

Ruthless Settlements: BHP, Brazil and the Samarco Fundão Dam Class Action

By [Dr. Binoy Kampmark](#)

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The BHP Group, as with other mining giants, has much explaining to do in the way it has approached the environment. It has become a master of the greenwashing experiment, an adept promoter of sham environmental responsibility (take, for instance, its practice of merely [selling](#) its oil and gas business to Woodside Petroleum in 2021 rather than retiring them); and, it transpired recently, a ruthless negotiator and litigant over contentious claims.

After nine years of negotiations and attritive legal proceedings, BHP has reached a settlement with Brazilian authorities regarding its role in the Fundão tailings dam collapse in Mariana, Minas Gerais. Taking place on November 5, 2015, the results were catastrophic to human life and nature, leaving 19 people dead and spilling toxic sludge over some 700 kilometres of land. The Samarco-owned facility, which held something like 26,000 Olympic-sized swimming pools' worth of tailings (50 million cubic metres), was a joint venture between BHP and Vale. In [addition](#) to killing 14 company employees and five residents, the released tailings rapidly reached Bento Rodrigues, and part of the communities of Paracatu de Baixo and Gesteira and, for good measure, flooded the centre of the town of Barra Longa.

The catastrophe merely compounded, turning the Rio Doce Basin a filthy brown and affecting dozens of municipalities and hundreds of communities reliant on the Rio Doce for drinking water. The pollution also destroyed wildlife, fishing stocks, farmland and churches, and affected various Indigenous communities, including the Krenak, Tupiniquim, Guarani and Quilombola.

In response to the collapse, BHP, Vale and Samarco established the Renova Foundation, intended to compensate individuals and small businesses for losses and ostensibly ameliorating environmental impacts. This was hardly a concession on BHP's part of guilt. "Conveniently," [write the authors](#) caustically in a *Nature Conservation* study on the disaster in August, "the company creates its foundation to repair its own damages. Through the dense patchwork of multiple lawsuits filed in Brazil, Australia, the United States and the United Kingdom, BHP has repeatedly denied any central culpability in the collapse.

Compensation payments to victims from the fund, to date, have also been scandalously tardy. The [BHP 2024 annual report](#) notes that R\$17.5 billion (US\$3.5 billion) had been paid to 430,000 people as of June 30 this year, with R\$12.2 billion (US\$2.5 billion) forked out to 110,000 people under the Novel system, or "court mandated simplified indemnity system". The company praises this arrangement as one that enabled "informal workers" (cart drivers, sand miners, artisanal miners and street vendors) to receive compensation despite having "difficulty proving the damages they suffered".

What BHP [fails to underscore](#) is that those under the Novel system had to wait for seven years after the dam collapse to receive any cash, with 40% of those only paid in the last two years. Of the 430,000, some 290,000 received a pitiful R\$1050 each for a disruption to their water supply for seven to 10 days following the dam collapse. And just to add to the nastiness of it all, the replacement housing for victims has been of questionable quality. Little wonder that Thatiele Monic, president of the Vila Santa Efigênia and Adjacências Quilombola Association, is [suspicious](#) of the efforts of the Renova Foundation.

The UK leg of proceedings, commenced in November 2018, is positively Dickensian in legal gyrations. It began as a High Court lawsuit against BHP involving 240,000 plaintiffs, including Brazilian municipalities and Krenak indigenous communities. In November 2020, the court [dismissed](#) the lawsuit, with Justice Turner making a memorable remark: “The task facing the managing judge in England would, I predict, be akin to trying to build a house of cards in a wind tunnel.” Various impediments, not least the size and scale of the claims, including “jurisdictional cross-contamination” and an abuse of process, were cited.

In March 2021, the Court of Appeal affirmed the decision, arguing that the plaintiffs were already seeking legal redress in Brazil. In July, the London court of appeal reversed the decision, granting permission to appeal on grounds that the case had a “real prospect of success”. To not do so would risk real injustice. In July 2022, a Court of Appeal ruled that English courts could hear the case, [noting](#) that, “The vast majority of claimants who have recovered damages have only received very modest sums in respect of moral damages for interruption to their water supply”. An April 2024 date was set for the commencement of trial proceedings.

In March 2023, the scale of the class action burgeoned further, with the addition of 500,000 claimants. Attempts by BHP to delay the lawsuit till mid-2025 [were rejected](#) by a London court in May 2023. On October 21 this year, the trial finally commenced. It would last all but a few days.

The settlement agreement signed on October 25 includes BHP, Vale, Samarco and some half a dozen Brazilian authorities. Of the 42 civil claims against BHP, the October 25 agreement covers the most monumental and contentious. Its value - R\$170 billion (US\$31.5 billion) - is deceptive. Brazilian authorities can have reason to cheer the result, as it comes close to the R\$175 billion sought in civil claims in 2016. BHP’s Chief Executive Officer, Mike Henry, also seemed suspiciously satisfied, [claiming](#) that the agreement would deliver a laundry list of benefits including “expanded and additional programs for the environment and for the people, including designated funding for the health system, economic recovery, improved infrastructure and extensive compensation and income support measures, including for farmers, fisher people and Indigenous and Traditional communities.”

A [sharp analysis](#) from Tony Boyd of the *Australian Financial Review*, hardly a forum known for its humanitarians and bleeding hearts, offers a rather different reading of Brazilian efforts and the tactics employed by the mining giants. It was evident to Boyd “that over the past decade, BHP and Vale have outplayed the Brazilian federal government, and statements of Minas Gerais and Espírito Santo as well as the federal and state Public Prosecutors’ and Public Defenders’ Offices.”

Much of this has to do, as Boyd remarks, on the time value of money. Some 60% of the final R\$100 billion settlement is payable over 20 years. Taking that time frame into account, the

nominal amount comes to a net present value of R\$48 billion. Using the net present value analysis also means that the R\$32 billion commitment to cover the cost of removing tailings from the Rio Doce and R\$30,000 compensation awards to individuals and small businesses who opt into the arrangement, is R\$25 billion.

The financial burden arising from BHP's compensatory undertakings has [also been lessened](#) by the near decade process of dispute resolution, allowing the reopening of the Samarco iron ore mine to take place in the meantime with healthy annual returns of US\$750 million.

Even now, BHP's mild description of the catastrophe is given a coolly confident assessment. The company's website [notes](#) that since the dam breach, Samarco operates "with a strong focus on safety and sustainability." Alleviating the use of dams has been possible because of the implementation of a "new filtration system", while 80% of the tailings arising from the operations "are now dry stacked, with the rest deposited in a confined rocky pit." Feeble assurance to those hundreds of thousands affected that fateful November in 2015.

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Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He currently lectures at RMIT University. He is a Research Associate of the Centre for Research on Globalization (CRG). Email: bkampmark@gmail.com

Featured image: A village flooded in the Bento Rodrigues dam disaster (2015). The dam was a property of Samarco, a joint venture between Vale and BHP Billiton. (Licensed under CC BY 2.0)

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