

The Mariana tragedy in Brazil and the role of the judiciary power before the Brazilian domestic and international environmental degradation: The conflict between the Brazilian State and Federal Jurisdictions and International Law

A tragédia em Mariana no Brasil e o papel do poder judiciário perante a degradação ambiental doméstica e internacional brasileira: O conflito entre o Estado Brasileiro e as Jurisdições Federais e o Direito Internacional

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## Abstract

This study aims to present the world with the largest Brazilian environmental tragedy and one of the largest planetary environmental disasters, namely the breaking of the dam of mining activity of tailings from Samarco companies, Vale and BHP Billiton in the city of Mariana, State Minas Gerais, which caused massive damage to the populations of several Brazilian cities, their ecosystems and, unfortunately, broke into the Atlantic Ocean causing deterioration of maritime waters.

Then, the study presents the world as the prosecutor of the states of Minas Gerais and Espírito Santo (Brazilian federal states), through civil class actions, caused the judicial branches of federal states, so companies were condemned outright to form a assets exclusively for the restoration of degraded environment and to compensation for damages suffered by the affected population.

However, demonstrate that federal prosecutors also acted with the same intent described in the previous paragraph, but provoking the Federal Judiciary.

As a matter of fact the actions of prosecutors of Minas Gerais, Espírito Santo and Federal and the immediate and commendable injunctions concessions determining the three to deposit more than two billion reais companies (about 500 million US dollars), several NGOs (non-governmental organizations) and citizens also filed hundreds of lawsuits for the same purpose described in the preceding paragraphs, before hundreds of local ordinances (counties) affected by toxic mud that covered more than 500 kilometers to reach the Atlantic Ocean.

In this scenario, they are handled in the Judiciary of Minas Gerais, Espírito Santo and Federal simultaneously hundreds and soon thousands (perhaps, millions) of remedial actions (collective and individual) due to the same event (dam break) demanding compensation for damage suffered by individuals and by society because of individual damage (patrimonial and moral) and environmental degradation, respectively.

Obviously, these demands will provide enormous diversity of judicial decisions that certainly will present the authors a ground various legal opinions, causing legal uncertainty and possibly injustices.

To make matters worse, the United Nations (UN) criticized Brazil for the delay in the disclosure of adverse effects of the tragedy, underscoring the international interest in preserving the environment.

Therefore, we conclude that the disjointed performance of Judicial Powers of Brazil and hinder the indispensable fair response on the social and environmental damage, it is not enough to give the planet a satisfaction at the disaster caused by mining.

**Keywords:** Mariana Tragedy. Brazilian courts. Domestic and International Law.

## Resumo

Este estudo objetiva apresentar ao mundo a maior tragédia ambiental brasileira e um dos maiores desastres ambientais planetários, conhecido como a ruptura da barragem de mineração de rejeitos de empresas Samarco, Vale e BHP Billiton, na cidade de Mariana, Estado Minas Gerais, que causou grandes danos às populações de várias cidades brasileiras, seus ecossistemas e, infelizmente, invadiu o Oceano Atlântico causando a degradação das águas marítimas.

Em seguida, o estudo apresenta ao mundo como as Promotorias dos estados de Minas Gerais e Espírito Santo, por meio de ações cíveis públicas, condenaram de imediato as empresas envolvidas para que as mesmas formassem um ativo exclusivamente para a restauração do ambiente degradado e a compensação por danos sofridos pela população afetada.

A Procuradoria Federal também agiu com a mesma intenção descrita no parágrafo anterior, contudo provocando a Jurisdição Federal.

De fato, as ações dos promotores estaduais de Minas Gerais, Espírito Santo e os federais resultaram em medidas liminares que determinaram o depósito imediato de mais de dois bilhões de reais das empresas (cerca de US \$ 500 milhões de dólares). Várias ONGs (organizações não governamentais) e os cidadãos vitimados também apresentaram centenas de ações judiciais para o mesmo propósito descrito nos parágrafos anteriores, perante as centenas de pequenos distritos afetados pela lama tóxica que cobriu mais de 500 quilômetros até chegar ao Oceano Atlântico.

Neste cenário, os casos são apreciados pelo Judiciário de Minas Gerais, Espírito Santo e o Federal simultaneamente, em que centenas e logo milhares (talvez, milhões) de ações corretivas (coletivas e individuais), devido ao mesmo evento (quebra de barragem), demandarão a compensação por danos sofridos por indivíduos e pela sociedade, pelos danos individuais (patrimoniais e morais) e pela degradação ambiental, respectivamente.

Obviamente, estas demandas irão proporcionar uma enorme diversidade de decisões judiciais o que, certamente, irá causar aos autores incerteza jurídica e possivelmente injustiças frente às diversas opiniões jurídicas.

Por último, as Nações Unidas (ONU) criticaram o Brasil pelo atraso na divulgação dos efeitos adversos da tragédia, ressaltando o interesse internacional em preservar o meio ambiente.

Portanto, concluímos que a atuação desajustada dos Poderes Judiciais do Brasil dificulta a indispensável e justa compensação aos danos sociais e ambientais, e a mesma não é o bastante para a satisfação dos danos causados pela mineração.

**Palavras-chave:** Tragédia em Mariana. Tribunais brasileiros. Direito Interno e Internacional.

## 1 The tragic history of Mariana and the civil environmental responsibility in Brazil

Brazil is one of the richest countries in the planet as far as natural resources is concerned and in such context minerals play an outstanding role. Mining in Brazil “is followed by territorial occupation, having as its main aim the exploitation of mineral wealth” (CLEMENTE; LEITE; PEREIRA, 2013, p. 85).

