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Sustainable value chains – Success factors for an internationally accepted binding standard

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Towards an internationally accepted binding standard on business and human rights – Ensuring respect for human, labour and environmental rights in corporate operations and value chain

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Executive summary

This paper is based upon the double experience of the author at Paul Hastings, an international corporate law firm, and as former General Counsel of the Organisation for Economic Co-operation and Development ("OECD")[1].

The paper focusses on three initiatives of the OECD (collectively, the "Cases") and the lessons that can be drawn from them:

1. the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the "Anti-Bribery Convention" or "Case 1")[2];
2. the Multilateral Convention To Implement Tax Treaty Related Measures To Prevent BEPs and Profit Shifting (the "Tax Convention" or "Case 2")[3]; and
3. the proposed Multilateral Agreement on Investment (the "Proposed Investment Agreement" or "Case 3")[4].

This paper will highlight what enabled Cases 1 and 2 to materialise into globally recognised and successful binding frameworks, whilst also exploring the shortcomings of Case 3, which was unable to achieve such success. An annex to the paper highlights the various points raised in the paper.

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Analysing the first two Cases, will show that there is clearly merit in introducing binding international instruments. Case 3 will serve, by contrast, as a reminder that important constraints and considerations frame the viability of such instruments. By exploring Case 3 through inception, process and scope, this paper will outline the likely pitfalls to be overcome when attempting to introduce a framework for human rights in business practice.

Similarities will be highlighted between, on one hand, the fight against cross-border tax evasion and corruption and, on the other, the protection of human rights in corporate operations and value chains. Within this context and by analysing the factors behind the success of the Anti-Bribery Convention and Tax Convention, the potential value of an internationally accepted binding standard in human rights becomes clearer.

How best to achieve this, however, requires careful consideration. The process and preparatory work for Cases 1 and 2 demonstrate that it is vital to build and maintain a broad base for acceptance with, and constructive engagement between, stakeholders. Indeed, collaborating and harnessing consensus with stakeholders directly contributed to the success of the Anti-Bribery Convention and Tax Convention. This clarity and transparency would be central to introduce a similar binding instrument on business and human rights.

When discussing the relevant outcome of such preparatory work and negotiations, an important point must be drawn on what it is meant by "binding standards" as there is false binary distinction between "hard" and "soft" law. In fact, the first two Cases illustrate there is no clear divide between the two. The flexibility afforded in the final Anti-Bribery Convention and the Tax Convention, in terms of implementation, scope and enforcement, was vital to their success. Seeking a binding standard based on a prescriptive set of rules may adversely affect any consensus built in the negotiation process and could thereby hinder the effectiveness, and uptake, of the proposed instrument.

In addition, the viability of an international instrument must be considered in a holistic manner. It is therefore important to factor in the non-binding arrangements already in place to protect human rights in corporate practice. These include the United Nations Guiding Principles on Business and Human Rights (the "UN Guiding Principles")[5], the OECD's Guidelines for Multinational Enterprises (the "OECD Guidelines") and the related Due Diligence Guidance[6], the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[7] as well as the relevant high level G20 principles[8]. Combined with further ongoing initiatives at EU and UN level, these arrangements are central to construing a legitimate basis for intervention and maintaining consensus from, and support of, key stakeholders.

1. The added value of a legally binding standard or instrument at the international level

The Anti-Bribery Convention and the Tax Convention are helpful case studies in demonstrating that carefully construed and negotiated legally binding instruments can add significant value.

