



National Contact Point for
the OECD Guidelines for
Multinational Enterprises

MINISTÉRIO DA
ECONOMIA



FINAL STATEMENT – Specific Instance no. 01/2020

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Guimarães

Respondent: Vale S.A.

NCP Brazil

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1. NATIONAL CONTACT POINT BRAZIL AND ITS ROLE

1. The Organisation for Economic Co-operation and Development (OECD) [Guidelines](#) for Multinational Enterprises (Guidelines) are recommendations addressed by governments to multinational enterprises operating in or from adhering countries, and are the only multilaterally-accepted and comprehensive government-backed code on responsible business conduct (RBC). The monitoring, promotion and implementation of the Guidelines are the responsibility of the OECD Investment Committee and the National Contact Points (NCPs).
2. The [NCPs](#) act as a central forum for all matters relating to the Guidelines, providing a unique mechanism for support, promotion and implementation. Their main objective is to help companies, groups, associations, trade unions and other stakeholders take appropriate action to implement the Guidelines, and to provide a platform to contribute to the resolution of issues related to non-observance.
3. NCP Brazil was created by Administrative Order no. 92, of the then Ministry of Finance, on 12 May 2003. Already within the new organisational structure of the federal Executive Branch, [Decree no. 9 874 of 27 June 2019](#) was issued, which contained new provisions on the powers and organisation of NCP Brazil, confirming its structure as an Inter-ministerial Working Group (IWG-NCP), composed of eight agencies with co-ordination and secretarial work from the Ministry of Economy.

2. EXECUTIVE SUMMARY

4. On 23 January 2020, NCP Brazil received a Complaint of Non-Observance of the Guidelines, formulated by the legal representatives of the Complainants in relation to the Respondent's conduct, arising from an accident that occurred in the city of Brumadinho, Minas Gerais, on 25 January 2019. This is Specific Instance no. 01/2020.
5. The company's conduct was said to be inconsistent with the provisions of the following chapters of the Guidelines: part I, chapter II. General Policies (paragraphs 1, 2, 3, 10, 11, 12, 14, 15, point "b" 2), III. Disclosure (paragraph 3, points "a", "b", "c" and "d"), IV. Human Rights (heading, paragraphs 1, 2, 3, 4, 5, 6) and VI. Environment (heading, paragraph 1, points "b" and "c"; paragraph 2, points "a" and "b"; paragraphs 3, 4 and 5).
6. The Complainants own property in the urban expansion area, near the village of Pires, which was impacted by the failure of the Córrego do Feijão tailings dam. They allege that the dam failure caused, among other things, material damage due to (i) the interruption of negotiations for a specific real estate development; (ii) an abrupt increase in the flow of vehicles, hindering access to the property; and (iii) the discharge of mud into the Paraopeba River, which impairs the conditions for effective economic use of the site, a situation that impacted the whole community, generating social, economic and psychological upheaval for the population.
7. An Admissibility Analysis was completed on 3 February 2020, which assessed the elements described in Section 4 of the Procedures Manual for Specific Instances of NCP Brazil (Procedures Manual). Subsequently, the representative of the Ministry of Mines and Energy in the IWG-NCP was appointed as rapporteur for the case. On 13 April 2020, the IWG-NCP accepted the rapporteur's recommendation and decided to accept the case.

8. Subsequently, the parties were served and the Respondent submitted its counterclaims on 29 May 2020. After the analysis, the rapporteur deemed it necessary to request additional information from the parties. This information was requested by the NCP Co-ordination on 20 July 2020 and received in August 2020. After reviewing the information, the rapporteur recommended that the NCP's good offices be offered, and the recommendation was implemented by the IWG-NCP on 16 October 2020.

9. As a strategy to engage the parties, the IWG-NCP Co-ordination held meetings with the Complainants (27 November 2020) and the Respondent (4 December 2020) to offer its good offices. However, on 17 December Vale sent a response to the Co-ordination, in which it officially refused the offer of good offices, arguing that "accepting the offer of good offices made by the NCP, to proceed with Specific Instances nos. 01/2020 and 02/2020, could result in irreversible institutional and legal risks in view of all the actions taken by Vale for the remediation of the territories affected by its dams".

10. In view of this, and in accordance with chapter 7 of the Procedures Manual, particularly item 7.5 b), the rapporteur is forwarding this Final Statement for consideration by the IWG-NCP, which, in addition to the summary of each of the parties' statements and the initiatives of the IWG-NCP and the Co-ordination, contains an assessment of the entire process and a set of recommendations for the parties.

11. This Final Statement contains the following sections: (3) Substance of the complaint and progress, (4) Initial assessment by the NCP, (5) Procedures adopted by the NCP, (6) Review and conclusions, and (7) Recommendations.

3. SUBSTANCE OF THE COMPLAINT

12. The episode that triggered the specific instance addressed herein is the failure of Dam B1, of the Córrego do Feijão Mine, located in Brumadinho, Minas Gerais, which occurred on 25 January 2019, and which is said to have revealed and caused a series of breaches of the Guidelines by the Respondent.

