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

**(ITEM 4) Part I - PREAMBLE AND ARTICLES 1 AND 2 (26/10/2020)**

**Brazil, national capacity**

**Thank you, Chair-rapporteur,**

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

**2. In the preamble, we reiterate our view that a general reference to internationally agreed legally binding instruments, without specifying or quantifying them, could be a way forward to build a consensual approach.**

**3. The reference to specific legally binding instruments may pose challenges to the negotiating position of countries that have not ratify them.**

**4. Due consideration should be given to the different legal status of declarations and treaties, especially when international declarations that were not subject to ratification under domestic procedures are considered as legally equivalent to legally binding international instruments.**

**5. We draw specific attention to references to rights that are not yet enshrined in legally binding international human rights instruments, such as the one provided for on PP5, and we call for their exclusion from the text or, at the very least, for the revision of their wording.**

**6. The inspiration given by previous international declarations adopted by the UN, however, should be considered while drafting of the aspirational aspects described in the preambular part. In this sense, we note that in PP6, new adjectives to characterize the human rights have been added to those established in the article 5 of the Vienna Declaration of 1993. A clarification on the source of the new wording would be much appreciated.**

**7. On PP13, we are unsure on why in the expression “civil society including human rights defenders” the term “inclusion” has been replaced by “and”. As we see, the latter constitutes an example of the former, and therefore “including” might be a more precise choice of word.**

**8. We also propose the revision of the language of PP13, to clarify that business enterprises, in general, have a central role in fostering the achievement of sustainable development.**

**9. On PP14, the deletion of the word “certain” seems to imply that all kinds of business-related human rights abuses will impose a distinctive and disproportionate impact on the vulnerable groups listed in this paragraph. This assumption needs to be better refined and explained since we are dealing with a legally binding instrument.**

**10. On PP15, while we reiterate the Brazilian unwavering commitment to combat any discrimination and violence against women, we would recommend caution to address this important issue under the guise of “gender perspective”, especially when requiring that it should be interpreted, in generic terms, “in line with (…) other international standards”. We call on the chair-rapporteur to give this matter due consideration, in order to not lose the focus of the discussions by aggregating non-consensual language to the draft LBI.**

**11. We are worried that PP16, as it currently stands, may lead to confusion regarding which Human Rights Council resolutions are, in fact, relevant to the issue at hand. Moreover, we are not convinced that it is appropriate to mention non-binding resolutions in the preamble of a legally binding instrument.**

**12. We also propose that PP17 recognizes the complementary role that the Guiding Principles has played with regard to the LBI.**

**13. In the last preambular paragraph, we welcome the efforts to provide an alternative to the generic statement that the LBI constituted “a contribution to the development of the international law”. However, we understand that by “clarifying and facilitation the implementation of obligations of States”, this LBI, which is of a specific nature, should not be treated as an opportunity to discuss and decide on the creation of new human rights.**

**14. concerning the definitions, in article 1, we welcome in paragraph 1.1 the new language that restricted the concept of victims to those persons that actually suffered abuses of their rights. However, we remain concerned about the inclusion of collectivities in the category of victims, and the lack of safeguards concerning the possibility of establishing new rights in the international sphere for a range of collective groups.**

**15. We also call for the substitution, in article 1.1 and throughout the entire document, of the expression “in the context of business activities” for the alternative “caused by business activities”, in order to increase the accuracy, predictability and legal certainty of the text – something that should not be overlooked in a legally binding instrument.**

**16. As stated by Brazil in the 5th session, we are still not convinced on the need of proposing a definition for human rights abuses.**

**17. Since it was kept in the text, we must reiterate our statement during the intersessional consultations that the inclusion of “omissions” could lead to serious controversy in criminal law systems - such as the one in Brazil - based upon the material conception of the illicit.**

**18. It is also relevant to notice that the article still fails to consider the different degrees of seriousness and significance of the harm and makes no reference to tolerable and acceptable harm that could be subject to remedy as part of the business operation. We believe that we should raise the bar for actionable offenses under the binding instrument to “serious harm”.**

**19. We would like to ask for clarification on the definition of environmental rights, mentioned in Article 1.2, for the purposes of the LBI. As it stands, the term may add to confusion and uncertainty.**

**20. On the concept of “business activity of transnational character”, it is still unclear what is the meaning of “substantial effects in another State”, in item 1.3-c. In the absence of a proper definition on this matter, we reiterate our suggestion to delete this item.**

**21. In Article 1.4, it is not clear whether the current language - business activities of a transactional character - covers adequately services traded globally. Moreover, in 1.3-c the expression “substantial effect” should be replaced by a more precise term, such as direct or measurable effect.**

**22. While we agree that the choice to replace “contractual relationship” by “business relationship”, in article 1.5, responds positively to the requests by delegations during the intersessional consultations, we noted very little improvement in the definition itself. In our view, it seems not feasible to maintain the notion that there should be an “indirect liability along the supply chain”, encompassing agents that only marginally participate of the enterprise.**

**Thank you. (1022 words)**