With respect to the Anti-Bribery Convention, its introduction provided greater accountability in the fight against bribery. Empirical data demonstrates a clear reduction in the level and growth of corruption globally since the implementation of the Anti-Bribery Convention[9]. Indeed, commentators have noted that, due to the increase in probability for punishment and accountability, the Anti-Bribery Convention has reduced the propensity of multinational corporations to commit bribery offences[10]. The obligations contained in the Convention had to be transposed in all the countries having ratified the Convention leading to changes going beyond simple foreign bribery (e.g. introduction of criminal liability of legal persons). Within its 20 years of implementation, the OECD itself notes a profound impact with sanctions imposed on over 800 companies and individuals for foreign bribery, incarcerations of over 125 individuals

and at least 500 investigations pending across more than 30 countries. Such success is further evidenced by its popularity in uptake, with 44 countries already signed up to the Anti-Bribery Convention, including 7 non-OECD members[11].

Similarly, the Tax Convention has led to significant changes in legal frameworks and tax practices. The most significant value provided has been increased efficiency, co-ordination and transparency in the fight against tax avoidance. The Tax Convention was able to harmonise a previously sporadic system of bilateral tax treaties and domestic rules marred by inefficiencies and undue complexity. The consolidation of such fragmented rules under the Tax Convention placed regulators in a unique position to adapt quickly and effectively to rapidly evolving commercial practices. A recent empirical study concluded that founding OECD member countries took on average over 18 years to update bilateral tax treaty networks[12]. The Tax Convention, by contrast, consolidates the process and thereby facilitates the ability of governments to react promptly to changes in corporate practice, passing updates in a fraction of the time.

Taken together, the Cases 1 and 2 sent a clear message of common political will to address publicly sensitive topics. In both cases, the value brought revolves around addressing political and public concerns through a cooperative and efficient intergovernmental approach to show that countries were taking meaningful and effective steps to tackle the relevant problem.

By contrast, the inability for participants to demonstrate such a benefit with respect to Case 3 was one of its key shortcomings and an important factor in its lack of impetus. As further examined below, this was due to a noticeable absence of public support given the lack of international concern.

Important similarities with Cases 1 and 2 can be noted with respect to the protection of human, labour and environmental rights in corporate operations and value chains. There is indeed already political and public engagement, evidenced through the number of non-binding frameworks in place and various commitments and pledges announced by governments. Certain G7 countries also introduced binding legal frameworks at a national level, showing the political will to tackle the matter. Such discussions, at both national and international level, provide legitimacy to the cause.

What challenges or gaps were the Cases seeking to address?

From a technical point of view, a legally binding instrument usually seeks to respond to one or more of the following:

1. an excessive fragmentation of international law (bilateral tax conventions or bilateral investment treaties);
2. non-existing regulation leading to unfair competition and race to the bottom (harmful tax practice/corruption); and/or
3. an excessive development of similar albeit different national legislation raising practical difficulties for cross border implementation (e.g. the reason for EU Whistleblowing directive).

However, technical considerations are a necessary but not sufficient condition for success. Another ingredient is indeed essential: political will.

Cases 1 and 2 responded perfectly to the types of challenges and gaps identified above.

With respect to Case 1, the lack of established rules between nations lead to impunity of perpetrators. The inception of the Anti-Bribery Convention came from a legal vacuum with a lack of an effective framework at any level, international or domestic. Within this context, an internationally binding framework was considered to be an effective response to a pervasive cross-border issue. Accordingly, Case 1 was based upon a need to establish accountability and harmonise practice to tackle bribery. In addition, public opinion and civil society increasingly called on countries to address the matter (Transparency International was established 4 May 1993).

With respect to Case 2, the issue of tax evasion/avoidance came to the fore in the aftermath of the 2008 financial crisis. Existing practice, previously tolerated, like bank secrecy became unacceptable. As with Case 1, public concern began to emerge, which demonstrated the limit of a purely domestic or bilateral approach (the NGO Tax Justice Network was created in 2003). The weaknesses of the then web of bilateral tax treaties also showed that there could be significant synergies and optimisation through a harmonised approach consolidating existing frameworks.

As noted above, the case for a multilateral agreement on investments in Case 3 did not stem from any particular public or political impetus. This is in stark contrast to Cases 1 and 2, where G7 member states were already under pressure to address already identified concerns for stakeholders. A clear missing piece here was that, both in the lead-up and negotiations for Case 3, there was no identified gap of particular concern to address. This is not the sole factor that explains the failure but it is a crucial one.

