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**Research Report**

## Shaping responsible business conduct through a Multilateral Treaty on Due Diligence

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### **Shaping responsible business conduct through a Multilateral Treaty on Due Diligence**

by

Katia Yannaca-Small\*

Human rights due diligence, including environmental due diligence,<sup>1</sup> is an integral element of companies' environmental, social and governance (ESG) performance. Its aim is to ensure responsible business conduct, especially for companies operating abroad, by identifying, preventing, mitigating, and accounting for potential adverse human rights and environmental impacts. It is one element of the longstanding United Nations work on a broad Business and Human Rights treaty, which, at this stage, remains far from reaching consensus on scope and content.<sup>2</sup> Consequently, international efforts to advance responsible business conduct remain in the sphere of soft law. A Multilateral Treaty on Due Diligence (MTDD) could change that.

The [OECD Guidelines for Multinational Enterprises](#) (OECD Guidelines), the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and the International Labor Organization (ILO) [Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy](#) are the main soft law instruments. In the 2011 revision of the OECD Guidelines, on the heels of the adoption of the UNGPs, adherent countries called for their companies to carry out due diligence. The OECD has produced [Due Diligence Guidance](#) through multi-stakeholder processes involving governments, business representatives, trade unions, and civil society.

Under the MTDD, parties would be required to adopt and enforce laws applying the treaty standards to companies under their jurisdiction. Parties would monitor each other's compliance, with civil society input. This would bring agreed and binding due diligence standards more widely to bear and allow companies to implement them without competitive disadvantage. The task is difficult, but the ground has been prepared by the OECD Guidelines and the UNGPs. Also, the international landscape has substantially changed, creating propitious conditions:

- Several governments have moved toward various forms of mandatory human rights due diligence requirements. In 2021, Germany and Norway joined France in enacting domestic laws, and the United States, the Netherlands, Switzerland, Belgium, and Finland started working on their own legislation. The European Commission just published a [Proposal for a Directive on Corporate Sustainability Due Diligence](#) to be presented to the European Parliament and the Council for approval.
- Corporations have enhanced responsible business conduct through ESG criteria, albeit with different degrees of engagement and a substantial dose of greenwashing. Nevertheless, the corporate world increasingly recognizes that due diligence is necessary, and a growing number of companies, under pressure from investors, regulators and other stakeholders, adopt these processes. The active participation and support of businesses in the OECD guidance on due diligence as well as business statements,<sup>3</sup> demonstrate that the private sector recognizes the importance of these issues.

The anti-corruption precedent is instructive. Bribery of foreign officials was once widely considered an acceptable and tax-deductible business practice. It took years of discussion in the OECD and several bribery scandals concerning European companies to develop a consensus on principles and on the need for a binding instrument. This eventually led to the [OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions](#). The international consensus on principles of human rights due diligence is already at a much more advanced stage, as is the trend toward binding rules.

The MTDD could also help rebalance international investment agreements (IIAs) that, in their vast majority, do not refer to the protection of human rights, labor and the environment or to investor obligations. A MTDD provision or protocol could reference investor due diligence obligations under MTDD-compliant party laws and allow ISDS tribunals to consider an investor's alleged violation in ways to be specified in the MTDD. This would, in effect, modify state consent to arbitration under prior IIAs between parties to the MTDD. This multilateral approach would be more efficient, and more likely to produce a quasi-universal language, than seeking to amend individual IIAs.

The OECD would be the proper institution to prepare and convoke a diplomatic conference to negotiate this treaty, which could contribute to the UN work on the broader instrument:

- It has the experience of the successful 1997 Anti-Bribery Convention and its on-going implementation.
- It has a long history of working productively with all stakeholders to promote responsible business conduct.
- It is home to the OECD Guidelines and has already developed the proper framework through its due diligence guidance.

In its recent lengthy draft [Recommendation on the Role of Government in Promoting Responsible Business Practices](#), the OECD recommends the promotion of responsible business conduct “through trade and investment policies, as well as bilateral and multilateral agreements.” This brief mention could be the first step and become the springboard toward developing a MTDD.

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<sup>1</sup> In October 2021, the UN Human Rights Council declared that a clean, healthy and sustainable environment is a human right. See, [United Human Rights Council Resolution, October 8, 2021](#).

<sup>2</sup> See, e.g., Joe Zhang, “Breakthrough in business and human rights binding treaty negotiation but be prepared for a bumpy road ahead,” *IISD* (Dec. 10, 2021).

<sup>3</sup> See the “[Join Statement in support of an EU framework on mandatory human rights and environmental due diligence](#)” signed by companies, business associations and initiatives, *Business and Human Rights Resource Centre*, Feb. 8, 2022.

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