13. The Complainants own property in the urban expansion area, near the village of Pires, which was impacted by the failure of the Córrego do Feijão tailings dam. According to their complaint, the dam failure has caused material damage due to (i) the interruption of negotiations for the real estate development; (ii) the abrupt increase in the flow of vehicles, hindering access to the property; and (iii) the discharge of mud into the Paraopeba River, which impairs the conditions for effective economic use of the site.

14. The Complainants are allegedly suffering immaterial damages resulting mainly from (i) the alleged failure to comply with international safety standards (such as the rules and criteria to which the company had committed in respect of the Mining Association of Canada (MAC) and the International Council on Mining and Metals (ICMM)) and the lack of information regarding the risks posed by the dam; (ii) the Respondent's alleged failure to answer complaints sent to its customer service channels; (iii) the consequences of the failure (three or four bodies are claimed to have been carried by the mud to the gates of the property); (iv) the installation of fences inside the property and sirens near the property, without the consent of the owners, causing anger and panic among residents; (v) the creation of an extrajudicial dispute settlement mechanism that it is claimed lacks the qualities of fairness and a search for settlement;

(vi) the failure to present the Mining Dam Emergency Action Plan to the population, which it is claimed caused great panic when the sirens were sounded after the dam failure.

15. The Complainants' property is located in the urban expansion area, near the village of Pires, which was affected by the failure of the Córrego do Feijão tailings dam. They allege that the event in question made it impossible to pursue the subdivision project that had been in preparation for years, and which already involved partnerships and investments. They also allege that they sought out the Respondent, through the company it had hired to reach an extrajudicial settlement, Faleck e Associados, and were denied compensation for the blocking of the subdivision project. They allege that, just like them, countless others have also been denied compensation, under the argument that the Commitment signed between Vale and the Public Defender's Office does not provide for compensation for the circumstances presented. They argue that they suffered immeasurable material and psychological distress.

4. INITIAL ASSESSMENT BY THE NATIONAL CONTACT POINT

4.1. ADMISSIBILITY ANALYSIS

16. The specific instance was admitted on 3 February 2020 by the then NCP Brazil Co-ordinator, who complied with the provisions of article 4 of NCP Resolution no. 01/2016, in force on the date of receipt of the case and during the Admissibility Analysis.

17. At the time, it was noted that the complaint met the requirements for admissibility, including proper identification of the parties, specification of the articles of the Guidelines being breached and submission of the duly signed confidentiality agreement. Additionally, the complaint was duly supplemented with documents to assist in understanding the facts.

4.2. INITIAL ASSESSMENT

18. Due to its relevance to the topic, the Ministry of Mines and Energy was called upon to act as rapporteur in the proceeding, starting with the initial assessment.

19. In accordance with item 5.7 of the Initial Assessment chapter of the Procedures Manual, the rapporteur verified, among other aspects, the relationship between the Complainants and the subject matter of the complaint; the correspondence between the alleged facts, the documentation attached to the files and the Guidelines; as well as the relevance of the issues raised for the interpretation of the Guidelines.

20. A conclusion was then reached to proceed with the specific instance, for the receipt of counterclaims and the possible offer of mediation by the IWG-NCP. The Co-ordination then notified the Respondent, which submitted its counterclaims as summarised below.

4.3. COUNTERCLAIMS

21. On 29 May 2020, the Respondent submitted its counterclaims, commenting on the points listed below.

4.3.1. Preliminary Counterclaim

22. Initially, the Respondent argues that "there are no solid elements concerning the alleged damages suffered and the difficulties faced by the Complainants as a result of the failure", and that, "in the few passages in which the Complainants raise supposed violations,

they do so with respect to abstract issues such as the assessment of impacts on the environment and cultural heritage which, even though they could (albeit potentially) affect them as individuals, are protected

for the community as a whole, in relation to which they do not describe concrete aspects of violations of their own individual rights.”

23. In this sense, it argues that the appropriate arena to discuss collective and social rights is that already in place at the time of the filing of the two public civil actions and that the NCP is not the competent body to address complaints that convey "issues of a collective and social nature", "for logical and legal reasons".

4.3.2. Corporate Governance

24. To "demonstrate that its business conduct and all measures taken as a result of the dam failure strictly follow national and international best practices, in line with the OECD Guidelines and the Brazilian legal system", the Respondent states that:

- a) it operates in compliance with legal and regulatory requirements, including financial market standards and ISO 9001 certification
- b) it complies with the voluntary standards cited in the specific instance "regarding transparency, disclosure, dialogue, respect for integrity, property and human rights, risk management control and treatment of the impacts caused"
- c) it made a presentation to shareholders and the market concerning the impacts on its finances caused by events such as the failure of the Córrego do Feijão dam.

4.3.3. Remediation Measures

25. On this topic, the Respondent argues that it has developed the "Comprehensive Remediation Program", "based on social, environmental and infrastructure pillars, to ensure that actions and resources effectively compensate individuals and communities, restore the environment and enable the sustainable development of Brumadinho and the surrounding area."

