing the Rivers 2017 – The picture of the quality of the Doce river basin water two years after the collapse of the Fundão dam]*. Available in Portuguese at: <www.sosma.org.br/106705/qualidade-da-agua-na-bacia-rio-doce-piora-dois-anos-apos-tragedia-em-mariana/>. Accessed on: 12 April 2018.
- ³¹ MOVEMENT OF PEOPLE AFFECTED BY DAMS. *MAB apresenta consequências do crime da Samarco na saúde dos atingidos [MAB presents the consequences of the crime committed by Samarco to the health of the affected people]*. Available in Portuguese at: <[MAB apresenta consequências do crime da Samarco na saúde dos atingidos](http://www.mab.org.br/mab-apresenta-consequencias-do-crime-da-samarco-na-saude-dos-atingidos)>. Accessed on: 16 April 2018.
- ³² UN ECONOMIC AND SOCIAL COUNCIL. *General Comment n. 15 on the right to water*. Available at: <www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf>. Accessed on: 16 April 2018.
- ³³ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Ibid*.
- ³⁴ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Ibid*.
- ³⁵ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Ibid*.
- ³⁶ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Ibid*.
- ³⁷ UN GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*. 18 July 2017. UN Document A/72/162.
- ³⁸ MPF; MPMG; MPES; MPT; DPU; DPMG; DPES. *Id*.

