Dear Melissa,

Please find our responses to your requests below. They have been drafted in collaboration with Nikki Reisch, Legal Director of the Center for Human Rights & Global Justice and Supervising Attorney in the Global Justice Clinic at NYU School of Law. We trust that you will take this information into consideration in your determination over Vale's status as a member of the Global Compact.

Our response addresses the following issues:

1. Evidence that the company has acted with negligence and about its responsibility for the disaster at Brumadinho;
2. "Re ipsa loquitur": negligence and causation that can be inferred from the disaster itself
3. Access to justice: legal and practical obstacles
4. Dialogue facilitation process and remediation measures

We take this opportunity to kindly request information in the following topics:

1. What is the status of the internal deliberations on changes to the integrity policy?
2. Which changes have been proposed?
3. Will the Global Compact open these changes to public comment?
4. What are the dates of upcoming board meetings?

Best regards,

Juana Kweitel

1. Evidence that the company has acted with negligence and about its responsibility for the disaster at Brumadinho

Please find the following documents attached:

a. *Ação Civil Pública* (civil lawsuit comparable to a class action) filed by state-level prosecutors against Vale.
b. Report by the National Human Rights Council about the disaster.
c. Recommendation by state-level prosecutors, federal prosecutors, and the federal police. It requests Vale to change its leadership due to the disaster.
d. Report by Reuters demonstrating that Vale was aware of the risks, citing 2018 internal documents according to which the risk level violated the company's own policy.

These documents help establish the company's responsibility for the disaster. However, should the Global Compact not find that there is sufficient evidence, we argue that there should be a presumption of negligence. According to the principle of *res ipsa loquitur* (discussed in point 2), in absence of access to information about the exact cause of the accident (which may not be knowable or which only Vale may know), negligence may be inferred when, as here, the type of accident that occurred would not normally happen without negligence, the defendant had exclusive control over the instrumentalities that led to the accident (e.g., the amount of waste put into the tailings dam, the construction and maintenance of the dam, the alarm system, etc.), and the accident caused demonstrable harm.

2. "Re ipsa loquitur": negligence and causation that can be inferred from the disaster itself

Res ipsa loquitur, a Latin phrase meaning literally "the thing speaks for itself," refers to a legal principle that permits a factfinder (such as a jury or judge) in certain circumstances to infer "both negligence and causation from the mere occurrence of the event and the defendant's relation to it."[1] The principle generally applies where: (1) the event (accident) that caused harm would not normally occur in the absence of negligence; and (2) the defendant was in exclusive control of the factors or instrumentalities that caused the accident.[2] Some formulations of the principle include a third factor: "(3) the defendant possesses superior knowledge or means of information as to the cause of the occurrence."[3] The presumption that events (accidents) such as the one in question do not usually occur without negligence can either be based on common knowledge or can be proven by expert testimony. Put another way, "if the defendant owes the plaintiff a duty of care, the [factfinder] is permitted to infer that the defendant was negligent in some unspecified way when, on the evidence adduced, there is a rational basis in common experience or expert testimony for finding (1) that the injury was probably the result of negligence, and (2) that the defendant was at least one of the persons who was probably negligent."[4] When applied, the principle allows the factfinder to infer negligence: "if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence."[5]

"In many jurisdictions the doctrine of res ipsa loquitur may be applicable under appropriate circumstances in an action to recover for damage caused by flooding as a result of the failure of a dam."[6] When a dam gives way without warning on a sunny day, the principle of res ipsa loquitur may apply, as "dams constructed and maintained with the requisite degree of care do not in the ordinary course of events break by the pressure of the water [or waste] held in the reservoir."[7] If a defendant can identify intervening factors that may explain the accident,