26. It states that it has provided extensive support to the people affected and has mobilised "large teams" dedicated to "consulting them, registering emergency requests, ensuring immediate assistance and providing them with up-to-date information as quickly as possible". It also says that it has signed "at least 27 agreements" with public agencies, "covering social, environmental, employment and property aspects, among others".

27. Finally, in arguing that it has adequate communications channels for accountability and information – such as its website and call centre – the Respondent states that "the intervention of this Co-ordination is unnecessary", and it has "no intention of discussing these issues individually with the Complainants within the scope of the NCP Brazil procedure".

4.3.4. Compensation Programme

28. The Respondent initially states that the Complainants entered into an extrajudicial agreement under the Compensation Programme, and yet they "are unfairly attempting to undercut it by suggesting that the chosen method is illegal".

29. In its defence, it refers to the agreement "used as a parameter for the community of Brumadinho and a guideline for the communities of Barão de Cocais and Macacos" – signed with the Public Defender's Office of the State of Minas Gerais (DPMG), which "has authority to file public civil actions and agree settlements in defense of individual and collective interests."

30. It clarifies that, despite the establishment of general compensation criteria, "the parameters of the Commitment are applied to the specific case, considering all details and documents presented, when drawing up a compensation proposal", and that "the analyses are conducted according to the specific characteristics required by each case, so that the result of the analyses varies, despite the application of the same parameters". For these reasons, the claims of "differential treatment" made with the NCP would not prevail.

31. Concerning the alleged delay in the processing of the Complainants' request, it says that some cases are more complex, and that they therefore take longer to complete. Regarding the criteria for assessing the compensation, Vale claims that "the parameters and methods used to prepare the proposal are explained and discussed in a face-to-face meeting or videoconference held with the claimants and their lawyers", at which time "all attendees are given the opportunity to consider the proposal and ask any questions deemed necessary".

32. Finally, the Respondent addresses the inadequacy of the requests formulated by the Complainants, requesting their "complete dismissal" and "summary dismissal of the complaints."

5. PROCEDURES ADOPTED BY THE NATIONAL CONTACT POINT

5.1. REQUEST FOR ADDITIONAL INFORMATION

33. As provided in item 5.14. of the Procedures Manual, the rapporteur analysed the Respondent's responses and issued recommendations on the next steps for conducting the procedure, specifically the request for additional information from the parties.

34. The specific reasons for the requests, made on 20 July 2020, and the parties' respective responses, are summarised below.

5.1.1. Compensation Programme

35. As stated in the report approved by the IWG-NCP, the Guidelines urge multinational enterprises to "provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts" (part I, chapter IV, paragraph 6).

36. The Respondent states that on 28 January 2020, five days after the filing of the present claims, an extrajudicial settlement was entered into between the parties under the Compensation Programme, in which the individual damages arising from the failure of the dam were resolved.

37. Since it is not for the NCP to analyse discussions that have become *res judicata* or that have a similar legal effect, as in the case of the judicial recognition of an extrajudicial settlement, it was incumbent upon the Complainants to provide information about the progress and extent of the settlement.

5.1.2. Disclosure of Accounting Data

38. The Guidelines state that "Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance" (part I, chapter III, paragraph 1).

39. On the point, the Respondent states that its conduct is regulated by market and sector norms and supervised by entities of the sector and the financial system. It further states "that all information relevant to the operational results and impacts on the company's financial performance caused by the failure of the Córrego do Feijão dam, in Brumadinho, and other events, were disclosed in Vale's Annual Report¹ and Financial Statements for the year 2019".

40. Considering the allegation that, in the disclosure of the accounting data, "one can conclude that a positive balance sheet has been simulated", the Complainants were required to provide pertinent information indicating, above all, "whether the complaint presents facts and evidence, verifiable through objective criteria" (Procedures Manual, item 5.7).

5.1.3. Disclosure of Risks and Governance Policies

41. The Guidelines state that "disclosure policies of enterprises should include, but not be limited to, material information on [...] foreseeable risk factors [and] governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process." In addition, "enterprises are encouraged to communicate additional information" on:

- a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines
- b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply
- c) its performance in relation to these statements and codes
- d) information on internal audit, risk management and legal compliance systems
- e) information on relationships with workers and other stakeholders.

42. Regarding the disclosure of risks involving tailings dams, especially risks to the communities located in the vicinity of the collapsed dam, the Respondent issued no comment, for which reason Vale was asked to provide additional information.

43. In relation to the policies and codes of conduct to which the company subscribes – especially those resulting from the adoption of international dam safety parameters – it would be important for the Respondent to provide data on, in the words of the Guidelines, the "policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply"; as well as on "its performance in relation to these statements and codes."

44. Thus, precise information was requested on disclosure and performance in relation to the international commitments undertaken by Vale that have implications in any way for the subject matter of the allegations.

5.1.4. Conclusion

45. In summary, the following was requested:

- a) of the Complainants:
 - (i) information on the extrajudicial settlement made under the aegis of the Respondent's Compensation Programme

¹ Vale (2020), Relatório anual, de acordo com a seção 13 ou 15(d) da lei de mercado de capitais de 1934 [Annual report, in accordance with Section 13 or 15(d) of the Capital Markets Act of 1934]. Vale, Rio de Janeiro, www.vale.com/PT/investors/information-market/annual-reports/20f/20FDocs/Vale%2020-F%202019_p.pdf.

