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The Permanent Mission of Brazil to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and, with reference to the upcoming public consultations in preparation for the sixth session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG – Geneva, October 26 to 30, 2020), has the honor to transmit herewith additional comments and textual suggestions on the revised draft legally binding instrument.

The Permanent Mission of Brazil in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, April 28, 2020

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**FEDERATIVE REPUBLIC OF BRAZIL**

**RESPONSE TO THE CHAIR-RAPPORTEUR'S CALL FOR ADDITIONAL  
SUGGESTIONS ON THE REVISED DRAFT LEGALLY BINDING  
INSTRUMENT AND INPUTS TO THE INFORMAL CONSULTATIONS IN  
PREPARATION FOR THE SIXTH SESSION OF THE OPEN-ENDED  
INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL  
CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT  
TO HUMAN RIGHTS.**

Bearing in mind the previous Brazilian preliminary written contributions in the context of the discussions held during the fifth session of the OEIGWG, in October 2019 – properly reflected in the annexes to the Report of the aforementioned session –, the Brazilian government presents the following additional comments and textual suggestions to the revised draft of the legally binding instrument (LBI):

#### GENERAL COMMENTS

(1) The revised draft LBI proposed by the Chair-Rapporteur of the OEIGWG encompasses all forms of business activities, which responds positively to previous Brazilian comments on the scope of the issue. In addition, there are elements in the text in line with Brazilian macroeconomic policies, such as article 5 on the prevention of human rights violation. This article is consistent with the Socio-environmental Responsibility Policy (PRSA), which was established by Resolution 4.327/2014 of the Central Bank of Brazil and is mandatory to all financial institutions authorized to operate in the country.

(2) That notwithstanding, it would be important to introduce in the draft LBI a reference to the principle of subsidiarity in the application of the international standards in relation to the domestic normative frameworks, a principle used for instance in the Inter-American Human Rights system.

#### BUSINESS ACTIVITIES

(3) The extended definition of business activity to cover activities of transnational companies and other business enterprises meet the Brazilian expectation on the scope of the LBI and should be retained in future versions of the draft LBI.

#### CONCEPT OF VICTIM

(4) In Article 1, the definition of victims is imprecise, which may hamper the implementation of the instrument. The item includes collectivities in the category of victims, granting rights to groups and individuals indistinctly. Thus, it ends up

contemplating the possibility of establishing rights in the international sphere for a range of collective entities, without presenting adequate safeguards.

(5) In addition, under no circumstances could it be possible to equate the loss and damage suffered by the affected person with the situation of individuals who only allege to be victims. The claim and the materiality of the fact are of a distinct legal nature and must be treated differently.

(6) In view of the above, it would be appropriate to propose a revision of the concept of victim, so as to distinguish between rights of individuals from those of collectivities. It would be also convenient to restrict the concept of victim to those who actually suffered violations of their rights.

#### COMMISSIVE AND OMISSIVE ACTS

(7) By defining abuses and violations of human rights, Article 1.2 covers the omissive conduct, assuming inaction as subject to criminal, civil and administrative imputation for the purpose of implementing the treaty. In the case of countries with a criminal law system based upon the material conception of the illicit, such as Brazil, that definition could lead to controversy. In this sense, it would be appropriate to exclude it from the text.

(8) The Brazilian national criminal legislation stipulates, as a rule, the fact that omission is punishable only if there is a clear duty to act, which allows, for example, the conviction for negligence. However, in the international sphere, it is inconceivable that the occasional absence of a human rights due diligence process could be cited by a court as a characterization element of a negligence case. The same limitation would be observed in cases of State legislative omission.

#### CONCEPT OF HARM

(9) In Art. 1.2, any form of harm is condemned, without categorizing it as serious or significant harm. Furthermore, the harm inherent to business risk, or even to the action from the State, is disregarded, while it is important to know when it refers to tolerable or acceptable harm that can subject to remedy as part of the business operation. The language is not aligned to the UN Guiding Principles, which deal with infringements, emphasizing the need for a causal connection between the agent's conduct and the perpetrated harm, in addition to a related legal obligation. Therefore, it would be helpful to qualify, in the text, the kind of harm referred to in this article.

