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Minister of State of Finance

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Ref.: Recommendations for the incorporation of the highest human rights standards into the policies and processes of the New Development Bank (NDB)

Dear Sirs,

The undersigned organizations hereby respectfully submit some considerations on the process of formalizing the New Development Bank (NDB), a multilateral financial institution whose creation was considered “feasible and viable” by the leaders of the five countries whose formal creation has been announced as one of the outcomes of the 6th Summit, held in Fortaleza, Brazil.

According to official statements from the BRICS authorities and information reported by the press, the primary goals of the NDB will be to enable infrastructure projects through financing and the provision of guarantees and, more generally, to pursue sustainable development in emerging and developing countries.

We believe that **the primary motivations for the creation of a new multilateral financial institution by the BRICS** are adjusted to the geopolitical context of the current economic global order, particularly concerning the democratic deficiency in the governance of the institutions that were created in the post-war. We appreciate the fact that **the traditional supranational sources of development financing are limited in their capacity to offer innovative and lasting solutions for increasing investments in high-risk projects** or to overcome the obstacles preventing a greater participation of the private financial sector in financing long-term business ventures in economic niches with positive externalities for the reduction of economic and social inequalities.

Despite the urgent need of developing countries to find alternatives for the financing of long-term projects and to raise funds for investments that contribute to the maintenance of minimum levels of economic growth, it is imperative to assert that **the BRICS countries and several of the NDB’s potential client states are facing acute tensions caused by development strategies that often conflict with the obligations of these States to protect human rights under the terms of the commitments made on the international level.**

In this context, it is with concern that the undersigned organizations watch **development financing institutions in the countries of the block, using mostly public funds, supporting projects that encourage or enable serious social conflicts and human rights violations.** There are numerous cases of indigenous peoples being removed from land they have legitimately occupied for centuries, of traditional peoples being forcibly displaced without due compensation, of

ecosystems and the environment being damaged by flooding and deforestation, of workers being held in conditions akin to slavery, of sexual exploitation, child labor and other human rights violations that, taken as a whole, demonstrate **an alarming pattern of human rights violations over the course of projects financed by domestic development financing agencies in the BRICS countries.**

Moreover, these institutions, even though they manage public funds, have not embraced a satisfactory level of social control as a result of legal interpretations that favor the protection of client data over the public interest in gaining access to this information, even though it can help shed light on cases of rights violations.

If the NDB is truly to become an **effective mechanism of international cooperation, reducing inequalities and promoting social justice, sustainable development and human rights** in the BRICS countries and other developing nations, the undersigned institutions recommend that the strategic plans, policies and processes of the NDB incorporate into its very structure, before the first loan is made, the following minimum points:

1. Socio-environmental and human rights-respecting policies and guidelines

Given its nature as a public financing institution and its mission to promote sustainable development, the NDB should assess the eligibility of the beneficiaries of its loans and ensure the viability of the operations based on robust environmental and human rights protection criteria, in accordance with the highest international standards.

In addition to the formal commitment that, for the NDB, development is inseparable from human rights protection, **the creation of operational guidelines and procedures is essential to minimize the chances that the NDB, in virtue of its financial support, may infringe on the fundamental rights of others, particularly individuals or groups directly affected by the projects, or be an accomplice in cases of serious human rights violations.**

The guidelines should include, at the very least, selection criteria and operating standards on i) the protection of the **environment**; ii) the protection of **human rights** and observance of the **rights of ethnic and religious minorities, as well as the human rights that guarantee the gender and racial-ethnic equality and the respect to the diversity of sexual orientation and gender identity**; iii) the **safety of the workers employed on the projects and the prohibition of labor in degrading conditions or akin to slavery, child labor and the sexual exploitation of children and adolescents** and iv) the rights to be safeguarded and the **compensation due to the populations subject to involuntary resettlements** caused by large-scale infrastructure projects.

In addition, the NDB should:

- (i) through a consultative and broadly participatory process, adopt operational and contractual mechanisms that safeguard the environmental and human rights of the populations affected by the projects it finances, including **independent tools for assessing and monitoring the socio-environmental impacts** that can efficiently diagnose, track, mitigate and offset the potential adverse effects of any activities that could negatively impact these rights;
- (ii) in its policies, **make express reference and incorporate, substantively, the internationally recognized standards of environmental and human rights protection that are enshrined in treaties approved by the UN and by the regional human rights**

systems, while the domestic legislation of the block's countries may also serve as a reference, provided the highest standard of human rights protection always prevails;

(iii) make an ex-ante evaluation of the **capacity of the State receiving the financing to guarantee environmental and human rights protection in the context of the construction and services being financed**, while also verifying its capacity to assess, prevent, minimize, mitigate and correct the adverse impacts associated with the financed projects;

(iv) ensure that the **investments and loans made to States and private companies do not contribute to already existing human rights violations**, or aggravate these violations.

2. Free, prior and informed consultation and consent in certain circumstances

International human rights law recognizes, for all indigenous and traditional peoples, the right to free, prior and informed consultation before the adoption of measures that could directly affect them. The main treaties that guarantee this right are ILO Convention 169, approved by the International Labor Conference at its 76th session in 1989, and the United Nations Declaration on the Rights of Indigenous Peoples, approved by the UN General Assembly on September 13, 2007.