(ii) objective information indicating the possibility to "conclude that a positive balance sheet has been simulated" and any possible connection with the Complainants

b) of the Respondent:

(i) information concerning the disclosure of risks

(ii) information regarding disclosure of international commitments and the company's performance in relation to these commitments.

5.2. STATEMENTS BY THE PARTIES

5.2.1. Complainants

46. On 18 August 2020, the Complainants submitted the additional information requested, as reported below.

5.2.1.1. Information on the extrajudicial settlement under the aegis of the Respondent's Compensation Programme

47. Regarding the extrajudicial settlement which, according to the Respondent, was entered into on 28 January 2020, the Complainants reaffirm that the dispute resolution model was "drawn up unilaterally, in order to facilitate negotiations to serve the interests of the Respondent only" and that the agreement was signed "after registration with the OECD", alleging that "the agreement signed did not consider the impracticability of the subdivision project", with it "merely compensating the moral damages of the owners and the impracticability of the lease and horticultural production agreement".

48. The Complainants add that, "that which is sought, regarding compliance with the OECD Guidelines for Multinational Enterprises, is for the Respondent to acknowledge its non-observance, especially as to the application of a methodology in which the persecutor is the 'court' that will impose the applicable penalty, whose extent it also instituted, also giving it the pleasure of changing the rules, in the middle of the game, as it sees fit".

49. Nevertheless, the Guidelines urge multinational enterprises to "provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts" (part I, chapter IV, paragraph 6). In view of this, the OECD NCP would, on that basis, be responsible for mediating conflict when there was no co-operation, by other legitimate means, to restore damage arising from the company's activities.

50. The information on this point was confirmed, considering that the Complainants signed an extrajudicial settlement agreement with the Respondent and that the agreement was ratified in court, therefore making it impossible to dispute the actions of the IWG-NCP, given, among other elements, the presumed legitimacy of the procedure ratified by the judicial authority. For this reason, the OECD NCP was without competence to consider the case, as determined by item 4.17.2 of the Procedures Manual, it being necessary to close this Specific Instance on this point.

5.2.1.2. Objective information indicating the possibility to "conclude that a positive balance sheet has been simulated" and any possible connection with the Complainants

51. Regarding the request for "objective information indicating the possibility to 'conclude that a positive balance sheet has been simulated' and any possible connection with the Complainants", it argues that "all individuals, including the Complainants, have a full interest (legal, social and economic) in the request submitted to NCP Brazil by the OECD, for the

Respondent to fulfil its obligations by assuming the real environmental, social and economic losses caused by the failure of the tailings dam in Brumadinho, reflecting the full value (of the liability) in its financial statements." It adds that "according to the Corporations Law in force in Brazil, as per the legal provision cited in the Complaint of Non-Observance, the liability corresponds to all the losses incurred during the financial year, regardless of whether or not they came out of the company's coffers".

52. Also according to the Complainants, there are "unequivocal grounds, at the very least, to require the company to conduct a study on the liability for which it is responsible, including a survey of the local people as to the level of satisfaction and sense of justice that such payments (through extrajudicial settlements) have caused among the population, as well as the criteria used, in order to ensure fairness and to report to the world, at the end of these Complaint of Non-Observance proceedings, the factual reality and the recommendations issued, should no spontaneous action be taken by the Company to correct its course".

53. It is clear from the Complainants' statement that the alleged "simulated positive balance sheet" is linked to the performance of the extrajudicial dispute settlement model, which is not sufficient for the factual limitation necessary to proceed with the specific instance.

54. Thus, and because it is necessary to demonstrate "whether the complaint presents facts and evidence, verifiable through objective criteria" (Procedures Manual, item 5.7), on this point a recommendation was also made to close the specific instance.

5.2.1.3. Other information

55. Finally, the Claimants' request for this specific instance to be dealt with jointly with NCP Canada was noted, "particularly in view of the Respondent's political and institutional power in Brazil" and the fact that, according to the Complainants, the procedural changes that NCP Brazil underwent over the last two years have eliminated the IWG's duty to issue recommendations, transforming it into a simple "Conflict Mediation Chamber".

56. On the first point, it was clarified that, according to item 5.7, X of the Procedures Manual, the IWG-NCP takes into consideration how similar issues are being treated by its international counterparts, and the commitments and standards of foreign origin assimilated by the company are an integral part of the analysis of the Guidelines.

57. Furthermore, events taking place in Brazil involving Brazilian multinational enterprises should warrant the attention of NCP Brazil whenever they occur.

58. Finally, it was noted that issuing recommendations is an important part of the current procedural model, as determined in the Procedures Manual, specifically in items 3.6 and 7.5, and therefore the conclusion that the IWG-NCP would no longer have this type of responsibility was rejected.

