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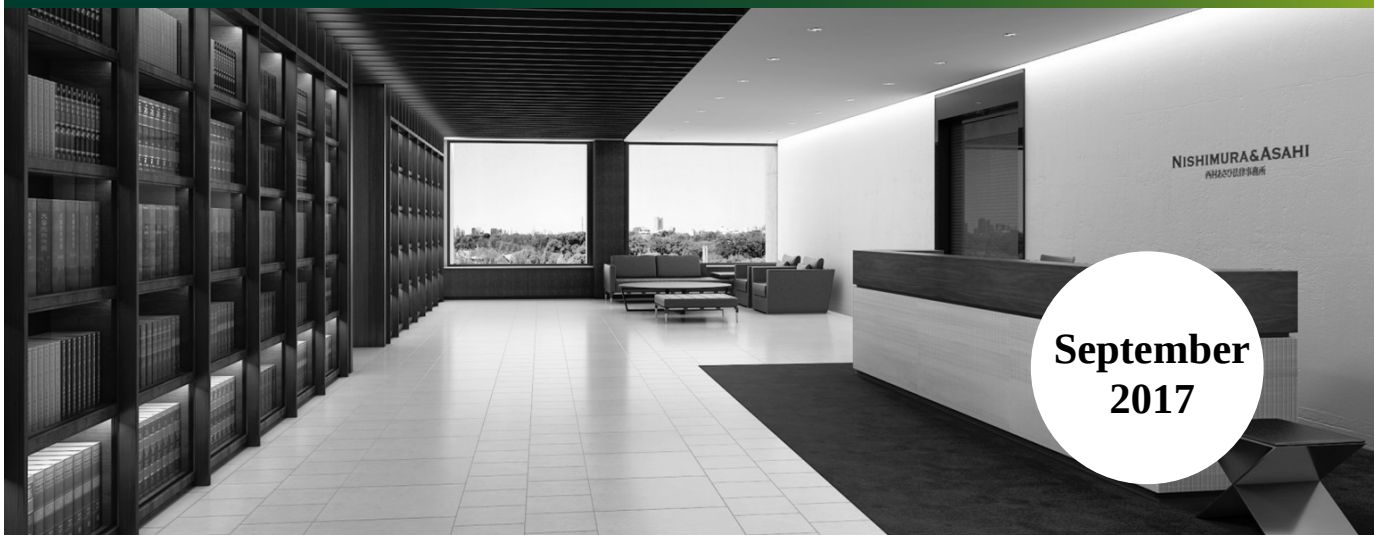


# Civil Environmental Liability of Shareholders in Brazil – Samarco's Dam Rupture Case –

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A key issue when investing in Brazilian companies, which is not always fully considered, is the risk related to indirect environmental liability. A very important question for a potential investor to ask is: how, when and under what conditions can the foreign investor be personally held accountable for the liability of the company the investor owns. Usually a shareholder will be treated as a separate legal person from the company in which it owns shares and is protected against the "piercing of the corporate veil"; however, recent case law in Brazil shows that in certain situations a shareholder might be made liable for the actions and liabilities of a Brazilian company.

## Piercing the Corporate Veil in Brazilian Environmental Law

Brazilian Federal Law 9,605/98 provides that "the corporate veil may be disregarded whenever the legal identity of the entity is an obstacle to the redress of damage caused to environmental quality". A literal interpretation of this provision is that, where a Brazilian company has insufficient assets to assure enforceability of the company's environmental obligations, the company's shareholders may be held liable (i.e., it is an **objective** requirement).

However, article 50 of the Brazilian Civil Code requires evidence of "abuse of a legal personality" by a company in order to extend obligations to its shareholders (i.e., a **subjective** requirement)[1]. These principles allow the corporate veil to be lifted where there is:

[1] "Article 50. In the case of abuse of a legal personality, characterized by the diversion of purpose, or by confusion, the judge may decide, at the request of a party, or prosecutor when it is entitled to intervene in the process, that the effects of certain obligations and certain relationships be extended to the private property of the directors or shareholders of the corporation."

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- evidence of the misuse of the corporate purpose of the entity in question. For example, the signing of contracts for the shareholders' personal gains and not for the benefit of the company; or
- evidence that there has been mingling between the assets of the entity and the assets of its shareholders; or
- evidence that there has been an abuse of corporate rights (i.e., statutory or contractual rights of the company, the management and exercise of which are carried out by its officers or employees). For example, a capital reduction of the company's equity in order to reduce funds available to creditors.

Although the Supreme Court has suggested that both pieces of legislation (i.e., the objective and the subjective requirements) should be considered and applied together when assessing a particular factual situation, there are cases where Courts have applied **only the objective test set out in Law 9,605/98** in order to pierce the corporate veil (i.e., the lack of resources of the legal entity required to redress the environmental damage).

Where shareholders are also **directly involved in managing the company**[2][3]**,** there have been cases in which the Court imposed liability on such managing shareholders **without even discussing the requirements for lifting the corporate veil.** In these cases the managing shareholders were held liable because the court considered that they had contributed to the environmental damage. Brazil's Superior Court of Justice decided that the polluting company's **managing** shareholders were held liable for the environmental remediation, however, in a **subsidiary (secondary) manner.** The court gave the managing shareholders the benefit of article 1.024 of the Brazilian Civil Code and held that managing shareholders should only be liable to the extent that the assets of the company are not sufficient to pay the necessary amounts of environmental remediation.