How did it do this?

A key feature of Cases 1 and 2 was the significant preparatory work in the lead-up of the relevant treaties. As part of this process, there was a purposeful engagement with stakeholders demonstrating publicly a commitment to collaborate with affected parties in identifying a basis for intervention.

A different approach was taken at the negotiation stage for Case 3, whereby a specialist body was set up with the purposes of identifying the relevant gap to be addressed. The composition of relevant body in Case 3 was less inclusive with broad stakeholder involvement not contemplated or sought.

In other words, for Cases 1 and 2, the relevant processes were inclusive of all relevant stakeholders, each being given a platform and a voice. By contrast, the most notable criticism faced by the OECD in Case 3 was the lack of inclusivity, particularly with respect to NGOs and other non-governmental stakeholders. This, combined with the lack of engagement between constituent governments, ultimately led to a failure in establishing a common ground between them or a motivation for change.

What does this suggest about the potential added value of such an instrument in the business and human rights area?

Looking at Cases 1 and 2, we can see that the process leading to a legally binding instrument took some time and was not linear. In fact, the work on tax initially took the form of political commitments at OECD and G20 level, which were subsequently transposed into a legally binding agreement. Similarly, the OECD's work on anti-corruption was initiated through preparatory discussions, followed by two non-binding Recommendations, before discussions on a binding multilateral Anti-Bribery Convention begun.

Similar, in many respects, to the inception of Case 1 and 2, the relevant preparatory work to address the issue of business and human rights benefit from public and political support. This is evidenced by the adoption of the UN Guiding Principles, and the inclusion of a new chapter on Human Rights in the OECD Guidelines. As noted above, pace has recently picked up on this issue with France and Germany introducing binding legislation and the European Commission putting forward a proposal for a Directive on corporate sustainability due diligence. Negotiations are also still ongoing in the context of the United Nations.

However, this organic development can potentially raise two concerns: fragmentation of international law and a risk of unfair competition or "race to the bottom".

The current situation could also put the transnational private sector in the difficult position of having to arbitrate between various legal frameworks. In the field of business and human rights, cross-border differences and market confusion in approach have resulted in unnecessary compliance and opportunity costs being borne by businesses. A harmonised framework would lead to a unified practice and, by extension, be beneficial in terms of multinational businesses ensuring compliance.

If time seems therefore ripe for a legally binding instrument, this should not lead to a dilution of the existing standards such as the UN Guiding Principles and the OECD Guidelines. An analysis of the current responses from, and initiatives by, G7 member countries already shows how the OECD Guidelines and UNGPs serve as a standard for global best practice. Accordingly, it is important that any internationally binding instrument be construed as complementary and supportive to such initiatives and building upon (rather than competing with) them. In this respect, it is worth noting that the draft EU directive builds directly upon soft law due diligence instruments developed by the OECD.

2. What can be are the critical success factors with regard to both content and process in building consensus around such standards or instruments

Case 3 failed in this at the preparatory level because of a noted lack of inclusivity and a perceived opaqueness in the negotiation process.

Key to the success of Case 1 and 2 was the establishment of trust from stakeholders first, through the inclusivity of stakeholders' input and perspectives; and second, through a solution-orientated predictable procedure.

The relevant inclusivity referred to here is one, which seeks to shore up consensus through incorporating the differing voices and viewpoints of each constituent stakeholder. Treating right-holders, businesses and governments as antagonists in this process would be mistake, notwithstanding the fact that they may have divergent expectations. The relevant procedure must involve organisations across the spectrum of civil society and from diverse geographical provenance. This means, in particular, that when addressing an underlying issue with a global footprint, an effective process cannot concentrate on organisations from one particular continent.