5.2.2. Respondent

59. On 4 August 2020, the Respondent submitted the requested additional information, as reported below.

5.2.2.1. Information concerning the disclosure of risks

60. Regarding the required information concerning "the disclosure of the risks of its activities, especially risks to the communities located in the vicinity of the collapsed dam", the company reports initiatives taken after the failure of the dam, highlighting the existence of

"detailed information about the actions and activities related to remediation and recovery of the region of Brumadinho and its surroundings".

61. In effect, following the terms of the specific instance and the Guidelines, which recommend that "disclosure policies of enterprises should include, but not be limited to, material information on [...] foreseeable risk factors", one wonders whether Vale provided information on disclosure of the risks that the activities it carries out could pose to the surrounding communities.

5.2.2.2. *Information regarding disclosure of international commitments and the company's performance in relation to these commitments*

62. Regarding the request for information about the adoption and disclosure of (a) international dam safety standards and (b) social and environmental commitments and the company's performance in relation to these standards and commitments, the Respondent states that it "seeks to comply with the best international standards in tailings management established by MAC (Mining Association of Canada), CDA (Canadian Dam Association) and ICM (International Council on Mining and Metals)".

63. It also states that it "maintains Geotechnical Monitoring Centres that operate 24h/day", adding that, as far as disclosure is concerned, it has "created a geotechnical portal to share experiences and disseminate knowledge, maintaining a rich database with technical articles, norms and guidelines, establishing a calendar of technical studies and organising supplementary workshops". The data on the "Control and Management of Dams" system was made available on the company's website (at www.vale.com/esg/pt/Paginas/ControleGestaoBarragens.aspx).

5.3. GOOD OFFICES

64. After analysis by the rapporteur of the additional information received from both parties and discussion in the IWG-NCP, it was deemed that there were sufficient elements to justify continuing with the procedure. Thus, based on item 5.14 of the Procedures Manual, the rapporteur recommended the offer of good offices to the parties.

65. In light of this, the NCP Co-ordinator offered its good offices so that, with a view to examining the entire specific instance, the interested parties would be called by the NCP to seek an understanding on the following alleged facts and Guidelines involved:

COMPLAINTS	GUIDELINES
Lack of support or engagement and promotion of social dialogue with the population potentially affected by the failure of the dam.	GENERAL POLICIES: B, 2; and 14
Lack of disclosure of risks and potential impact of activities on the environment and on public health and safety.	ENVIRONMENT: 2, a) and b)
Lack of incentives for the economic stimulation of the region and co-operation with the local community.	GENERAL POLICIES: 3, 4
Non-observance of the obligation to meet the "relevant international agreements, principles, objectives and standards".	ENVIRONMENT heading
Lack of disclosure about conduct, risk management and compliance with legislation.	DISCLOSURE: 3, a) – d)
Absence of monitoring mechanisms and clear objectives relating to environmental performance.	ENVIRONMENT: 1, b) and c)
Disregard for the precautionary principle.	ENVIRONMENT: 4

66. In addition, the IWG-NCP recommended that, with the objective of "stimulating sustainable economic development as much as possible" (Procedures Manual, item 1.5) through RBC standards, the NCP Brazil Co-ordination should, in parallel with the offer of good offices, provide prior guidance to the parties on the form and content of the Guidelines, as well as on the institutional objectives of the work conducted by the IWG-NCP.

5.3.1. Offer of Good Offices

67. The NCP Co-ordination offered its good offices to the parties on 9 November 2020 and held meetings with the Complainants on 27 November and with representatives of the Respondent on 4 December 2020.

68. At both meetings, the NCP Co-ordinator presented information to the parties and their representatives about: the Guidelines; the role of the NCPs; what specific instances are; what steps have been taken under Specific Instances nos. 01/2020 and 02/2020; and the next steps.

69. The NCP Co-ordinator offered good offices to the parties, explaining that this is the main stage of specific instances, in which the NCP seeks to further discuss the issues brought by the Complainant and help reach a solution through dialogue between the parties. He pointed out that this procedure is aimed at establishing constructive engagement between the parties and strengthening RBC practices and the implementation of the Guidelines. He also emphasised that, as with the rest of the procedure, engagement with the good offices is voluntary.

70. Finally, the NCP Co-ordination stated that either or both of the parties may decide whether to accept the offer, noting that, should the offer be accepted by both parties, the procedures for choosing the mediator and establishing the mediation work plan would begin.

5.3.2. Refusal of Offer of Good Offices

71. Vale then requested a meeting with the NCP Co-ordination and the rapporteur (held on 16 December 2020) to communicate that, in its assessment, the acceptance of the good offices could jeopardise its efforts within the scope of individual remediation and socioeconomic and environmental recovery programmes in the regions affected by the dam failure and by the raising of the safety levels of other dams.

72. At the time, the Co-ordination and the rapporteur highlighted that, even if the company did not feel comfortable discussing the issue – specifically covered by the Human Rights chapter in the Guidelines – it would be interesting to continue with the procedure so that the other issues of the specific instances could be clarified and explored under the conciliation parameters.