(10) The "in the context of business activities" is also unclear and further detail on its scope is needed in the text. As currently drafted, it may imply the business agent's responsibility for acts of third parties that occur within a business unit, but over which the company has no control.

(11) In the same vein, art. 3.2(c) is imprecise and vague given that it defines the transnational activity as any action that has "substantial effects" in another country, encompassing any effect of business performance, regardless of the existence of a serious harm. For that reason, it would be appropriate either to define what those substantive effects are or to exclude Art. 3.2(c) altogether from the text.

#### CONTRACTUAL RELATIONS

(12) Art. 1.4 suggests allocating responsibility along the supply chain, seemingly reaching all contractual relations, among natural persons and legal entities, and between entities within the same business group. The proponents' attempt to extend solidarity and subsidiary liabilities to reach an entire economic or corporate group could reach entities that participate only laterally from the enterprise. The draft proposal for this article does not seem feasible, especially considering that creditors of an economic group are hardly ever informed of the entirety of groups linked in a given production chain. Therefore, the language should be improved in order to exclude the notion of indirect liability along a production chain.

## HUMAN RIGHTS VIOLATIONS AND ABUSES

(13) Throughout the text, references to human rights violations and human rights abuses are made indistinctly. However, bearing in mind the example from the Inter-American Court of Rights Humans case law (case of Velásquez Rodríguez vs. Honduras, 1988), it is important to identify the criteria to determine the imputability of the State in relation to acts from third parties. Therefore, it is advisable that the language used in the LBI allows to determine the situations in which there is effective lack of zeal / due diligence by the State to prevent a possible violation, according to its obligations in the relevant international instruments.

## PROTECTED RIGHTS

(14) Article 3.3 states that the LBI covers "all human rights". This constitutes a terminological imprecision and gives margin to require States to comply with provisions of non-ratified instruments. The exclusion of this clause would not prejudice the intended purposes of the LBI, taking into account to its limited substantive content. Alternatively, it would be necessary to specify that, for the purposes of the LBI, only those provisions contained in instruments ratified by the State Party should apply.

## RIGHTS OF THE VICTIM VS. OBLIGATIONS OF THE STATE

(15) The title of Article 4 ("rights of victims") conveys the idea that the section would be dedicated to the rights of the victim. However, it encompasses a gradient between rights that the victim could claim ("victims shall") and obligations to which the State would have to answer ("State Parties shall"). In that context, it is more appropriate to separate obligations and duties from different parties.

(16) This article also defines the obligation of diplomatic posts to offer legal aid, which should include legal assistance. As currently drafted (item 4.7), it is difficult to interpret whether the treaty would oblige diplomatic and consular representations to ensure access to public defenders, for instance, or its purpose would be to impose on them the

obligation to provide the victims with legal advice from lawyers. Further clarification of the kind of obligations established by the text is necessary.

(17) Another challenge can be observed in the provision dealing with the delay in court procedures, while the “caput” of the Article 4.12 restricts its scope to the forms of legal assistance.

#### THIRD-PARTY INTERVENTION

(18) Article 4.8 contemplates the possibility for third parties to intervene to protect the victim at risk, or to prevent the occurrence of human rights abuses or violations. The waiver of consent for representatives of civil society or others stakeholders to act on a person’s behalf is not consistent with the United Nations human rights system practices. Chapter VIII of the *Handbook for Civil Society*, issued by the Office of the United Nations High Commissioner for Human Rights, recognizes that “[c]ivil society actors can often act as a conduit for individuals seeking redress from human rights abuses by preparing, submitting or lodging a complaint on their behalf; [h]owever, anyone submitting a complaint on behalf of an individual should ensure that they obtain the consent of that individual and that the individual is aware of the implications of making a complaint”. Therefore this article should be revised in order to reflect the language used in the Handbook.

#### DELAY IN JUDICIAL PROCEDURES

(19) Article 4.12(c) seeks to curb the judicial slowness in implementing the LBI. Taking into account the specificities of the Brazilian legal system, it would be preferable to combine the fulfilment of this right with the need to demonstrate the harm and the causal link. Therefore, the delay in court procedures would not be “per se” an element to scrutinize the State compliance with an international instrument. An analysis on the objective elements of connection between the public service operation and the harm caused by the administration is hence necessary.