According to Carlos Eugênio Gomes Farias (2002, p. 03), the history of Brazil itself, “has a close connection to the search for and application of mineral resources, which have always contributed to important inputs in the national economy, being part of the territorial occupation in the national history”.

Nevertheless, the mining industry, “together with the development it provides for the country, is potentially degrading to the natural environment” (COSTA; REZENDE; 2012, p. 771).

Mining in itself, is an impacting industry, once it promotes the transformation of the physical, chemical and biological properties, in the environment it is inserted. Beatriz Costa Souza and Celso Antônio Pacheco Fiorillo (2012, p. 18), share the same opinion and recognize that “there is no way to hide that the mining exploration , somehow, can cause environmental damage, since there is no lack of risks in such economic industry, needless to say, in almost any economic industry whatsoever”.

Unfortunately, companies such as SAMARCO, VALE and BHP have caused huge environmental damage on November 05, 2015, when the dams burst causing great loss and damage to people and the environment as the toxic mud with solid waste spread throughout the states of Minas Gerais and Espírito Santo.

The facts were thus summoned by *Veja Magazine*, one of most influent in Brazil<sup>1</sup>

On November 5, in only eleven minutes, a tsunami of 62 million cubic meters of mud has buried Bento Rodriguez. Ten deaths have been confirmed until the late afternoon of last Friday and eighteen people are missing. The wave has devastated other seven villages of Mariana municipality and has already contaminated the rivers Gualaxo do Norte, do Carmo and Doce. Inhabitants of towns in Minas and Espírito Santo have had their routines affected by the interruption of their water supply distribution. The final destination of the mud shall be the sea in Espírito Santo, where the River Doce has its mouth. What caused such tragedy was the bursting of the two dams in the Alegria complex, from the mining company Samarco. The dams stored tailings, the non-toxic waste from iron-ore mining operations.

1 Available from: <<http://veja.abril.com.br/complemento/brasil/para-que-nao-se-repita/>>. Accessed in: apr. 13, 2016.

There were three tailing dams in Alegria: Germano's, Fundão's and Santarém's. All of these operated according to a traditional hydraulic landfill site used all over the world. It considers the action of gravity forces in order to enable to waste separated from the iron ore flow into the basins. The frontal section of such basins is made of sand so as to filter the water. The Public State Prosecution of Minas Gerais and the State Police Department has opened an inquiry to investigate and ascertain the causes of the disaster, but a satisfactory answer shall not be provided in six months. The main hypothesis raised by technicians, however, is that the process of liquefaction might have occurred, taking place when the outer sand layer, instead of expelling, retains the water. A sudden variation in the internal pressure of the waste deposit can transform the sand into mud, which cannot hold the waste behind any longer. This could explain why the Fundão dam burst — having devastated Santarém's and whatever was ahead. Two low magnitude seismic waves registered in the region a little before the tragedy might have caused the change in pressure in the dam — such hypothesis also needs to be proved.<sup>2</sup>

Such damages, not yet measurable, have caused material and moral losses to thousands of human beings, and nonetheless, degrading to the artificial and natural environment.

### **1.1 The damages already caused and the possible damage**

The damages caused by the facts above mentioned have not yet been measured and perhaps never will.

As a matter of fact, people and the environment have suffered and will continue suffering deterioration caused by the contamination with chemical products spread after the dams burst.

However, it can already been declared, on the grounds of the Agreement settled by the company that the following damages have occurred:

- a) impact on habitats and on the ictiofauna along the rivers Gualaxo, Carmo and Doce, over 680 km of the rivers;
- b) alteration in the quality of water of such rivers due to the mud of mineral waste;
- c) discontinuation of public water supply distribution as a result of the EVENT on the impacted towns and localities;
- d) discontinuation of water collection as a result of the EVENT for

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2 Available from: <<http://www.advocaciageral.mg.gov.br/images/stories/downloads/Acordo/acordo-final-consolidado.pdf>>. Accessed in: apr. 12, 2016.

economic industries, rural properties and small communities alongside the Rivers Gualaxo do Norte, Rio do Carmo and Rio Doce; e) silting of the river beds of Rios Gualaxo do Norte, Carmo and River Doce up to the reservoir in the dam of UHE Risoleta Neves; f) impact on neighboring ponds and natural water fountains alongside the river beds; g) impact on the aquatic and native vegetation; h) impact on the connection of tributary rivers and marginal ponds; i) alteration of the river flow as a result of the EVENT; j) impact over estuaries and mangroves in the mouth of the River Doce; k) impact in areas of fish reproduction; l) impact on areas of “nurseries” for replacement of the ictiofauna (areas for feeding larvae and juveniles); m) impacts on the trofic chain; n) impacts over the genie flow of species in water courses resulting from the EVENT; o) impacts on species with specificity of habitat (water rapids, sites, wells, backwaters, etc) in the River Gualaxo do Norte and the River do Carmo; p) casualties of specimens of the trofic chain resulting in the EVENT; q) impact in the condition of conservation of species already listed as under threat and inflow of new species in the rank of such; r) compromising the structure in function of aquatic and land ecosystems associated as a result of the EVENT; s) compromising fish stock, with an impact on fishing as a result of the EVENT; t) impact on the way of life of the riverside populations, estuary populations, aboriginal tribes and other traditional populations; u) impacts on Conservation Units.<sup>3</sup>

Actually, as mentioned above, the damages certainly cannot yet have been measured, neither are they confined in the listing above.

It can be assured that, for decades, new damages will be identified as a consequence of the bursting of the dams, besides, obviously, the impossibility of quantifying life, dignity and the environment economically.

## 1.2 Environmental liability in Brazil

In face of the tragedy described, with extensive personal and mainly environmental losses, there shall be liability charges to all those who somehow have contributed to the event.