73. However, according to a document filed with the Co-ordination, it was the company's understanding, in short, that a discussion of the issue at the NCP could lead the public authorities and the people involved in the remediation programmes to consider that Vale's initiative constituted a privileging of the Complainants and lead them to question the equal treatment provided under the ongoing programmes.

74. Concomitantly, in spite of Vale's decision to decline the offer of good offices, it registered its willingness "to discuss in more detail and/or provide all necessary clarification in relation to its conduct, in general, and the work that has been conducted for the full reparation of the people and territories affected".

75. Despite the willingness shown by the Respondent, there is no provision in the Procedures Manual for the continuation of inquiries or similar actions after the refusal of a party to participate: specifically, item 6.6.2 states that "when there is no agreement or when a Party is not willing to participate in the proceeding, NCP Brazil will prepare a Final Statement".

76. Such an initiative would also go against the conciliatory nature of the procedure, as provided for, among others, in the chapter of the Manual dedicated to the post-conclusion follow-up of specific instances (item 8.1).

77. In light of this, the NCP's role is merely to record the reasons and procedures, as it has already done, and, when appropriate, to issue recommendations to the parties, as dictated by items 3.6, e), and 7.5, heading, of the Procedures Manual², as has been done below.

6. REVIEW AND CONCLUSIONS

78. Specific Instances nos. 01/2020 and 02/2020 were filed by different Complainants and were motivated by facts specific to each of the proceedings. In the first case, the complaints were made by individuals who argued that the dam failure eliminated their source of income and the enjoyment of their property. In the second, a group of people from a district located on the banks of the B3/B4 Dams alleged that the actions and omissions of the Respondent had led to a deterioration in the quality of life and tranquillity of the region, which drove away tourists and thus the population's largest source of income. The first case concerned the direct consequences of the failure of the Brumadinho dam; the second involved the increased risk of a breach of the B3/B4 Dams and the resulting socioeconomic consequences.

79. As a result, the specific instances highlighted nuances that warrant individual assessment. The first concerns the content of the complaints, since the first Complainants focused on issues specific to the relationship between the parties, centring their complaints on criticism of the extrajudicial dispute resolution mechanism created by the company to remedy the rights of those affected by the dam failure. On the other hand, the facts narrated in Specific Instance no. 02 primarily focus on the dissatisfaction of a community over the Respondent's conduct in the *remediation and the risk generated* for an entire region, hence the emphasis on events that have disrupted the local community and economy.

80. In general, the most essential differences in the arguments made in the complaints lie in the emphasis on community, collective, and social issues given in Specific Instance no. 02. In the meantime, items were highlighted from the General Policies of the Guidelines (A 3, 4 and 14; and B 2) that concern the need for companies to engage and enter into dialogue with stakeholders and seek to stimulate the region's economy, in co-operation with the local community.

² 3.6. In addition to the principles provided for by article 2 of Law no. 13 140/2015 (which addresses mediation between private parties as a means of dispute resolution and for settling conflicts within the public administration), the main characteristics of the good offices of NCP Brazil are as follows: [...]

e) Aims to bring the parties together and facilitate dialogue, helping them to resolve issues in a consensual manner, seeking to reach a mutual agreement on the resolution of the problems raised. In the absence of an agreement, NCP Brazil may, in its Final Statement, issue recommendations as it deems appropriate.

81. Notwithstanding these differences, the specific instances presented identical arguments in respect of some items of the Guidelines. The most prominent of the themes discussed jointly were those covered in the Environment chapter, which call for (i) observance of "relevant international agreements, principles, objectives and standards" (heading); (ii) establishing and monitoring environmental targets (1, b, c); (iii) disclosure and consultation with communities affected by the company's environmental, health, and safety policies (2, a, b); and (iv) respect for the precautionary principle (4). In addition, the Complainants in both specific instances argued that there had been a failure to comply with the chapter on Disclosure, especially paragraph 3, when it encourages companies to disclose their commitments and codes of conduct and their performance in relation to them and their compliance with legislation.

82. Still on common points, both complaints devoted much attention to an alleged disregard for recommendation 6 of the chapter on Human Rights, which states that companies should "co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts". According to the Complainants, the remediation system devised by the Respondent together with the DPMG was not, in fact, helping to expedite remediation, nor to ensure that compensation reaches fair levels.

83. The emphasis given to the remediation procedure was clear throughout the specific instances. On the part of the Complainants, the complaints focused on the lack of direct dialogue with the company in the negotiation process and the difficulty in understanding the criteria used to measure the damage to be compensated, in addition to the Respondent's delay in completing negotiations.

84. The company, in turn, argued that the Complainants were seeking a way to reopen discussions on a topic that had been widely debated with representatives of the Public Defender's Office, the Public Prosecutor's Office and the Judiciary, and that the system affords flexibility and equal conditions consistent with the commitments to achieving fast and fair remediation, as provided for in the agreement reached with the DPMG. The dispute over this issue led Vale to reflect on whether it was appropriate to accept the offer of good offices, which, as has been noted, culminated in Vale's refusal to participate in the mediation procedure.

