



## **UPDATE: 5<sup>th</sup> session of the Inter-Governmental Working Group to elaborate a UN Treaty on Transnational Corporations & Other Business Enterprises**

### **Reminder - What?**

- The UN's Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights (IGWG) met for its [5<sup>th</sup> session](#) from 14 to 18 October 2019 in Geneva.
- During the 5<sup>th</sup> session, the IGWG discussed/negotiated on the [Revised Draft Treaty](#) prepared by the Chair (Ecuador in June 2019).

*Reminder: The IGWG was established in 2014 (under [Resolution 26/9](#)) to elaborate a legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.*

### **5<sup>th</sup> session format**

- The fifth session's [programme of work](#) focused on the different Articles in the Revised Draft Treaty (often with discussions on multiple Articles at the same time).
- Each three-hour segment followed this format:
  - The Chair (Ecuador's Ambassador) introduced the relevant Article(s);
  - 2-4 "legal experts" (mostly NGOs and pro-Treaty academics) gave preliminary comments on the Article(s);
  - Participating States made their comments and raised questions on the Article(s);
  - The "legal experts" briefly responded to the various State interventions;
  - The Chair (occasionally) provided a summary of some State comments / questions; &
  - NGOs & business had 2x minutes each to make their interventions on the Article(s);

### **IOE participation**

- Prior to the 5<sup>th</sup> session, the IOE released a [Joint Business Response to the Revised Draft Treaty](#), which it drafted with Business at OECD (BIAC) and Business Europe. This joint response describes the business community's:
  - i. Commitment to respecting human rights - in context.
  - ii. Substantive concerns with the Revised Draft Treaty.
- The IOE participated in the 5<sup>th</sup> session all week, supported by USCIB and the IOE's partner company/law firm Littler, to follow the discussions and explain the business position on the Revised Draft Treaty.
- In addition, Littler spoke as a "legal expert" on the articles on "Mutual legal assistance", "International cooperation" and "Consistency with international law."

## State engagement

- Eighty-nine UN Member States participated in the 5<sup>th</sup> session (compared with 92 in 2018; 99 in 2017; and 80 in 2016).
- State engagement varied considerably and can be summed up under four categories:
  - i. **States that actively participated and expressed broad support for the IGWG:** Azerbaijan, Bolivia, Brazil, Cuba, Ecuador, Egypt, India, Indonesia, Iran, Mexico, Namibia, South Africa and Venezuela.
  - ii. **States that participated but only to put on the record their concerns about the substance and process:** Argentina, China, Colombia, EU, Peru, Russia and Switzerland.
    - China and Russia stressed that they were not, in fact, negotiating on the Revised Draft Treaty but instead presenting comments on elements that could be considered for a possible future legally binding instrument. They also said that the Treaty must not create any new legal obligations on States.
    - EU explained that it did not have a mandate to negotiate on the Revised Draft Treaty and that it was merely asking questions about various articles.
  - iii. **States that were in the room but said nothing/very little (making their position unclear)\*:** Afghanistan, Algeria, Angola, Austria, Belgium, Botswana, Burkina Faso, Burundi, Chile, Congo, Costa Rica, Cote d'Ivoire, Czech Republic, Denmark, Djibouti, El Salvador, Ethiopia, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Iraq, Ireland, Italy, Jordan, Kenya, Lebanon, Liberia, Liechtenstein, Luxembourg, Mauritania, Montenegro, Morocco, Mozambique, Myanmar, Nepal, Netherlands, Nicaragua, Niger, Nigeria, Pakistan, Panama, Paraguay, Philippines, Poland, Portugal, Qatar, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Spain, Sweden, Thailand, Togo, Turkey, Uganda, Ukraine, UK, Uruguay and Zambia.
    - *\*The list of States in this category changes somewhat from year to year. For example, this year a few more EU Member States attended.*
  - iv. **States that did not participate (not an exhaustive list):** Australia, Bangladesh, Canada, Israel, Japan, Norway and USA (released a [statement](#) online).