What is important to mention, as far as Legal Science is concerned, is that Liability be defined, relentlessly, in the light of Environmental Damages in effect, worth mentioning, independently of proof of fault or fraud. In other words, even if the act was unintentional, all the same, even if lack of prudence might be ascertained, negligence

3 Available from: <<http://www.advocaciageral.mg.gov.br/images/stories/downloads/Acordo/acordo-final-consolidado.pdf>>. Accessed in: apr. 12, 2016.

or inefficiency, all those who are somehow linked to the environmental damages, respond to civil liability, as we will demonstrate.

In the concrete case the issue is in the articles 5º, LXXIII; 20, II; 23, VI; 24, VI, VII and VIII; 129, III, 220, § 3º, II; 170, VI and, finally 186, II, explicitly demonstrated its concern with the Environment.

Despite the constitutional regulations listed in the previous paragraph, the article 225 of the Federal Constitution of Brazil, opened the chapter devoted to the Environment, such as:

Art. 225. All have the right to an ecologically balanced environment, as well as its essential use from the people and essential to a healthy quality of life, imposing itself to the Public authorities and to the community the duty to defend it and preserve it for the present and future generations.

§ 1º - To ensure the effectiveness of such right is the duty of Public authorities:

...

§ 3º - The courses of action and activities considered harmful to the environment subject the transgressors, be them individuals or companies, to the legal and administrative sanctions, independently of the obligation to repair the damages caused.<sup>4</sup>

Based on the inexorable premises that the Environment is one of the most valuable legal assets to any human being, it can be concluded, on the grounds of fully established concepts, that anyone who by means of fraud or willfulness degrades environmental goods, even when in the exercise of ontologically licit however abusive, acts, shall be liable to such deterioration. Therefore, it has been broadly determined by the article 927 of the Code, as it determined that whoever commits an illicit act (arts. 186 and 187) and causes damage, is obliged to repair it.

Therefore, the only paragraph of the article 927, determines that “There Will be the obligation to repair the damage, independently of fault, in the cases established by the law, or whenever the industry normally developed by the agent of such damage implies, by its nature, risk to the rights of others”.

It can be seen in *retro* applications; thus it can be concluded that the Law has adopted the Objective Civil Liability whenever the degradation is a consequence of a risk activity.

It can be concluded, therefore, that in the Classic Legal Rights the theoretical grounds for the Objective Civil Liability and the Risk Theory. Thereby, in light of studies about Civil Liability, it has been assured that in the face of potentially damage

4 Available from: <[http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm)>. Accessed in: apr. 12, 2016.

generating activities, the excessive concern over the full demonstration of the psychic aspect of the degrader – fault and fraud - should be driven away in order to value the quest for legal support of the victim, who should never be found in a situation which suffering has never been repaired.

In Environmental Law, which course of affairs this work focuses on, Civil Liability can be understood as a legal consequence from the degradation of the Environment.

Apart from the issue of its being widely harmful, the environmental damage has several other implications differentiating the civil damages themselves, as:

- a. The damages are generally widespread, in other words, in normal circumstances, when environmental damage occurs nowadays, all the public, unidentifiably, is a victim of the degrader.
- b. The environmental damage is normally inseparable, worth mentioning, the benefit of the doubt cannot be identified, as for the parcel of loss suffered by each individual affected;
- c. Usually the damage is irreversible, meaning the repair of the degraded areas, so as to recreate the previous state of affairs for degraded areas, is not always feasible, by means of the technology we available;
- d. It assumes a cross-border feature since it cannot be usually possible to identify exactly the regions suffering from degradation. A common example is the air pollution, which, certainly, does not cause damage to a restricted city due to the characteristics of the wind currents;
- e. It has cumulative effects, once the degrading effects have not been stanchd, much to the contrary, the damages affecting the environment are added to those previously generated, enabling a continuous degrading accumulation;
- f. Difficulty to establish a causal nexus. This, certainly, is one of the most significant difficulties to press civil and liable environmental charges. The bond linking cause-effect, in other words, the need that the victim of the damage has to demonstrate that the loss suffered was a consequence of the action or omission of the supposed offender is crucial in liability charges. When speaking of environmental damage, proof is impossible to demonstrate practically. Examples can be provided such as in cases of air pollution in a specific industrial district where numerous industries release toxic gases into the atmosphere. In these situations, hardly will it be accurately demonstrated which industry has caused the pollution generating damage to the city dwellers.

It can be demonstrated thus that the Environmental Damage deserves a diverse treatment from Civil Damage, considering that the good which is the matter of concern



and aimed at being protected, once deteriorated, will afflict all widespread and, many times, it will be impossible to regenerate.

However, there is raised a burning issue not quenched by the doctrine of jurisprudence, as follows: Brazil adopts the Theory of Generated Risk or the Theory of Entire Risk.

In the former, considering a supposed degrader could prove that the harmful event was caused by the exclusive fault of the victim – rare in terms of environmental issues, due to the broad characteristic of such good, single, random or major force fact caused by another party, it would be as an immediate consequence exempt of liability.

On the other hand, considering the Theory of Entire Risk, even if having been demonstrated the excluding illegalities described in the previous paragraph, the one who exercises any activity which, eventually, has a bond to an environmental damage, will incur in legal consequences.

Part of the Brazilian Doctrine considers that only by applying the Theory of Entire Risk shall the environment be protected, once the one who has degraded the environment shall be effectively protected, once the one who degraded the environment shall always be held responsible, even if it proves it to be fortuitous, major force, or exclusive fault of the victim or others. In this sense, there is undoubtedly what Sergio Cavalieri Filho (2012, p. 154) highlights as the need to protect the environment, because for him “If it were possible to evoke the random or major force case as the excluding causes of civil liability for ecological damage, it would be foreign to the application of the law in most cases of environmental pollution.”

