A New Route for Redress in the Samarco case? An overview of the Simplified Indemnification System's (un)lawfulness

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Abstract:	This contribution focusses on the July 2020 decision by the 12th Federal Court of Belo Horizonte that created the 'Simplified Indemnification System', a fast-track route to redress victims of the Fundão dam collapse in Brazil. This mechanism arguably presupposes that the victims disaster might have been litigating in bad faith. Moreover, recently leaked recordings suggest there could have been collusion between the companies and the judge, who created the mechanism ex officio and is also in charge of most proceedings relating to the Samarco case. This DiF's structure is as follows: section II gives a brief overview of the main proceedings and redress mechanisms; section III explains the Simplified Indemnification System and its main legal issues; and section IV concludes.

I. INTRODUCTION

On 5 November 2015, the Fundão dam collapsed, causing the most devastating tailings dam disaster to date. The dam was operated by Samarco S.A., a joint venture by Vale, Brazil's biggest mining company, and BHP Billiton, the world's largest mining company.[1] Its tailings travelled down the Doce River for ca. 700 kilometres until they reached the ocean, affecting 42 municipalities, two states, and thousands of communities along the way. The disaster caused myriad social, environmental and economic impacts: nineteen individuals were killed, and thousands endured physical or psychological harm; water resources and the soil were polluted; habitats were irreversibly destroyed; and the local economy was long-lastingly damaged. Traditional and indigenous communities were especially harmed, as their historical, social, religious and cultural relationships with their land led to even more profound harms.[2]

Six years since the collapse, redress has been elusive. No finding or admission of liability has occurred in the main collective proceedings of the Samarco case, which contrasts with the ever-growing number of judicial and extrajudicial attempts to settle claims. To date, an unprecedented 85,756 civil and criminal, individual and collective proceedings[3] have coexisted with special settlement schemes and extrajudicial reparation programmes.

Given its complexity, it would be impossible for a DiF to dissect all routes for reparation on the Samarco case.[4] This piece thus focusses on a 2020 decision by the 12th Federal Court of Belo Horizonte (henceforth, 12th Court) that created yet another route for reparation – the 'Simplified Indemnification System'. This route arguably presupposes that the victims of the Fundão Dam disaster might be litigating extraterritorially in bad faith and, according to leaked

[1] PwC, *Mine 2019: Resourcing the future* (2019), https://www.pwc.com/gx/en/energy-utilities-mining/publications/pdf/mine-report-2019.pdf (accessed 10 October 2021).

[2] For more information, *see* Daniela A Prata, 'Corporate crime and environmental victimisation: analysis of the Samarco case', in Manuel Espinoza, Antonio Gullo and Francesco Mazzacuva (eds.), *The Criminal Law Protection of Our Common Home* (Paris: International Review of Penal Law, Issue 1, 2020); and Camila Manfredini de Abreu, 'Towards Effective Remedies for Violations of Human Rights by Corporations: Lessons from The Fundão Case' (2020), LLM Thesis, University of Amsterdam.

[3] National Council of Justice (CNJ), 'Cases of Great Repercussion' (2021, https://paineis.cnj.jus.br/QvAJAXZfc/opendoc.htm?document=qvw_l%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shOBSPrincipal&select=LB513,Mariana (accessed 10 October 2021).

[4] For accounts focussing on other aspects of the case, *see* Baskut Tuncak, 'Lessons from the Samarco Disaster' (2017), 2:1 *Business and Human Rights Journal* 157; Joana Nabuco and Leticia Aleixo, 'Rights Holders' Participation and Access to Remedies: Lessons Learned from the Doce River Dam Disaster' (2019), 4:1 *Business and Human Rights Journal* 147; Francesca Farrington, 'Municipio de Mariana v BHP Group: Implications of the UK High Court's Decision', 6:2 *Business and Human Rights Journal* 392.

recordings, might have been the product of possible collusion of the judge who created it *ex officio* (and who is also in charge of most proceedings relating to the Samarco case).

This DiF's structure is as follows: section II gives a brief overview of the main proceedings and redress mechanisms; section III explains the Simplified Indemnification System and its main legal issues; and section IV concludes.

II. Main Proceedings and Reparation Mechanisms

Under Brazilian law, public civil actions (ACPs) are often brought against corporations when their behaviour harms collective and transindividual rights (such as environmental rights, consumer rights, and human rights). ACPs are a type of collective claim, in which public prosecutors, public defenders, federal/state/municipal governments and associations can claim on behalf of the victims. Harm endured both by individuals and the broader community can be redressed through ACPs, as its main judicial outcome is a generic sentence that establishes liability for all damages. This generic sentence may then be relied upon by individuals seeking redress in enforcement proceedings, where only then specific losses, damages or harm need to be proven. Oftentimes, however, ACPs are settled through conduct adjustment terms (TACs), which might feature different forms and types of redress (e.g., the payment of food as in-kind compensation).