## Outcome from the 5<sup>th</sup> Session – what next?

- The Chair (Ecuador) will release a "[second Revised Draft Treaty](#)" by the end of June 2020. At the same time (at the request of China mainly), Ecuador will also present a "document that contains an outline of the key issues and a structure of the revised draft which can serve as a tool to assist direct negotiations."
- A 6<sup>th</sup> session of the IGWG will be held in 2020 (likely in October) during which States are encouraged to negotiate on the preparation of a "[third draft legally binding instrument](#)" (on the basis of the "second Revised Draft Treaty").
- New: Ecuador is explicitly inviting "a group of experts from different regions, legal systems and fields of expertise to provide independent expertise and advise" in relation to preparing the second Revised Draft Treaty. No further clarity on this was provided.

- Ecuador will also hold "comprehensive and periodic informal consultations" with Governments, regional and political groups, intergovernmental organisations, UN mechanisms, civil society and other relevant stakeholders before the IGWG's 6<sup>th</sup> session.
- States and other stakeholders are invited to submit additional textual suggestions on the Revised Draft Treaty by the end of February 2020. (NB: Ecuador did not provide an official online platform - on the IGWG website for example - for stakeholders to submit their comments on the Revised Draft Treaty before the 5<sup>th</sup> session. Therefore, the IOE's [Joint Business Response to the Revised Draft Treaty](#) remains valid for this).

## Some key points

- After five years and five IGWG sessions, it is still unclear what the "scope" of UN Treaty will be. States (and civil society) have divergent views on this. For example:
  - Some States (like the EU and Brazil) insist that the UN Treaty's scope should be on all business enterprises, including State-owned enterprises.
  - Other States (such as South Africa and Egypt) argue that the IGWG's mandate makes clear that the scope should only be on transnational corporations, not domestic enterprises.
  - Furthermore, a sub-category of States (such as China) argue that the "[footnote](#)" to UN Resolution 26/9 that set up the IGWG in 2014 must apply, which could be interpreted to exclude SOEs from the Treaty's ambit:
    - *The footnote: "Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law."*

Ecuador's attempt in this year's "Revised Draft Treaty" to try and manage these divergent views appears not to have worked.

- While the 5<sup>th</sup> session had a less tense atmosphere than past IGWG sessions with more State engagement on substance, a number of States (especially industrialised ones) were not present and other influential States (such as China, Russia and the EU) said they were not, in fact, negotiating on the Revised Draft Treaty text.
- It remains unclear what Ecuador wishes to do moving forward. Since the start, it has largely ignored the fact that the IGWG does not have broad-based political support. Equally, it has managed to press ahead each year without needing to confront this reality.

## Questions to consider

- a) **What will Ecuador do next?**
  - Does it want to have long-drawn out negotiations on the IGWG or does it want to try and complete the IGWG's mandate quickly (even if doing the latter only achieves a low level of State ratification\*)?
  - Will Ecuador stick to the IGWG's mandate with a strict focus on TNCs and the footnote or make another attempt to massage the language on the scope (etc.) to try and persuade hitherto reluctant States to engage more?

- Across all the articles, which of the different States' interventions will shape the "second Revised Draft Treaty" and which will not?
  - What is the impact of the different civil society/academic voices on Ecuador? Ecuador's decision (at the end of the 5<sup>th</sup> session) to invite "a group of experts" from different regions, legal systems and fields of expertise to provide independent expertise and advice on the drafting of the "second Revised Draft Treaty" raises the following questions: Who will these experts be? How will they be selected? What will be their contribution to the next draft Treaty text?
- b) **What will non-active/present States do between now and the IGWG's 6<sup>th</sup> session?**
- Will those States, such as the EU, change position and decide to engage/negotiate?
  - Would their engagement have any impact on addressing fundamental challenges such as the Treaty's scope, its divergences with the UNGPs and its many legal ambiguities?
- c) **\*How many States would be needed to ratify the Treaty for it to come into force?**
- Ecuador did not address this point during the 5<sup>th</sup> session.
  - We understand that each IGWG can determine for itself how many States in total will need to sign up to and ratify a new UN Treaty for it to come into effect. Apparently, the figure could be as low as 20-30 States.