However, to a minority of scholars, it is possible that the defendant of a Compensatory Suit for Environmental Damage demonstrates the disruption from the Causal Nexus thus avoiding a sentence, this doctrine is called Theory of Created Risk.

The Superior Court of Justice of Brazil adopts, undoubtedly, the Theory of Entire Risk, unduly, thus, overruling any exclusion of Civil Liability, as stated bellow:

EDcl in the REsp 1346430/PR, Rel. Minister LUIS FELIPE SALOMÃO, Fourth Round, tried February 05, 2013, DJ and February 14, 2013.

Indeed, the STJ – Supreme Court of Justice – in recent trial followed by the Recurring appeal, n. 1.114.398/PR, rel. Min. Sidnei Beneti, asserted that “the liability for environmental damage is objective, **informed by the theory of entire risk**, having as a premise the occurrence of activities implying in risks to health and the environment, being the causality nexus the agglutinating factor allowing for the fact that the risk is integrated in the unit of act which is the source of compensation, so that the one who explores the economic activity is placed in the position of guarantor of the environmental preservation, and the damages

concerning the activity will always be linked to such, therefore it is inappropriate for the party liable for the environmental damages to invoke safeguards excluding its civil liability, and therefore, such allegations are **irrelevant to the discussion concerning the lack of liability for exclusive fault of others or for other major forces.** (Grifos acrescidos)

Special Claim nº 1.175.907- MG, reported by the Minister Luís Felipe Salomão.

The jurisprudence of the STJ - Supreme Court of Justice- is firm, as far as the environmental damages are concerned, that **the theory of entire risk is applicable**, thus resulting in the objective nature of liability, with express constitutional and legal anticipation (art. 225, § 3º, of the CF – Federal Constitution) and (art. 14, § 1º, of the Law n. 6.938/1981), being, therefore, **unfounded such allegations of lack of responsibility, being it enough, for such, the incidence of harmful results to mankind and the environment as a consequence of an action omission of the liable party.** (emphasis added).<sup>5</sup>

It is worth highlighting that in a very similar case of the tragedy hereby reported, the Supreme Court of Justice of Brazil has made a statement:

THE LAW OF CIVIL LIABILITY AS A RESULT OF ENVIRONMENTAL DAMAGE CAUSED BY THE COMPANY RIO POMBA CATAGUASES LTDA. IN THE MUNICIPALITY OF MIRAÍ-MG. RECURRING CLAIM (ART. 543-C OF THE CPC AND RES. 8/2008-STJ).

Regarding the accident which happened in the municipality of Mirai-MG, in January 2007, when the company **Mineração Rio Pomba Cataguases Ltda., during the exercise of its entrepreneurial activities, leaked about 2 billion of residual waste of toxic mud (bauxite), such material reached kilometers of extension and was spread to the cities in the state of Rio de Janeiro and Minas Gerais, leaving countless families homeless and without shelter and their assets -personal belongings and estate:** a) the responsibility for environmental damage is objective, **informed by the theory of entire risk**, considering that the causality nexus is the agglutinating factor allowing for the fact that the risk is agglutinated with the unit of the act, being totally unfounded the allegation of the responsible company for the environmental damage, exclusion of liability to divert its obligation of loss compensation; **b) as a result of the accident, the company must make up for the material and moral damages caused;** and

5 Available from: <[https://ww2.stj.jus.br/processo/revista/inteiroteor/?num\\_registro=201102230797&dt\\_publicacao=21/11/2012](https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201102230797&dt_publicacao=21/11/2012)>. Accessed in: apr. 12, 2016.

c) the fixation of compensation for moral loss, it is recommended that the arbitration be analyzed case by case with moderation, proportionally considering the level of guilt, the socioeconomic level of the agents, and, still, the size of the defendant company, abiding the judge by the suggested criteria of the jurisprudence doctrine, reasonably, applying experience and common sense, focused on the reality of life and the peculiarities of each case, so as to, on the one hand, not allow for unreasonable financial gain from the part of those compensated and, on the other hand, enable compensation for moral loss experienced by those who have been harmed. As a matter of fact, regarding environmental damages, the **theory of entire risk**, as a result of the objective liability feature, with expressive legal and **constitutional** anticipation (art. 225, § 3º, of the CF) (art.14, § 1º, of the LAW 6.938/1981).<sup>6</sup>

It can be concluded, indeed, that the jurisprudence of the Superior Court of Justice of Brazil effusively proclaims that the Theory of Entire Risk must be considered, being, though, important to assure that the discussion over the random, major force fact or even fault of others is absolutely irrelevant to any civil or criminal liability which may arise from a conduct like the one in discussion.

Nonetheless, the seriousness of the environmental damage is - due to the characteristics mentioned above - infinitely greater than a mere liable damage, as the one resulted, e.g., from property as a result of vehicle accidents or the collapse of some construction.

Eventually, it is such essential good to human life that is being addressed that it is unmistakably priceless.

Moreover, certainly, the reproachable attitude of those who deteriorate the environment, mainly for fraud or fault, it is considerably greater than the liable damage.

In this standard, the Theory of "Punitive Damage" arises, which can be explained as the possibility to use the Civil Liability as a tool for punishment of those perpetrating the damage.

Thus, besides being sentenced to repair the damage caused, as, for example, reforestation of burned Woods, demolishing construction in a protected area, cleaning a polluted water source, should the degrader be condemned to a punitive pecuniary sanction.