Dozens of ACPs have been filed in relation to the Fundão dam disaster, two of which are regarded as the main ones: the '20bn ACP',[5] filed by the Federal Government and some governmental bodies against Samarco and Vale, claiming at least BRL 20 billion, and which was tentatively settled on 2 March 2016 by a *sui generis* agreement called TTAC (Term of Transaction and Adjustment of Conduct); and the '155bn ACP',[6] filed in May 2016 by the Federal Prosecutor's Office (MPF) against Samarco, Vale, the Federal Government and others, which challenged a number of provisions of the TTAC agreement.[7]

[5] *Federal Government et al v Samarco et al*, Proceeding n. 1024354-89.2019.4.01.3800, 12th Court (2015).
[6] *MPF et al v Samarco et al*, Proceeding n.1016756-84.2019.4.01.3800, 12th Court (2016).
[7] There had been a number of concerns by academics, national authorities, and international bodies regarding, among others, the potential BRL 20bn cap on redress and the lack of participation of victims in the negotiations which led to the TTAC being signed. *See,* e.g., National Council of Human Rights (CNDH), 'Report on the Samarco's tailings' dam and its effects on the Rio Doce Basin' (May 2017); United Nations General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (2016) 8; MPF, 'Technical Report n. 695/2016/SEAP' (2016).

The TTAC agreement is relevant as it created the Renova Foundation, a formally independent organisation funded by Samarco and its parent companies. Renova was mandated to repair and compensate all damages arising from the collapse, through the implementation of 42 socioenvironmental or socio-economic programmes.[8] The ratification of the TTAC was annulled on 17 August 2016, but the Renova Foundation (that had begun operating only two weeks prior) remained in place as the main mechanism through which compensation was to be awarded. Concerns regarding the lack of victims' participation, the lack of free prior and informed consent of traditional and indigenous communities, and the absence of proper social participation mechanisms in Renova's decision-making processes remained largely unaddressed.[9]

In June 2018, a new agreement (TAC-Governance) was signed with the companies, aimed at reforming the structure of Renova and creating governance bodies for victims to participate. In practice, the decision-making remained in the hand of appointees by the companies, and the proposed representative participation mechanisms were understood to be potentially ineffective by academics, technical assistants to the MPF and affected individuals.[10] Besides its structural issues, the TAC-Governance also remains largely unenforced. Parties have litigated a number of aspects of the implementation of the Renova's programmes and the TAC-Governance (such as the hiring of the technical consultancies chosen by the victims, a requirement for local participation commissions to be instituted).[11]

In January 2020, the 12th Court created ten new proceedings *ex officio* ('priority axes proceedings') to organise the parties' disagreements. The 12th Court recognised that programmes were not being effectively implemented by the Renova Foundation, and argued that the new priority axes proceedings would allow 'society to obtain a System of Justice that gives faster, adequate and effective legal responses'.[12] It should also be noted that, in February 2021, the State of Minas Gerais Prosecutor's Office (MPMG) filed an ACP requesting the extinction of Renova due to potentially illicit activities and undue influence of Samarco, Vale and BHP in its

[8] TTAC, Clauses 1, XII, XIII and XX; and 2.
[9] Inter-defenders Group of Rio Doce (GIRD), 'Technical Note n. 01/2017' (2017); MPF, 'Technical Report n. 695/2016/SEAP' (2016); Grupo de Estudos e Temáticas Ambientais (GESTA), 'Parecer sobre o Cadastro Integrado do Programa de Levantamento e Cadastro dos Impactados (PLCI) elaborado pelas empresas Samarco e Synergia Consultoria Ambiental' (November 2016) 14, 64-5.
[10] MPF, 'Technical Report n. 279/2018/SPPEA' (2018), 87-8.
[11] TAC-Governance, Clause 98, sole para.
[12] *Federal Government et al v Samarco et al*, Proceeding n. 1024354-89.2019.4.01.3800, 12th Court, Decision, 19.12.2019.

governance. As of October 20210, the case is still pending, with the terms of a new reparation agreement also being discussed.[13]

III. The Simplified Indemnification System

It is under this backdrop of systemic failure that the Simplified Indemnification System (SIS) should be analysed. On 1 July 2020, in the context of one of the local commission proceedings (Baixo Guandu), the Court established a new 'matrix of damages', determining category-based compensation amounts without victim participation, and disregarding the efforts of technical assistance organisations to collaboratively create an inclusive matrix with the affected communities.[14] This mechanism is of facultative adhesion, allegedly 'grounded on the notion of 'rough justice'', and would be made available solely through an online platform managed by Renova.[15] Its purpose is to be an alternative route for victims to receive redress, in addition to Renova's Mediated Indemnification Programme (PIM) and the lodging of individual proceedings before local courts. As of October 2021, over 50 local commissions have filed proceedings to be allowed to benefit from the SIS, which has in turn been repeatedly amended by the 12th Court to encompass more categories of victims.