## PREVENTIVE DUTY OF LEGAL PERSONS

(20) Article 5 of the draft LBI reflects, to a large extent, the concern about the reach of the foreseen obligations throughout the production chain, restricting them to situations where there is an effective contractual relationship.

(21) In this article, it is inappropriate to retain the idea of consultations to groups that could potentially be affected by business. Not only does the proposed language on "free, prior and informed" consultations with indigenous peoples (item 3(b)) significantly differ from the provisions in the ILO Convention n. 169 on indigenous and tribal peoples, but it also allows the possibility of expanding the duty to consult with other groups, including legal entities. In order to build consensus in the draft LBI, under no circumstances should nonconsensual binding language on the consultation of indigenous peoples be used in the text, as referred art. 5.3(b).

(22) In addition, it should be taken into account the existence of individual micro-entrepreneurs, micro and small businesses, and other business figures with limited economic capacity.

(23) In this sense, it is advisable to exclude the duty to undertake human rights impact assessments as provided for in Article 5.3(a), which could lead to costly additional measures, taking into account, in the Brazilian perspective, the already thorough national legislation on environmental impact assessments.

## THE CONCEPT OF "DUE DILIGENCE" IN HUMAN RIGHTS

(24) The six paragraphs under Article 5 seek to exhaust the applicable preventive measures, which could be summarized as obligations to perform "due diligence" on human rights. The expression "due diligence" refers, in short, to the Guiding Principles 17 and 24, where it is defined as the "collection and utilization of information, risk assessment, reasonable decision-making procedures, monitoring, reporting, and adjustments in corporate policy when and where necessary". It is necessary, however,



to improve the clarity on which criteria would trigger the consultation process, and how to define the relevant stakeholders in each case.

(25) While establishing general obligations for companies, regardless of their size, sector, operational context, ownership profile and structure, the draft LBI is unclear on whether the decisions made by the proposed monitoring and verification mechanisms (judicial and non-judicial) would directly affect the companies or would only oblige the State Parties, which should ensure thenceforth the compliance by companies.

(26) Article 4.5 (b) provides that victims must have access to remedial action in the event of environmental damage, which covers ecological restoration. In addition, Article 5.3(a) stipulates the need for environmental impact assessment. From the Brazilian point of view, the conceptual basis for environmental measures should emanate from international agreements.

(27) Moreover, given that item 3 in Article 5 is only referenced to the measures referred to under the immediately preceding paragraph, which does not deal with environmental issues, it is appropriate to exclude the term "environment" from the paragraph 5.3(c).

#### CORPORATE CRIMINAL LIABILITY

(28) Art. 6.7 establishes the criminal liability of legal persons, listing a series of situations where the company should be held accountable. In this regard, it should be noted that in the Brazilian Federal Constitution (art. 173, § 5) the responsibility of the legal person in criminal law only applies in cases of transgressions to the economic and financial order. Other issues are thus excluded, since there is no recognition of crimes that are not committed "in interest" of the legal person. Therefore, only the civil and administrative liability of legal entities should be dealt with in this article.

#### UNIVERSAL JURISDICTION

(29) Articles 6.6 and 7, read together, seem to hamper the identification of the natural judge for the action, which could promote the phenomenon of “forum shopping”. Although limited to the liability of legal persons, the articles as currently drafted leaves room for a wide range of interpretations regarding the connecting elements.

(30) Given that the extension of the jurisdictional scope constitutes a central element of the LBI under negotiation, further work on the interpretations of the terms is needed in order to balance the application of the new disciplines, while not overlooking the reparation needs of the victims. In this respect, the consideration of a possible clause on “forum non-conveniens” is pertinent.

(31) It should be noted that, in Brazil, the extraterritorial application of criminal law is limited to certain cases, and require the presence of the suspect in the Brazilian territory and the existence of an international treaty providing for the punishment of the crime over which it is intended to exercise jurisdiction.

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