In other words, the value arbitrated by the magistrate should encompass two elements: the first, only taking into account the attempt to quantify the loss suffered in face of the measurement of the damage and another, further, the magistrate should

6 Available from: <[https://ww2.stj.jus.br/processo/revista/inteiroteor/?num\\_registro=201201796436&dt\\_publicacao=25/09/2013](https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201201796436&dt_publicacao=25/09/2013)>. Accessed in: apr. 12, 2016.

establish an amount as a punitive sanction, with an educational scope, so as to avoid future illicit acts of such nature. It is believed that “Punitive Damage” is an excellent legal tool to justify the liability sentencing, effectively implacable towards those who degrade the environment.

## **2 The reaction of the attorney – general of the state of Minas Gerais, attorney- general of the state of Espírito Santo and the attorney-general of the federal government**

As previously stated, in the Legal, Administrative and Legislative scopes in Brazil, considering the system of control and counterpoints by Montesquieu, do not mingle, having, functional and administrative scopes of action.

As a matter of fact, the article 2º of the Federal Constitution of Brazil states that “The Legislative, the Executive and the Judiciary Powers are independent and harmonic among them, and are in the Power of the Union”.<sup>7</sup>

After the penalties provided partly by the Executive Powers of the State of Minas Gerais, Espírito Santo and of the Union, an agreement of 119 pages was settled<sup>8</sup>, whose judicial homologation is still pending, where it is established a Foundation to manage the target values in the agreement to recovery and compensation of the victims of the environment. Among those financial values, it can be highlighted: R\$ 1.100.000.000,00 (a billion and a hundred million Brazilian reais) to carry out the Forest Recovery Program and Water Supply recovery mentioned in the document, highlighting that if there is any surplus other actions of reforestation and regeneration of the area shall be carried out:

7. R\$ 500.000.000,00 (Five hundred million Brazilian reais) to be made available for the Program sewage and waste water treatment and disposal of solid residual waste;
8. R\$ 27.463.793,00 (twenty-seven million, four hundred and sixty thousand and seven hundred and ninety-three reais) to reimburse extraordinary public expenses;
9. R\$ 500.000.000,00 (Five hundred million reais), to pay for costs in the design of basic plans of sanitation, development of design of sanitary sewage system, implementation of works to collect and treat sewers, eradication of unlawful disposal of garbage and deployment of regional sanitary landfills;

7 Available from: <[http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm)>. Accessed in: apr. 12, 2016.

8 Available from: <<http://www.advocaciageral.mg.gov.br/images/stories/downloads/Acordo/acordo-final-consolidado.pdf>>. Accessed in: apr. 26, 2016.

10. R\$ 600.000.000,00 (six hundred million reais) to be deposited in 2016 to meet the obligations listed in the preliminary Term of Commitment of Environmental Partner celebrated together with the Prosecutor Office of the State of Minas Gerais and the Federal Prosecutor Office on November 16, 2015;
11. At least R\$ 800.000.000,00 (eight hundred million reais) and at the most R\$ 1.600.000.000,00 (one billion and six hundred million reais) due to the need resulting from projects to be carried out in 2019, 2020 and 2021;
12. R\$ 240.000.000,00 (two hundred and forty million reais) a year, for a period of 15 (fifteen) years starting from 2016, to carry out the projects of compensatory nature and the compensatory measures in the scope of the programs;

Obviously, highlighting that this agreement has not yet been approved of in conformity with the law, neither has it been signed by the Prosecutor's Office, the loss of lives, the loss of dignity, and the immeasurable Environmental damage shall never be forgotten.

### **3 The reaction of the federal and state public prosecutor office**

Acknowledging the normative and supervising competence not only of the Union but of the Member-State as well, in the case of the State of Minas Gerais and Espírito Santo, in the treatment of the environmental issue, both the State Public Prosecutor Office and the Federal seek for action in this case, especially seeking for those agents responsible for environmental and social damage caused by the accident in Mariana.

The agreements settled by the state and federal Attorney - General offices have not had the participation of several ministerial departments contrary to the treatment provided.

In the event of divergence or objection the agreements above described and settled by the Public Prosecutor Office, such attitude susceptible of alteration or even determinant for reformulation which can contemplate the interest of several departments involved, a judicial environment of considerable insecurity can be envisaged.

How can the compliant parties – Grupo Samarco – and the attorneys interpret the dissonant Will of the Public Prosecutor Office which will certainly bear compensation payment , IF such payments could be invalidated; and, thus, be vulnerable to judicial decision, despite delayed, of higher amounts and the margin of agreements settled?

It would be ideal to have the participation of all agents with legitimacy to discuss the issue, excluding, of course the thousands of people Who suffered impact as a result

of the accident, who would potentially have the right to demand repairing, mainly if the state departments in charge of taking care of the protection and in case damage takes place, the reconstitution of the environment.

It is desirable that there shall be, as soon as possible, a balance among the several sector involved and in Samarco itself, so as to avoid emotional distress and postponement of a judicial solution which, certainly, even if condemnatory would bring negative consequences for the local economy local and, if possible, partly, of the environment degraded by the rupture of the rupture of the dam.

#### **4 The course of action of the federal and state judiciary power**

The discussion over the environmental damages caused by the accident is still far from being far from a solution; or even, if it is the case, of a decisive decision in the scope of the Brazilian Judicial Power.

It is a controversial fact in the country the slowness in the judicial service particularly in the protocol proceedings in the Federal Justice, besides the usual, whose competence, in thesis, would encompass the covered issues.

We could, inclusively, state that the possibility of happening, as in fact can be envisaged, proposition for suits in different judicial courts; even because as the episode has a national as well as international repercussion.

It can be noticed, however, that the constituting legislator attributes responsibility to all the federal entities to standardize and supervise the actions or omissions in which mismanagement and impact on the environment can be witnessed.