Despite being framed by the Court as 'clearly beneficial and favourable to the affected',[16] as well as its unarguable progressiveness in striving to provide compensation through an accessible redress venue and in recognising the ultimate failure of Renova's indemnification programmes, the conditions for victims to benefit from the SIS are concerning. For instance, the new matrix of damages features arbitrary and unreasoned compensation amounts, which were unilaterally decided by the 12th Court without participation of the victims nor expert evidence. The SIS also

[13] MPMG, 'MPMG pede na Justiça extinção da Fundação Renova' (24 February 2021) https://www.mpmg.mp.br/comunicacao/noticias/mpmg-pede-na-justica-extincao-da-fundacao-renova.htm (accessed 10 October 2021); MPF, 'Caso Samarco: primeira rodada de discussões trata de repactuação' (28 September 2021) http://www.mpf.mp.br/mg/sala-de-imprensa/noticias-mg/caso-samarco-primeira-rodada-de-discussoes-trata-de-repactuacao (accessed 10 October 2021).

[14] There had been previous attempts at establishing a matrix of damages with broad victim participation, but none succeeded in having a binding nature. Guilherme de S. Meneghin 'Esclarecimentos sobre a matriz de danos' (11 December 2019) http://jornalasirene.com.br/direito-de-entender/2019/12/11/esclarecimentos-sobre-a-matriz-de-danos (accessed 10 October 2021).

[15] *Comissão de Atingidos de Baixo Guandu v Samarco et al*, Proceeding n. 1016742-66.2020.4.01.3800, 12th Court, Decision, 01/07/2020, 18.

[16] Ibid, 186.

requires victims to sign a general and definitive release agreement, by which they would give up on any future claims regarding the Fundão dam collapse – despite the full extent of damages from the collapse still being unknown.[17]

Particularly curious is the requirement that individuals also give up on any proceedings brought before foreign courts in order to benefit from the SIS, and present a 'Declaration of Discontinuance/Waiver' in relation to any proceedings lodged in foreign fora.[18] The 12th Court reasoned that having 'associations, hotels, companies, small business owners, and other impacted persons'[19] litigating simultaneously in Brazil and elsewhere against Vale and/or BHP would be a hypothesis of 'unjust enrichment', prohibited by Art. 884, 2002 Civil Code. Such a requirement is not only extremely unusual in Brazilian Law, but it was also established *ex officio* and seems to have been motivated by the litigation against one of the Samarco's parent companies before English Courts[20] – the SIS decision introducing this requirement was in fact given only a few weeks prior to the English Court's jurisdiction hearing.[21]

Besides its impact on access to justice, instituting such a waiver is also expressly *contra legis*. Brazilian Law is categorical in stating that 'proceedings lodged before foreign tribunals do not create *lis pendens* and do not forbid the Brazilian judicial authority to hear the same or connected claims, without prejudice of contrarian dispositions in international treaties or bilateral agreements in effect in Brazil'.[22] The Brazilian Constitution, too, has pre-emptively addressed the possible issue of unjust enrichment due to the same action being brought before different fora by requiring that all foreign sentences be reviewed by the Brazilian Superior Justice Tribunal before they can be enforced in the country.[23] Indeed, by creating such undue barriers for victims to access courts, it is possible that the 12th Court has breached some of Brazil's international human rights

[17] Ibid.
[18] *Comissão de Atingidos de Baixo Guandu vs Samarco et al*, Proceeding n. 1016742-66.2020.4.01.3800, 12th Court, Decision, 01/07/2020, 186.
[19] Idem.
[20] *Município De Mariana & Ors v BHP Group Plc & Anor* (Rev 1) [2020] EWHC 2930 (TCC) (9 November 2020).
[21] The 12th Court decision was rendered on 1 July 2020, while the UK hearing started on 22 July 2020. Kirstin Ridley, 'BHP faces first step in $6.3 billion UK claim over Brazil dam failure', *Reuters* (14 July 2020), https://www.reuters.com/article/us-bhp-britain-court-dam/bhp-faces-first-step-in-63-billion-uk-claim-over-brazil-dam-failure-idUSKCN24F2TC (accessed 10 October 2021).
[22] Art 24, 2015 Civil Procedure Code.
[23] Art 105, I, i, 1988 Federal Constitution.

obligations regarding access to justice[24] and effective remedy,[25] which could inaugurate a new strand of disputes in relation to the Fundão Dam collapse.