[1] Restatement (Second) of Torts, § 328D & comment (2018).
[2] See 57B Am. Jur. 2d Negligence § 1163; Restatement (Second) of Torts, § 328D (2018); see also Dennis Binder, Legal Liability for Dam Failures 43 (2002), available at: https://damsafety.org/sites/default/files/Legal%20Liability%20for%20Dam%20Failures.pdf.
[3] 19 Am. Jur. Proof of Facts 2d 75, at §10 & n.99
[4] § 169.Res ipsa loquitur: general rules, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 169 (2d ed.).
[5] Sweeney v. Erving, 228 U.S. 233, 238–39, 240 (1913); *see also* Restatement (Second) of Torts, § 328D (2018).
[6] "Dam Failure As Result of Negligent Design or Maintenance," 19 Am. Jur. Proof of Facts 2d 75, at § 10 (2019).
[7] Binder, supra note 2, at 43.

other than negligence of the party in control of and responsible for the dam's construction and maintenance, the accident may not be due to negligence and thus res ipsa loquitur may not apply. However, the burden is on the defendant to demonstrate that the burst is not a consequence of its own actions and omissions.

3. Access to justice: legal and practical obstacles

Predicating the Global Compact's response to serious human rights and environmental harms, like those caused by the disaster at Brumadinho, on a final legal determination of the company's responsibility ensures in many cases that no action will be taken. Indeed, such a policy lets the worst actors—those who refuse to admit wrong—and/or those operating in jurisdictions with weak governance or regulatory oversight—where official investigations or authoritative determinations of responsibility are unlikely or not timely—off the hook. The requirement that official investigations conclude that a company involved in gross human rights abuses and serious environmental damages is responsible for such impacts before the Global Compact opts to de-list such company in practice guarantees that the company will face no penalty. This is because, in the context of countries where the judiciary is for many reasons dysfunctional, as is the case of Brazil, the delivery of a final judgment may take years, if not decades.

The case of the Rio Doce disaster, following the collapse of the Fundão iron ore tailings dam in Mariana, illustrates the slowness of official investigations and many of the endemic problems that stymie efforts at holding corporations accountable for environmental crimes and egregious human rights abuses. Such problems exist in both civil and criminal procedures.

First, the three companies involved in the Rio Doce disaster (Samarco, Vale and BHP Billiton) have paid only a tiny fraction of the fines levied against them. The figures vary from 3.4[8] to 7%[9]. Fines remain unpaid because companies pursue an aggressive strategy of challenging these financial sanctions in the courts, which take years to issue a ruling. Thus, fines are not an effective instrument of deterrence in relation to disaster prevention.

Second, criminal investigations are by their very nature complex processes that seek to establish individual responsibility for conduct that caused the harms at issue. In the context of a complex organization such as a big mining company, attributing the actions or omissions that resulted in a dam failure to specific individuals is a daunting task. It comes as no surprise, therefore, that courts, in non-final decisions, have rejected prosecutors' attempts to

[8] Danielle Nogueira. *Empresas envolvidas em desastres ambientais quitaram só 3,4% de R$ 785 milhões em multas*. O Globo: May 6th, 2018. Available at: https://oglobo.globo.com/economia/empresas-envolvidas-em-desastres-ambientais-quitaram-so-34-de-785-milhoes-em-multas-22657874

[9] Léo Rodrigues. *Samarco pagou menos de 7% das multas ambientais após Mariana*. Agência Brasil: January 30th, 2019. Available at: http://agenciabrasil.ebc.com.br/geral/noticia/2019-01/samarco-pagou-menos-de-7-das-multas-ambientais-apos-mariana

convict individual persons of manslaughter or murder, even though 19 people were killed in the Fundão dam disaster almost 4 years ago. The courts are more sympathetic to the defendants' claims that the crime to be charged is exposing the environment and people to danger, with deaths as an aggravating component. Moreover, the criminal case has been stalled. The case was filed in October 2016, almost a year after the dam collapse, and since then no one was convicted, two out of the 21 defendants were absolved, and the case was suspended for over nine months.[10]

The determination of corporate criminal liability is similarly complex. Brazilian criminal law provides that legal persons may be held criminally liable for environmental crimes, and the Brazilian Supreme Federal Court ruled that criminal liability in such cases does not depend on the correspondent liability of any natural person.[11] However, judges in lower courts are still hesitant to find a company criminally liable without holding individuals liable as well.