Whenever the NDB intends to finance projects that could potentially affect the rights of indigenous and tribal peoples, and which therefore are subject to the duty of consultation by the States responsible, the NDB should verify the existence of adequate processes of free, prior and informed consultation and consent that satisfy and respect the highest international standards for the application of this right.

Following the orientation of the jurisprudence of the regional systems, such as the Inter-American Court of Human Rights, and in accordance with existing standards on financing and human rights, such as the Performance Standards of the International Finance Corporation (IFC), **the NDB should verify, in certain circumstances, that the free, prior and informed consent was obtained from the indigenous and traditional peoples before certifying the viability of the project**. Examples of situations in which consent must be obtained include the loss of access to goods or resources, restrictions on land use resulting from the activities of the project (IFC Performance Standard No. 7), or the development of large-scale projects that could threaten the physical and cultural survival of the affected peoples (as held by the Inter-American Court of Human Rights).

In order to integrate the application of the rights of indigenous and traditional peoples into all the activities of the NDB, **we recommend creating a specific policy** that should include criteria for the independent assessment and monitoring of adverse impacts, participation, recognition and mitigation measures and distribution of benefits considering the ethnic and territorial particularities of these populations.

3. Transparency and access to information

Transparency is a crucial feature of the work of Multilateral Development Banks and indeed of all public institutions in modern democratic societies. It is an indispensable requirement for the control and accountability of public officials, for the exercise of citizenship, for the protection and reparation of violations of fundamental rights and for the strengthening of democratic institutions in the States.

Just like other Multilateral Development Banks, the **New Development Bank should institute effective transparency mechanisms, both active and passive**, and, more specifically, the NDB should:

- (i) **establish its own Transparency and Access to Information Policy**, through a consultation procedure and the involvement of all interested parties;
- (ii) **make public all its policies and internal regulations; its procedures for the selection, assessment and monitoring of projects; documents that contain investment strategies by country or by sector**; and, in general, any institutional information and data on the cycle of the financed projects, except when there is a genuine risk to the privacy or the security of the beneficiaries that justifies banking secrecy;
- (iii) **disclose information on the assessments of the socio-environmental and human rights impacts of financing for public or private organizations**, as well as reports on the monitoring and assessment of the effectiveness of the mitigation and offsetting measures established during the execution of the projects, including assessments provided by independent auditing institutions contracted for this purpose.

4. Grievance and conflict resolution mechanism

The NDB should institute a **mechanism for handling complaints and grievances with the authority to verify and guarantee effective compliance with its own internal policies, particularly its socio-environmental and human rights policies**.

This mechanism should be designed to serve as a **direct communication channel between the NDB and the workers, unions, communities, victims and interested civil society**, enabling them to express their concerns and submit actions and commitments for the observance of their rights in the planning and execution stages of the financed projects.

It is essential for the NDB's grievance and conflict resolution mechanism to fulfill, at the very least, the following criteria:

- (i) in accordance with the UN Guiding Principles on Business and Human Rights, the **mechanism must be legitimate, accessible, predictable and equitable; its composition and governance must meet the requirements of independence and impartiality**; and its work must be guided by the protection of human rights, in addition to being a source of learning and for improving the bank's policies in an engaged and dialogue-oriented way;
- (ii) **it must be transparent, catering to individuals and communities in the most comprehensive way possible**, with minimal conditions for opening and keeping track of the investigation process; accordingly, different communication channels must be guaranteed, with various formats available for making and submitting complaints, which must be accepted in any language and answered in the bank's official language(s) and in the original language of the party that submitted the complaint;
- (iv) it must be efficient in resolving the problems that are presented and identified; **therefore, it must have powers to call of projects that violate human rights and to provide the affected parties with effective remedies to cease the violations and provide appropriate redress**.

5. Participatory and inclusive process

The absence or weakness of participatory mechanisms for the communities directly affected by the projects and for interested civil society in the definition of the strategies and in the cycle of the financed projects leads to an increase in grievances and to more legal action taken to settle the social conflicts caused by the impacts of the activities of the clients on the lands where the infrastructure projects are located.

Based on this fact, and considering the imperative for communities to participate in decisions that can impact the enjoyment of their material and intangible rights, the NDB should:

- (i) establish, preferably in its own founding documents, **formal and institutionalized dialogue forums so civil society can be consulted about the institutional framework of the bank**, including the rules of governance, the corporate purpose, the geographic scope of the investments and the principles that will guide its action;
- (ii) once the formal participation forums are instituted, these dialogue channels should be used regularly, in order to guarantee the **free participation of civil society and the communities affected by the projects financed by the NDB**; public consultations should be encouraged and there should be a constant monitoring of the socio-environmental impacts, the effectiveness of the established mitigation and offsetting measures, and the respect for human rights.

We urge the Brazilian government to work together with the other countries of the block to establish a **broad and transparent consultative process with the civil society organizations of their respective countries in this stage of the creation of the New Development Bank**, and to guarantee broad transparency for all the diplomatic agreements between the countries, whether in the BRICS multilateral forum itself or in any other bodies.

In all the subsequent stages, we recommend that **the governments guarantee that the participation of all interested parties is an absolute condition for the construction of a legitimate process of institutionalization and operationalization of the new bank**.

Respectfully,

Artigo 19

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