**OEIGWG on TNCs and OBEs - 6th session**

**(ITEM 4) Part VI - ARTICLE 9, 10 AND 11 (28/10/2020)**

**Brazil, national capacity**

**Thank you, Chair-rapporteur,**

**Under this agenda item, concerning the articles 9, 10 and 11 of the second revised draft, the Brazilian delegation would like to comment on the following issues:**

**2. Articles 8.7 (previous 6.6 in the first draft) and article 9 (previous article 7), read together, continue to 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 revised text of both articles seems to leave even more room for a wide range of interpretations regarding the connecting elements.**

**3. The new paragraphs 9.4 and 9.5 and article 11 are of special concern in this regard, especially on the use of the criteria of conclusion about the existence of a "close connection" between cases in different countries, the consideration of unavailability of a "fair trial" in the forum State and the possibility of the victim to request the use of a law from another state.**

**4. In this context, we would like to suggest, concerning Article 9.4, the substitution of the expression "closely connected with", which is vague and hard to measure, by “directly” or “clearly” connected.**

**5. We would also like to propose the replacement of item 9.5 by a new paragraph, which would determine that the provisions of Article 9 shall take into account the principle of subsidiarity, in order to guarantee that only after domestic procedures have been exhausted, where they exist, may remedies be sought in different fora from the one where the abuse has occurred or where the business enterprise has its residence. This would be essential to avoid forum shopping and legal uncertainty.**

**6. Furthermore, it does not sound reasonable to determine that victims may, at their will, select the law to be applicable to each case, as proposed by Article 11.2, as this could lead, once again, to forum shopping.**

**7. 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. While we commend on the indicative to include a clause on "forum non-conveniens", we reiterate that the terms of the new article 7.5 may require further refinement, in light of its potential impact on the national justice systems.**

**8. Finally, with regard to Article 10, we are not yet convinced of a need for special rules concerning statutory or other limitations. Therefore, we believe that the general rule of each jurisdiction is enough to guarantee the protection of the rights provided for in the LBI.**

**Thank you. (439 words)**