Attempts at holding the companies civilly liable have been similarly complicated because the companies and authorities have opted for an extrajudicial settlement agreement, the problems with which have been addressed in detail elsewhere.[12] Nonetheless, in occasions where courts have been called to settle conflicts or to correct the failures of the extrajudicial mechanism, the judiciary has placed obstacles for effective remediation. An example is a judicial decision that restricted the eligibility of entities that could perform the economic assessment of the damages caused by the Fundão dam collapse.

Overall, the judiciary has not acted with the necessary level of leadership to coordinate the negotiations between the companies and the public authorities. This has caused the whole process to be delayed, creating severe problems for the affected people. The reconstruction of Bento Rodrigues, the village that was entirely swept away by the mud wave, is not bound to be completed before 2021. This means that families will be living in temporary lodging for 6 years, with demonstrated profound impacts on their psychological health.[13]

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[10] Luiz Vassallo. *Em dois anos, ação contra executivos e mineradoras por tragédia de Mariana sofre 9 meses de interrupções*. Estadao, 3 February 2019. Available at <https://politica.estadao.com.br/blogs/fausto-macedo/em-dois-anos-acao-contra-mineradoras-por-19-homicidios-em-mariana-sofre-9-meses-de-interrupcoes/ >

[11] Brazil. Supreme Federal Court. Extraordinary Appeal n. 548.181.

[12] Conectas Human Rights. *A proposal of governance reform to remedy the Doce River disaster*. 2018. Available at: <https://www.conectas.org/en/publications/download/proposal-governance-reform-remedy-doce-river-disaster>

[13] PRISMMA: *Pesquisa sobre a saúde mental das famílias atingidas pelo rompimento da barragem de Fundão em Mariana*. Maila de Castro Lourenço das Neves et al. organizadores. – Belo Horizonte: Corpus, 2018. Available in Portuguese at <https://ufmg.br/storage/3/5/1/4/3514aa320d36a17e5d5ec0ac2d1ba79e_15236492458994_644662090.pdf>

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4. Dialogue facilitation process and remediation measures

Do you already have a direct line of communication with the company about the remedial efforts the company should be taking?

Conectas has engaged with Vale's Independent Committee for Extraordinary Support and Reparation Advice (*Comitê de Reparação Independente da Vale*). Such engagement happened through a presentation on February 22nd, followed by the submission of written remarks (attached).

Could you please share with us your views on what remedial actions you feel the company should be taking at present?

In the above-mentioned document, submitted to Vale's Independent Committee for Extraordinary Support and Reparation Advice, Conectas made the following recommendations:

- **"Apology, collaborative spirit, and good faith**: Vale must make a public apology to affected communities, the population of the city of Brumadinho, and the Brazilian society as a whole. This is a positive first step, but the apology alone is not sufficient. It must be accompanied by a commitment, guaranteeing that the company and its legal representatives will not try to avoid liability by adopting aggressive legal strategies. Regardless of Vale's right to use all legitimate judicial and extrajudicial means of defense in favor of itself and its employees, the most important obligation on the part of the company is to restore its "social license to operate", which depends on a balance between legal rationality and social and extra-legal accountability.

- **Adequacy of extrajudicial mechanisms to international standards**: Standards governing non-judicial grievance mechanisms include the UN Guiding Principles on Business and Human Rights, specifically Principle 31, which stipulates that such mechanisms should be accessible, predictable, transparent, equitable, participatory and based on rights. The centrality of right-holders should be guaranteed, respecting the diversity of experiences, expectations, interests, and opinions.[14]

[14] On the centrality of rights-holders during remediation processes, *see* Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: *Access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*. 18 July 2017. A/72/162. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement>

- **Effective and Legitimate Governance**: The Guiding Principles stipulate that remediation for violations committed by companies must be effective and legitimate, both in relation to the process and the outcome. The independence of remedial mechanisms should be guaranteed.[15] Mediation mechanisms should be guided by the fundamental principles of this type of conflict resolution, avoiding the confusion of roles, conflicts of interest, and the process being controlled by the party with greater economic power, meaning the company/companies. Decisions regarding the scope and definition of the affected population, the dimension of the impacts, and the technical and legal assistance required, must be carried out by independent and bona fide entities, trusted by those affected.