Because of this, due to the multifaceted Brazilian Legal competence where the Ordinary and the Federal Law could be provoked to make a statement about the tragedy in Mariana, which could be a sign of greater protection and care for nature, it could, on the contrary, as manifestation of the national Judiciary, have morose and perhaps contradictory results lacking in efficiency.

In this way, in face of the structuring and the specialization of the Brazilian Judicial Power, confronted with what is anticipated in the article xx of the CF – Federal Constitution, uncountable legal suits have been proposed and will still be. There would only be, this considering a time line which one can lose sight of, a funneling of the discussions in superior courts – Superior Court of Justice and Supreme Federal Court– perhaps a moment when the heat of the course of events and the environmental social and economic trauma caused by this tragedy cools an eventual decision which would be an essential reference such as these , presenting and absolute and important educational feature to the attitude of companies whose regular actions bring clear environmental impacts and, in the event of an accident, would have an exponential effect.

Strictly speaking, IF it were possible to concentrate all the discussing affecting the accident and its consequences in only one jurisdictional department, especially that whose expedience could be better, it would be possible to reach some dynamics and decisions and more suitable and equitable rationale to the claims of the Brazilian society and of the international community given the impacts caused by the impacts caused by the planetary ecosystem.

In this light, the system of sharing competences and the specialization of the Brazilian Justice in environmental issues it does not work due to the competence in common with the federal entities; being able to, unfortunately, bring hindrances for a permanent negotiated solution or the harmonic, coherent and efficient jurisdictional.

## 5 The attitude of international organizations

The United Nations Organization (UNO), once the knowledge of the magnitude of the environmental disaster caused by the bursting of the tailing dam of waste in Fundão, belonging to Samarco, replaced specialists to the affected area in a “sea of mud” which has shifted, through the river basin of the River Doce – and is still moving even IF it is just a little and not intensely – from the state of Minas Gerais to a place, whose mouth is surrounded by the sea, in the coastal state of Espírito Santo, finally flowing into the Atlantic ocean.

When visiting the site, UNO, through its representatives, have made harsh criticisms to what it considers an “unacceptable” answer on the part of the Brazilian government on the part of Vale and the mining anglo-australian company BHP, integrating the joint venture of Samarco’s entrepreneurial group.

In a release with the declaration of the special rapporteur for issues concerning Human Rights and the Environment, John Knox, and the rapporteur of Human Rights and Toxic Substances, Baskut Tuncak, ONU have criticized the delay of three weeks for the disclosure of information about the risks generated by billions of liters of mud leaked into the Doce River through the rupture of the dam, on the 5th:

The measures taken by the Brazilian government, Vale and BHP to prevent damages were clearly insufficient. The government should be doing everything possible to prevent further problems, including exposure to heavy metal and toxic substances. This is not the moment. It is not the moment for defensive attitude.<sup>9</sup>

This because, in its criticism, ONU mentions the contradiction in the information broadcast about the disaster, particularly the insistence of Samarco, *joint venture*

9 Available from: <<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>>. Accessed in: apr. 13, 2016.

formed Vale and BHP to explore minerals in the region, that the mud did not contain toxic substances. Describing in detail the ecological disaster provided by the leakage, including the arrival in the mud into the sea.

Strictly speaking, there is still little information and reliable data to measure, with the minimum of the necessary accuracy of the damages caused by the environmental disaster.

Thus, there would be left, at least momentarily, for the International Organizations, such as ONU, only make comments and superficial observations and considering the general reaction is still remaining as a mixture of fear and the effects of the accident, distress of what will bring the clear insecurity of what effectively can be done to avoid in the recurrence of such tragedy in Brazilian land.

## 6 Conclusion

The rupture of the dam where the tailings could be found in the Mining Company Samarco/Vale/ BHP was a major environmental tragedy happening in Brazil.

Even though it can be recognized that the State through the Executive and Judiciary Powers, as well as, the Public Prosecutor Office, have acted rapidly, nothing has been or will be efficient concerning the suffering caused to the victims and the environment.

As a matter of fact, several environmental demands, being pursued through the Judiciary Power or the administrative processes have rapidly been presented by the state and the allocation of responsibilities of the Mining companies. However, human death and the huge environmental degradation will never be recovered.

In spite of the rapid manifestation of the State Powers, a huge legal confusion has been presented owing to cross-border characteristic of environmental damage. After all, which state departments have the competence to process, fine, and try the Mining companies which cause environmental damage?

In fact, the Judicial Police of the State of Minas Gerais, and the Judicial Police of the state of Espírito Santo, the departments in charge of environmental protection of both states of the Union. All have acted promptly. However, the situation is much more complicated when it involves the Judiciary Power, after all, the Public Prosecutor Office of the State of Minas Gerais, State of Espírito Santo and of the Federal Union, all have taken the responsibility of probing liability, and consequently, the Judicial Powers of such states and of the Union as well.

As if the problem presented in the previous paragraph concerning legal competence were not enough, the Executive Powers of the Union and of the states have presented for judicial approval, an agreement (still pending for approval) whose terms have not been accepted by the Public Prosecutor Office.



Thus, it can be concluded that an Environmental damage of huge proportion must have special attention on the part of the legislator, especially in the Constitutions, once it might, unfortunately, cause conflict of jurisdictional competences inside a country, indeed, in need of international organization interference in the environmental protection acts.