## Key Case and Establishment of Precedents – Samarco's Dam Rupture

On November 5, 2015, an accident occurred that would have a great impact on legal precedents for piercing the corporate veil in Brazil.

In the worst environmental disaster in Brazilian history, a dam owned by the company Samarco Mineracao S.A., containing iron ore tailings, ruptured; releasing about 60 million cubic meters of iron waste into the surrounding area, and affecting land, rivers, sea and the local population. Samarco is a 50:50 joint venture between the Brazilian company Vale do Rio Doce and the Australian company BHP Billiton.

As the environmental and social effects were so significant, and due to the subsequent suspension of mining activities by Samarco due to the accident, Samarco's financial capability to perform the necessary environmental remediation and compensation measures was uncertain. The accident resulted in a massive litigation involving the company and also its shareholders (Vale and BHP). Vale was included in many cases as a direct polluter, because the various public entities filing actions took into account evidence that Vale had been using Samarco's dam for storage of residues from its own, separate operations.

Aside from the thousands of individual indemnification cases, several collective actions were filed by State and Federal Prosecutors,

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2 Shareholders may be considered to "manage" the company, for example, in cases where the shareholder is also a managing director of the company, or the director(s) act under direct orders from the shareholders.

3 In cases involving a parent/subsidiary company relationship, control of the subsidiary by the parent or its director or officer itself was a requisite. The Courts did not involve the director or officer of the parent company being held liable for environmental damages caused by the subsidiary, if they did not operate direct management control in such subsidiary.

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environmental agencies and related governmental bodies, not only against Samarco, but also including Vale and BHP as defendants. The basis of these allegations was that Vale and BHP, in their role as shareholders of Samarco, needed to be held liable in order to ensure the payment of all remediation and compensation measures required due to the accident, as it was very unlikely that Samarco could meet these liabilities from its funds. Though drafted differently due to being issued by different public entities, the claims directed at the shareholders **were founded either expressly on the text of Law No. 9,605/98 or on the objective requirement principle determined from Law No. 9,605/98.** The amounts claimed in these lawsuits were significant, with some individually reaching (in Brazilian Reais) 155 billion, 20 billion, and over 2 billion (c. US$50 billion, US$6.44 billion and US$644 million respectively).

In March 2016, Samarco, Vale and BHP signed a Framework Agreement with the federal government for socioeconomic and environmental recovery work worth over 20 billion Reais (approximately US$6.44 billion), to be implemented over 15 years. However, the Framework Agreement was subject to judicial challenge in May 2016 when federal prosecutors filed a separate legal action for 155 billion Reais (c. US$50 billion, a figure based on the amount paid by BP for clean-up measures after the Deepwater Horizon case) claiming that the Framework Agreement would not be sufficient to compensate and remedy the entirety of the damages caused by the accident. While there is yet to be any definitive judicial ruling on the judicial challenge to the Framework Agreement, Samarco, Vale and BHP are continuing with the implementation of the ongoing remediation and compensation procedures set out in the Framework Agreement, and the lawsuits filed against the companies remain ongoing.

Within the scope of this 155 billion Reais lawsuit, a new and preliminary agreement was signed between Samarco, Vale, BHP and various state and federal government agencies, and validated by the Court, by which studies are to be performed by the companies to evaluate the social and environmental damage caused by the accident as well as the measures already implemented and under implementation by the companies. The judge in the case held that these studies should be the foundation on which a definitive settlement agreement between the parties is entered into and should also be used to assess the effectiveness of the provisions of the March 2016 Framework Agreement.

On June 30, 2017, BHP Billiton reported[4] that it has released a 790 million Brazilian Reais payment that will go towards the rehabilitation work arising out of the dam collapse. BHP stated it will put 550 million Brazilian Reais towards aiding the clean-up work for the rest of 2017 and pay compensation to the victims and a further 240 million Brazilian Reais will be set aside for the Samarco mining company to carry out dam stabilization work and keep the business solvent. Accordingly, although there is no definitive decision yet as to whether the corporate veil should be lifted in this case (as there are still pending appeals by BHP and Vale against the findings in the lower courts where BHP and Vale were held liable), the shareholders (especially BHP, who did not have any direct operations in the area) have already spent significant time and money on claims relating to the Samarco incident.

## Conclusion

Samarco's case has been instrumental in the Brazilian courts' approach to the piercing of the corporate veil in Brazilian Environmental Law. It led to several judicial decisions expressly recognizing a shareholder's liability for environmental and related social damages caused by its Brazilian subsidiary.

[4] News extracted from: http://www.telegraph.co.uk/business/2017/06/30/bhp-billiton-puts-250m-towards-samarco-clean-up/. Amounts converted to Brazilian Reais are approximated values, and may have slight variations according to the payment's day exchange rates.

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Even though these decisions are currently on appeal, both BHP and Vale have, in their role as Samarco's shareholders, entered into agreements and made large compensation and remediation payments in respect of the accident. This money will not be reimbursed even in the event of the appeals being successful and the decisions to pierce the corporate veil being overturned.

This case shows what effect the potential piercing of the corporate veil under Brazilian Environmental Law can have on shareholders and demonstrates why it is so important to obtain and maintain proper legal and technical assessments before and after deciding on an investment, especially in activities with a high environmental risk.


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*Please note that we are not engaged in a Gaikokuho Kyodo Jigyo (the operation of a foreign law joint enterprise).

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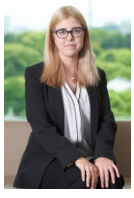

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