- **Promoting human rights and strengthening the normative framework:** Businesses do not thrive in a society where institutions - which dictate the rules of the game - are dysfunctional and/or operate exclusively in favor of the economic and political interests of privileged groups. As one of the measures to guarantee non-repetition, Vale must establish a public commitment to use its political, economic, and social capital to improve the normative framework and strengthen public policies on prevention and reparation of social and environmental disasters. This is the expected and necessary conduct after being involved in two massive disasters, and can be achieved by drawing lessons, so as to turn sad and preventable episodes into a positive legacy for society. Political activity must observe the obligations of transparency and accountability, ensuring that society knows if and how the company engages in normative and/or public policy debates. The company should review its business and investment decisions to ensure that they do not encourage measures that weaken public policies and standards.

- **High-level commitment to institutional human rights policies and due diligence:** The understanding of social and environmental responsibility is not always accompanied by a genuine commitment at the highest levels of company management, which in practice compromises institutional human rights policies, whose effects end up not influencing business decisions. The ineffectiveness of these mechanisms was clearly evident in the case of Brumadinho, since Vale had already been involved in another disaster. The establishment of institutional human rights policies and due diligence processes should be accompanied by periodic review, alongside publicity of their content and lessons learned."

[15] UN Task Force on Business and Human Rights, Report to the General Assembly, A / 72/162. 2017. Available at: <http://bit.ly/2XbbhQO> Accessed on: February 22, 2019.

In addition, Conectas has consulted with organizations in direct contact with victims and their family members, who have made the following recommendations:

- The company must not control the information, and all information obtained or produced by the company on the risks, damages, and agreements, should be shared with public institutions as soon as possible;
- The company must not disrupt the social cohesion of communities by interfering with victim organizations (which has happened);
- The company must not use remediation measures as publicity, refraining from releasing marketing-oriented content related to the disaster (transparency is not advertising);
- The company must not be responsible for providing public services, especially psychosocial care. These services should be provided by the competent public agencies (CRAS, CREAS, CAPS, etc.), with financial support from the company.
- The company must make every possible effort to conduct its future mining activities without dams (dry mining).
- The company must apply the best international standards for dam safety until all of them are decommissioned and deactivated.
- The company must publish a clear timeframe for safely decommissioning and deactivating its dams.
- The company must adopt the best international standards for reparations with a view to restoring the rights of those affected to the greatest extent possible;
- The company must observe the principle of the centrality of the suffering of the victims in the process of reparation of the damages, recognizing and respecting the centrality and autonomy of those affected by the disaster;
- The company must disclose socio-environmental impact assessments, declarations of stability of structures, as well as other relevant documents. This document should be available to investors, allowing them to make informed investment decisions.
- The company must present a clear timeframe for the restoration of normality in communities affected by the disaster, as well as in other communities currently under risk (Ouro Preto, Nova Lima, Barão de Cocais, Itatiaiuçu). For example, families should know for how long they will stay in hotels, and whether they will be able to pick up their belongings in the houses that have been compulsorily abandoned.
- The company must present a detailed emergency plan for the possibility of other dam failures. It is particularly important to plan water supply in case tailings reach the "Rio da Velhas" basin, which would cause water shortages in Belo Horizonte and its metropolitan area (population: 5 million);

- The company must guarantee the right to education for children deprived of classes in communities affected by the disasters and in communities resettled due to the risk of future disasters;
- The company must reimburse the state for extraordinary expenditures associated with the disaster and the risk of future bursts;
- The company must guarantee independent technical advisory services to the affected communities, so they can better understand and meaningfully engage with the remediation process.