## References

- ANTUNES, Paulo de Bessa. **Direito Ambiental**. São Paulo: Atlas, 2013.
- BARRETO, Vicente de Paula. Bioética, Responsabilidade e Sociedade Tecnocientífica. **Juris poiesis**: revista do curso de direito da Universidade Estácio de Sá p. 319.
- BOBBIO, Norberto et al. **Dicionário de Política**. Tradução de Carmem Varriale et al. Brasília, DF, Editora Universidade de Brasília, 1995.
- BOBBIO, Norberto. **A era dos direitos**. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.
- BRASIL. Advocacia-Geral do Estado de Minas Gerais. Acordo com a Samarco. Available in: <<http://www.advocaciageral.mg.gov.br/images/stories/downloads/Acordo/acordo-final-consolidado.pdf>>. Accessed: 12 abr. 16
- BRASIL. **Código Civil**. Available from: <[http://www.planalto.gov.br/ccivil\\_03/leis/2002/l10406.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm)>. Accessed in: 4 mar. 2016.
- BRASIL. Lei Federal 6.938/81. **Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências**. Available from: <[http://www.planalto.gov.br/ccivil\\_03/leis/l6938.htm](http://www.planalto.gov.br/ccivil_03/leis/l6938.htm)>. Accessed: 4 mar. 2016.
- BRASIL. **Constituição da República Federativa do Brasil de 1988**. Available from: <[http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm)>. Accessed in: 27 mar. 2016.
- \_\_\_\_\_. Superior Tribunal de Justiça. Recurso Ordinário em Mandado de Segurança. Processo 564960. Recorrente: Leao e Leao Ltda. Recorrido: Ministério Público do Estado de São Paulo. Relator: Ministro Félix Fischer. Acórdão 29 jun. 2006. Available from: <<http://stj.jusbrasil.com.br/jurisprudencia/7147673/recurso-ordinario-em-mandado-de-seguranca-rms-20601-sp-2005-0143968-7/certidao-de-julgamento-12864563>>. Accessed in: 30 mar. 2016.
- \_\_\_\_\_. Superior Tribunal de Justiça. Recurso em Mandado de Segurança. Processo 39173. Recorrente: Petróleo Brasileiro S/A – Petrobrás. Recorrido: União Federal. Relator: Ministro Reynaldo Soares da Fonseca. Acórdão 1 jun. 2015. Available from: <<http://www.jusbrasil.com.br/topicos/40616855/processo-n-39173-ba-do-stj>>. Accessed in: 3 jan. 2016.
- \_\_\_\_\_. Supremo Tribunal Federal. Recurso Extraordinário. Processo 548181. Recorrente: Ministério Público Federal. Recorrido: Petróleo Brasileiro S/A – Petrobrás. Relator: Ministra Rosa Weber. Acórdão 6 ago 2013. Available from: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7087018>>. Accessed in: 30 mar. 2016.
- \_\_\_\_\_. Tribunal de Justiça de Minas Gerais. Apelação criminal. Processo 10471100038309001. Apelante: Ministério Público do Estado de Minas Gerais. Apelado: Município de Pará de Minas. Relator: Desembargadora Márcia Milanez. Acórdão 16 abr. 2013. Available from: <<http://tj-mg.jusbrasil.com.br/jurisprudencia/114842955/apelacao-criminal-apr-10471100038309001-mg>>. Accessed in: 4 mar. 2016.

\_\_\_\_\_. Tribunal de Justiça da Paraíba. Recurso em Sentido Estrito. Processo 00120080058553001. Recorrente; Ministério Público. Recorrido: Sandro Gomes da Silva. Relator: Desembargador Joas de Brito Pereira Filho. Acórdão 26 mar. 2016. Available from: <<https://app.tjpb.jus.br/consultaprocessual2/views/consultarPorProcesso.jsf>>. Accessed in: 4 jan. 2016.

CALDERÓN, Silvia Mendoza. La protección penal del medio ambiente en Alemania, Italia, Francia y España: estudio de derecho penal comparado. **Revista Eletrônica de Ciências Jurídicas**. RECJ.02.03/05 Available from: <<http://www2.mp.ma.gov.br/ampem/artigos/Artigos2005-2/ProdeccionPenal-RECJ.02.03-05.pdf>>. Accessed in: 31 mar. 2016.

CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. Coimbra: Editora Almedina, 1998.

CAVALIERI FILHO, Sérgio. **Programa de Responsabilidade Civil**. São Paulo: Atlas, 2012.

COSTA, Beatriz Souza. **Meio Ambiente como Direito à Vida: Brasil, Portugal e Espanha**. Rio de Janeiro: Lumen Juris, 2013.

DOTTI, René Ariel. **A incapacidade criminal da pessoa jurídica (uma perspectiva do direito brasileiro)**. In: PRADO, Luiz Regis; DOTTI, René Ariel (coord.). A responsabilidade penal da pessoa jurídica: em defesa do princípio da imputação penal subjetiva. 3. ed. rev. atual. e ampl. São Paulo: Revista dos Tribunais, 2011.

ESPAÑA. **Código Penal de España**. Available from: <[http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.l2t16.html#l2t16](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l2t16.html#l2t16)>. Accessed in: 30 mar. 2016.

\_\_\_\_\_. **Constitución Española 1978**. Available from: <<http://www.congreso.es/consti/consti-tucion/indice/titulos/articulos.jsp?ini=39&fin=52&tipo=2>>. Accessed in: 30 mar 2016.

\_\_\_\_\_. **Decreto 3096/73**. Available from: <<http://e-spacio.uned.es/fez/eserv/bibliuned-BFD-1984-11-12-30170/PDF>>. Accessed in: 30. mar. 2016.

\_\_\_\_\_. **Ley Orgánica 1/2015**. Available from: <[http://noticias.juridicas.com/base\\_datos/Penal/549720-lo-1-2015-de-30-mar-modifica-la-lo-10-1995-de-23-nov-del-codigo-penal.html](http://noticias.juridicas.com/base_datos/Penal/549720-lo-1-2015-de-30-mar-modifica-la-lo-10-1995-de-23-nov-del-codigo-penal.html)>. Accessed in: 30 mar. 2016.