85. In any event, the specific instances which, as noted above, concern different facts and implications, were drafted by the same lawyers and end with a set of four "requests" that, starting with the acceptance of the procedure, aimed at: (i) the acknowledgement of the Respondent's responsibility for the failure of the Brumadinho dam; (ii) the amendment of the terms of the remediation programme and the installation of a "mediation chamber"; (iii) the disclosure of information regarding the failure; (iv) the adjustment of the Respondent's conduct to comply with the international commitments it has assumed; (v) a suspension of profit distribution "until the entire liability has been recognised and accounted for".

86. Given the scope of the good offices, which ultimately aim to provide a free and impartial negotiating platform through which to "temper differences and overcome obstacles between Stakeholders"³, the role of the NCP to assess the "requests" made by the Complainants was discussed in the IWG session. It was concluded that the assessments should be limited to verifying the plausibility of the complaints (by comparing the facts alleged and the documents brought by the parties) and the advisability of accepting the procedure in view of the NCPs' general aim of promoting the OECD Guidelines.

³ Procedures Manual, item 3.4.

87. In the meantime, it was clarified, from the initial assessment, that the IWG-NCP would not analyse "requests" from the Complainants, but rather, *by whom, how and what* was claimed and the importance of the episode to achieving the objectives of the Guidelines. Thus, it was a matter of observing the terms of item 5.7 of the Initial Assessment Chapter of the Procedures Manual for Specific Instances⁴, as stated by the IWG-NCP in the initial report:

It is also clarified that the NCP, as the body responsible "for promoting the [OECD Guidelines for Multinational Enterprises](#), in addition to addressing specific instances of non-observance of those Guidelines"⁵, must initially assess, among other things, "whether the complaint contains elements that are thematically relevant to the topics addressed by the Guidelines" and "whether consideration of the specific issue would contribute to the objectives and effectiveness of the OECD Guidelines".⁶ In light of this, and in compliance with the NCP's role of promoting the Guidelines and mediating disputes under the Guidelines, the initial report assesses the plausibility and appropriateness of accepting the complaints, and hence no judgment should be made on the acceptability of the requests, limiting the rapporteur's role to comparing the specific instances and the Guidelines.

88. Accordingly, if the issues raised are (i) legitimate; (ii) linked to the Respondent's actions; (iii) have a connection, albeit only potential, between the Complainants and the substance of the complaints; and (iv) their consideration contributes to the promotion of the Guidelines, the IWG-NCP should promote the relevant proceedings, ensuring compliance with the programme's objectives and the effective participation of the parties.

89. Furthermore, it was noted that the Procedures Manual and the Guidelines are clear in stating the objective of building a guiding platform for "better defining the expectations of adhering governments with regard to business conduct", constituting a "point of reference for companies and other stakeholders", including – notably – on conduct that has the potential to impact individuals, but also the community, the environment and human rights.

90. This line of argument was necessary, above all, because during the course of the specific instances in question, starting with the initial complaints, in their submissions both parties suggested an understanding of the NCP as a "decision-making" platform, along the lines of arbitral and judicial arenas. As a result, a number of arguments were made, especially in the counterclaims, such as, for example, that the complaints sought, without legal standing,

⁴ The rapporteur should propose to the IWG-NCP whether or not the specific instance should be accepted. The following will be taken into consideration in its report, without prejudice to other information:

I – the identity of the party concerned and their interest in the matter

II – whether the issues raised are legitimate, presented in good faith and relevant to the interpretation of the Guidelines

III – whether the issues are relevant and substantiated

IV – whether there is a direct link, albeit a potential one, between the Complainant and substance of the complaint

V – whether there seems to be a link between the company's activities and the issue raised

VI – whether the specific instance gathers elements that are thematically relevant to the chapters addressed by the Guidelines

VII – whether the Complaint contains a sufficiently delimited focus

VIII – whether the specific instance presents facts and evidence that are verifiable through objective criteria

IX – the relevance of applicable laws and procedures, including court rulings

X – how similar issues have been or are being treated in other domestic or international proceedings

XI – whether the consideration of the specific issue would contribute to the purposes and effectiveness of the OECD Guidelines.

⁵ Procedures Manual, item 1.2.

⁶ *Idem*, item 5.7 (IV and IX).

to discuss collective and diffuse rights related to "environmental, cultural, real estate market, etc." aspects, which ended up placing the procedure on the level of judicial disputes, appearing to compromise efforts to reach an understanding, since, as stated by the Respondent, there was no intention on Vale's part "to discuss or reopen discussions on the issues referred to in the Allegations before this Co-ordination."

91. On this point, according to the terms of item 4.7 of the Procedures Manual, judicial issues do not prevent facts from being alleged and addressed within the scope of the NCP, subject to the particular details provided for in the same item. The purposes and procedures of the NCP do not correspond fully to those of the Judiciary, and therefore the points of similarity do not make the IWG-NCP a judicial body or a jurisdictional body, and as such, do not follow the specific practices and rules of judicial disputes.