Another striking element of this requirement is its reasoning, which seemingly presupposes that victims seeking redress in foreign fora might wish to slyly profit off the companies that violated their rights. Besides any moral reprehensibility of such assumption, especially in light of the various systemics failures in giving victims effective redress, adopting such a view it is also at odds with the interpretive principle of good faith, which binds Brazilian judicial authorities.[26]

The alarming contents of the SIS decisions have not been unnoticed, however. In October 2020, the MPF challenged the abovementioned SIS requirements (and others) through an appeal, which is still pending decision as of October 2021.[27] The MPF also challenged the legitimacy of the local commissions that filed proceedings related to the SIS. Chapter IV, TAC-Governance, recognised local commissions as the legitimate interlocutors of the victims in decision-making and participatory processes, and regulated how they should be structured; however, the MPF argues that the groups that have acted on the SIS proceedings are not, in fact, the TAC-Governance local commissions, that they lack procedural and representative legitimacy, and thus that the 12th Court erred in recognising them as legitimate claimants.[28] The MPF also questioned the legality of an online system that requires a qualified lawyer to input the victims' information (and who receives a tenth of the compensation for a fundamentally administrative task), as well as the reasonableness of the BRL 450,000.00 on legal fees that was awarded to the lawyer that represented the local commission on the proceedings that instituted the SIS.[29]

In April 2021, the MPF and other governmental authorities filed a joint request to have the judge of the 12th Court removed from the case, as, according to them, there would be reasonable grounds to question the judge's impartiality. One of the arguments raised by the MPF et al was precisely the judge's conduct in relation to the SIS, who would have 'a strange procedural

[24] Art 14(1), International Covenant on Civil and Political Rights (ICCPR).
[25] Art 25, American Convention on Human Rights (ACHR).
[26] It is an express requirement that both claims and judicial decisions be interpreted 'in conformity with the principle of good faith'. Arts 332, para 2, and 489, para 3, 2015 Civil Procedure Code.
[27] *Federal Prosecutor's Office v Comissão de Atingidos de Baixo Guandu et al*, Appeal (AI) in Proceeding n. 1016742-66.2020.4.01.3800, 12th Court, 22/10/2020.
[28] Idem.
[29] Idem.

relationship' with the companies, the illegitimate local commissions, and the lawyers representing them.[30] They also presented evidence that the judge had discussed instituting a system like the SIS with the local commissions' lawyers and the Renova Foundation before any request had been lodged. Despite compelling evidence, in May 2021, the Federal Regional Tribunal of the 1st Region decided against the removal of the 12th Court judge from the case on procedural grounds, arguing that there was not enough urgency and risk of harm to the parties that would justify the request.[31]

IV. Final Remarks

Despite being framed as beneficial to the victims, the Simplified Indemnification System might be yet another chapter in an alarming series of judicial and extra-judicial failures in the Samarco case. This series began with the creation of the Renova Foundation, the entity that is legally responsible for repairing and redressing all damages caused by the collapse. As Renova significantly fell short of fulfilling its mission, the extra-judicial negotiations that were supposed to take place directly with the Foundation began to be judicialised. In parallel, despite recognising the lack of effective remedy available for the victims of the Fundão in the Brazilian courts, the 12th Court required victims to give up on their right to pursue remedies not encompassed by the matrix of damages when establishing a new, 'facilitated' venue for redress, as well as claims before foreign courts. That is, despite recognising the failure of Renova's governance system, the 12th Court in practice renegaded victims to either accept a top-down, arbitrary matrix of damages; or accept Renova's programmes as they are; or lodge their own individual proceedings and bear years of insecurity of court proceedings.

The burdensome requirements to benefit from the Simplified Indemnification System signal to even more worrisome aspects of the institutional responses to the Samarco case. The reasoning of the 12th Court fails to appreciate that victims' pursuit of justice abroad might not be an attempt to receive compensation twice, but rather be a consequence of the perceived ineffectiveness and morosity of the judicial and extra-judicial mechanisms in place in Brazil. While it is beyond the scope of this article to analyse any foreign proceedings and whether or not

[30] *MPF et al v Samarco et al*, Proceeding n.1016756-84.2019.4.01.3800, 12th Court, Motion for Disqualification, 30/03/2021.
[31] *MPMG et al v Judge of the 12th Court*, Proceeding n. 1017945-29.2021.4.01.3800, Federal Regional Tribunal of the 1st Region, Decision, 23/05/2021.

those routes could better provide victims with justice, the simple fact that victims are seeking alternatives in other countries suggests a degree of unsatisfaction with how the Samarco case has been dealt with by Brazilian authorities – which would not be unfounded, especially in light of concerns by several prosecutors and public defenders that the main judge's impartiality has been compromised. Whether or not that would be an accurate depiction of most victim's motivations, ordering them to make an *a priori* decision on in which forum they believe they would have greater chances of receiving adequate redress does not seem to be the best path to dissipate such concerns.