

Statement by ***Gladice Pickering – Ministry of Justice and Office of the Attorney-General,*** 4th session of the WG on Transnational Corporations and Human Rights, Geneva, 17 October 2018

Item 4 – Articles 10, 11 & 12

Mr Chair,

Just as introduction, Namibia would like to indicate that we are confident that the drafters of the text and those of us contributing thereto will as far as possible strife to keep in mind the literal rule of interpretation in the process of drafting and we still have the golden rule of interpretation as safety net for just in case we end up in absurdity. So, we acknowledge, much work still needs to go into the refining the text.

Article 10: Legal Liability:

Article 10 provides for instances where States legal systems do not permit criminal prosecutions of legal persons such as corporations. Proportionate and dissuasive non-criminal sanctions, including monetary sanctions can be considered. This is set out in instruments like the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Convention and provides for some useful flexibility.

The UNCAC for example also requires States to “establish the liability” of corporations for offenses under that Convention, whether that be criminal or, in States whose legal systems do not permit criminal prosecution of legal persons, then “effective, proportionate and dissuasive” civil or administrative sanctions. We agree with Mr. Deva that these sanctions should however be clarified.

In Namibia, like in many countries with a similar legal system, the burden of proof differs between civil and criminal cases. In civil cases, we have to proof on a balance of probabilities, which is lighter than that in criminal cases, where the burden of proof requires proof beyond any reasonable doubt. The institution of a civil claim is also not dependant upon any criminal charge and criminal and civil cases arising from the same incident often run concurrently.

Further, intention as stated in Article 10 (8) is an element of crime in many legal systems and requires that the criminal act must be on purpose. However, the foreseeability test provides for a viable alternative to this stringent requirement, which is often difficult to proof. This can indeed be helpful if incorporated as stated by Mr. Devan.

We agree with Mr. Bilchitz that a closer connection needs to be established between the decision-makers and the violations that occurs and more generally, between this draft treaty and corporate law. As indicated yesterday during the discussions under Article 6 (Statue of limitation), the process of piercing of the corporate veil is not an easy one and can be an obstacle to indigent victims, especially in developing States. Article 10(6) can be enhanced in this regard, keeping in mind the challenges with the enforcement of laws in States with weaker governance structures as the abuses taking place at the hands of TNC’s in such States are often more severe.

We prefer the flexibility of article 10(4) on the burden of proof, making the reversal subject to domestic law, because reversal of the burden can be problematic for some states.

Articles 11 & 12 are clear and is clearly based on other international instruments, which provides for MLA and International Cooperation, and which have been implemented with great successes.

I thank you.