92. The Respondent also argued that there was an overlap/correlation between the issues dealt with in the specific instances and those discussed in different forums, noting that two public civil actions "are already in progress for the compensation of collective and social damages allegedly caused to the population of this municipality and surrounding areas" and that "these issues do not and cannot pertain to individual discussions", and hence "the Complainants are not legitimate parties to discuss the issues raised in the complaints" and the "assessment of the requests and issues proposed" would go beyond the role of the NCP.

93. It is for the IWG-NCP, however, to clarify that its role is not to judge the complaints, rather "seeking to resolve the conflict involving available entitlements, and may suggest alternatives, never imposing a solution, leading the Parties to find a non-contentious solution"⁷ to disputes involving the rules and advice of the OECD Guidelines, with the general objective of "stimulating the adoption of RBC (Responsible Business Conduct) by companies"⁸. As a corollary, because the specific instances function as a tool to promote the Guidelines, the Procedures Manual states (item 4.2) that "any natural or legal person" may submit complaints to the NCP regarding non-observance of the Guidelines, which means that *all* recommendations contained in the OECD Guidelines, *including those that dictate standards of conduct with respect to the environment, social values and human rights*, may be referred to the IWG-NCP.

94. By way of conclusion, we reiterate the statement made about the role of NCPs in the Introduction to the Guidelines: "The NCP assists enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise". As seen, it was not possible to make any progress in establishing dialogue directly between the parties through good offices. Still, the NCP can seek to improve the implementation of the Guidelines with regard to the conduct under review by means of recommendations. This practice is provided for in the Procedural Guidance of the Guidelines and in item 3.6. of the NCP Procedures Manual, and is adopted below.

⁷ *Idem*, item 3.6, b).

⁸ *Idem*, item 1.4. As noted in the Guidelines, the aim is, among other things, to: (i) ensure that the operations of multinational enterprises in Brazil "are in harmony with government policies; (ii) strengthen the basis of mutual confidence between enterprises and the societies in which they operate; (iii) help improve the foreign investment climate; and (iv) enhance the contribution to sustainable development made by multinational enterprises."

7. RECOMMENDATIONS

95. Specific instances can be understood as a conflict resolution method that seeks to convert disagreement into an opportunity to improve and disseminate the efforts of enterprises and governments in implementing RBC standards.

96. In view of the importance of the points under this specific instance for the Guidelines and for RBC policies implemented in Brazil, besides the company's willingness to provide information to shed light on its conduct in relation to the material and immaterial heritage of the individuals and society of the region, it is recommended that the Respondent:

- a) prepare and publish a report on the scope and effectiveness of the remediation measures at the individual, collective and societal levels
- b) disclose the list of national and international commitments assumed by Vale that have any implications for the subject matter of the complaints, and the company's performance regarding these commitments
- c) carry out and disclose a diagnosis of the extent to which the company's governance activities comply with the Guidelines in general
- d) adopt a due diligence mechanism concerning the relationship with stakeholders of the company's operations or parties that are affected in the context of such operations, in a broad sense (relevant public, economic and social entities and actors in national and international settings and in countries where the company operates) and in a strict sense (public and private entities and actors, including communities and people living in the vicinity of its mining or production plants), taking as reference the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector
- e) implement the National Guidelines on Business and Human Rights in all areas of its operations, as established by Decree no. 9 571 of 21 November 2018.

97. Finally, it is recommended that follow-up be conducted of the Respondent's compliance with the recommendations within six months of receipt, with a possible schedule for subsequent follow-up activities to be defined.

98. With this Final Statement, Specific Instance no. 01/2020 is closed.

8. ANNEX I – Chronological Summary of Specific Instance no. 01/2020

Description	Date
Receipt of Specific Instance no. 01/2020	23 January 2020
Admissibility Analysis completed by the NCP Co-ordinator	3 February 2020
Initial Assessment Report – Acceptance is approved by the IWG-NCP	13 April 2020
Communication to the Respondent and request for counterclaims	14 April 2020
Receipt of counterclaims from the Respondent	29 May 2020
First Initial Evaluation Report – Forwarding is sent by the rapporteur (additional information)	10 July 2020
Request for additional information from the parties	20 July 2020
Receipt of response from the Respondent	4 August 2020
Receipt of response from the Complainants	18 August 2020
Second Initial Evaluation Report – Forwarding is approved by the IWG-NCP (good offices)	16 October 2020
Offer of good offices to the parties	6 and 9 November 2020
Meeting for offer of good offices with the Complainants	27 November 2020
Meeting for offer of good offices with the Respondent	4 December 2020
Response to the offer of good offices by the Complainants – acceptance	15 December 2020
Response to the offer of good offices by the Respondent – refusal	17 December 2020
Draft Final Statement is approved by the IWG-NCP	23 April 2021
Draft Final Statement sent to the parties	26 April 2021
Request for review of the Final Statement by the Respondent	12 May 2021
Request for review of the Final Statement by the Complainants	26 May 2021
Meeting between Co-ordination and Complainants about Final Statement	9 June 2021
Revised version of the Final Statement is approved by IWG-NCP	13 September 2021
Parties are informed about the final version of the Final Statement	20 September 2021
Publication of the Final Statement	28 October 2021