\_\_\_\_\_. **Ley 26/2007**. Available from: <<http://www.lyrsa.es/index.php?ids=636&lang=pt>>. Accessed in: 30 mar. 2016.

FIGUEIREDO DIAS, Jorge de. **O papel do direito penal da proteção das gerações futuras**. In Boletim da Faculdade de Direito, n. LXXV, Coimbra: Coimbra Editora, 2003. Available from: <<http://www.defensesociale.org/02/9.pdf>>. Accessed in: 30 mar. 2016.

FRANCISCO de P. Blasco Gascó. **Los supuestos de responsabilidad objetiva**. Available from: <<http://www.tirant.com/editorial/actualizaciones/Tema69.pdf>>. Accessed in: 30 mar. 2016.

GRINEVALD, Jacques. **Os pioneiros da ecologia**. In BEAUD, Michel e Calliope; BOUGUERRA, Mohamed Larbi (Org.). Estado do Ambiente no Mundo. Tradução de Ana Maria Novais. Lisboa: Instituto Piaget. 1993.

KAUFMANN, Jean-Claude. **A entrevista compreensiva: um guia para pesquisa de campo**. Petrópolis: Vozes, 2013.

- LAFER, Celso. In PIOVESAN, Flávia. **Direitos Humanos e Justiça Internacional**. São Paulo: Saraiva, 2006.
- LOZANO CUTANDA, B. (Coord.). **Comentarios a la ley de responsabilidad medioambiental**. Pamplona: Aranzadi. 2008.
- MUKAI, Toshio. **Responsabilidade civil objetiva por dano ambiental com base no risco criado**. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 1, n. 4, jul. 2002.
- NOGUERA, Antonio Vercher. **Evolución jurisprudencial del delito contra el medio ambiente**. Available from: <<http://www.jcyl.es/web/jcyl/binarios/147/.../RJ1-11-A.Vercher.pdf?>>. Accessed in: 30 mar. 2016.
- ONU - Organização das Nações Unidas. **Declaração De Estocolmo Sobre Meio Ambiente Humano De 1972**. Available from: <[http://www.mma.gov.br/estruturas/agenda21/\\_arquivos/estocolmo.doc](http://www.mma.gov.br/estruturas/agenda21/_arquivos/estocolmo.doc)>. Accessed in: 04 abr. 2016.
- PIOVESAN, Flávia C. **Direitos humanos e o direito constitucional**. São Paulo: Saraiva, 2006.
- PRADO, Luiz Régis. **Direito penal do ambiente**. 5. ed. rev. São Paulo: Revista dos Tribunais, 2013.
- REALE JÚNIOR, Miguel. **A responsabilidade penal da pessoa jurídica**. In: PRADO, Luiz Regis; DOTTI, René Ariel (coord.). *A responsabilidade penal da pessoa jurídica: em defesa do princípio da imputação penal subjetiva*. 3. ed. rev. atual. e ampl. São Paulo: Revista dos Tribunais, 2011.
- RIBEIRO, Luiz Gustavo Gonçalves; SILVA, Fábio Márcio Piló. **Um ensaio sobre vícios legislativos contidos na lei de crimes ambientais à luz do princípio da proporcionalidade**. Revista Direito Ambiental e Sociedade, Caxias do Sul, n. 4, n. 1, p. 41-64, 2014, jan./jun. 2014.
- RUDA GONZÁLEZ, A. **El daño ecológico puro – La responsabilidad civil por el deterioro del medio ambiente, con especial atención a la Ley 26/2007, de 23 de octubre, de responsabilidad medioambiental**. Pamplona, Aranzadi. 2008.
- RUIZ, M<sup>a</sup> Ángeles Cuadrado. **Derecho y medioambiente**. Available from: <[http://huespedes.cica.es/gimadus/21/03\\_derecho\\_y\\_medioambiente.html](http://huespedes.cica.es/gimadus/21/03_derecho_y_medioambiente.html)>. Accessed in: 2 abr. 2016.
- SAMPAIO, José Adércio Leite. **Direitos fundamentais**. 2 ed. Belo Horizonte: Del Rey, 2010.
- SILVA, José Afonso da. **Direito Ambiental Constitucional**. 7. Ed. São Paulo: Malheiros, 2009.
- SIMONETTI, Florence. *Le droit Européen de l'Environnement*. In: **Pouvoirs, revue française d'études constitutionnelles et politiques**, n° 127, 127 – Droit et Environnement, p. 67-127. Available from: <<http://www.revue-pouvoirs.fr/Le-droit-europeen-de-l.html>>. Accessed in: 4 abr. 2016.
- STEIGLEDER, Annelise Monteiro. **Responsabilidade Civil Ambiental**. Porto Alegre: Livraria do Advogado, 2011.
- TEIXEIRA, César Teixeira; PAULETTO, Fernando; FRUET, Ana Paula Burin; KIRINUS Jackeline Karsten; DÖRR Andrea Cristina. **Responsabilidade civil por dano ambiental no direito espanhol**. Reget/ufsm. Dezembro. 2013: Available from: <<http://cascavel.ufsm.br/revistas/ojs-2.2.2/index.php/reget/article/view/10960>>. Accessed in: 4 abr. 2016.

UNIÃO EUROPEIA. **Directiva 2004/35 do Parlamento Europeu e do Conselho de 21 de abril de 2004, relativa à responsabilidade ambiental em termos de prevenção e reparação de danos ambientais.** Available from: <<http://www.isp.pt/winlib/cgi/winlib.exe?s-key=&pesq=2&doc=14371>>. Accessed in: 4 abr. 2016.