Similarly, to the fight against corruption, the most egregious instances of human right violations have been noted to originate countries with lesser accountability and less robust enforcement procedures. By extension, the efficacy of a meaningful fight against such abuse will require not only incorporating these countries' perspectives but also securing their buy-in. It is of paramount importance to ensure such countries are included and that their voices are taken into account when devising a potential framework to tackle human rights and business practice.

The procedures in Cases 1 and 2 further indicate that successful negotiation management requires a shared assessment that incorporates a variety of input. This entails proactive engagement with stakeholders to ensure issues are identified in a holistic and inclusive manner. This then lays a firm foundation for change, which can be validated by expert opinions by way of open and accessible technical discussions. As part of this process, stakeholders must be assured that nothing is agreed until everything is agreed. The incorporation of expert opinions legitimises discussions and validates the case for intervention. However, stakeholders must be able to interact with one another and exchange perspectives as to how to frame the instrument in question. Throughout this procedure, areas of disagreement should be scoped out and the treasons behind them identified and addressed, placing all views on an equal footing and validity.

A case study: the OECD Recommendation on Artificial Intelligence

The development of the Recommendation was participatory in nature, incorporating input from a broad range of sources throughout the process. In May 2018, the CDEP agreed to form an expert group to scope principles to foster trust in and adoption of AI, with a view to developing a draft Council Recommendation in the course of 2019. The AI Group of experts at the OECD (AIGO) was subsequently established, comprising over 50 experts from different disciplines and different sectors (government, industry, civil society, trade unions, the technical

community and academia) – see http://www.oecd.org/going-digital/ai/oecd-aigo-membership-list.pdf for the full list. Between September 2018 and February 2019 the group held four meetings: in Paris, France, in September and November 2018, in Cambridge, MA, United States, at the Massachusetts Institute of Technology (MIT) in January 2019, back to back with the MIT AI Policy Congress, and finally in Dubai, United Arab Emirates, at the World Government Summit in February 2019. The work benefited from the diligence, engagement and substantive contributions of the experts participating in AIGO, as well as from their multi-stakeholder and multidisciplinary backgrounds. Drawing on the final output document of the AIGO, a draft Recommendation was developed in the CDEP and with the consultation of other relevant OECD bodies. The CDEP approved a final draft Recommendation and agreed to transmit it to the OECD Council for adoption in a special meeting on 14–15 March 2019. The OECD Council adopted the Recommendation at its meeting at Ministerial level on 22–23 May 2019.[13]

It is also crucial, when seeking to develop trust between stakeholders, to ensure the underlying procedure is transparent. An opaque methodology, as had been the public perception regarding Case 3, is polarising and hinders consensus building. The focus should therefore be on openness. This however should be done with care and consideration, as past practice shows that systematically publicising each iteration, text or position often leads to rigidity in positions or favours minimum common denominator which is counterproductive. The type of openness advocated here is one within the working method itself, namely the need to ensure clarity in the dialogue between stakeholders. This process must, by extension, embrace the fact that a number of issues simply cannot be addressed effectively in a binary manner. Consensus cannot be reached with an approach that frames dialogues within a "right or wrong" or "fail or pass" measurement. Acknowledging that fact through an open process which factors in differences in opinions will engender support in the underlying instrument.

With respect to human rights in corporate practice specifically, we are not starting from scratch. Existing non-legally binding instruments have been developed through intergovernmental discussions as well as through dialogue between NGOs, corporates and civil society. This process would benefit from the abovementioned approach.

As already discussed, experience shows that, more often than not, a bottom up is more effective than a top down one. The initial development of a legally binding instrument on human rights could be articulated in three phases. First, it is important for intergovernmental and political input to be provided, including the definition of some general objectives and a transparent description of the working methodology. Second, the process must reflect a multi-stakeholder approach, as had been done with the OECD work on artificial intelligence mentioned above. Third, technical work must be consolidated into a coherent draft for open discussion. The draft could contain options, questions and alternatives that can constitute the focus of, and base for, discussion.

The outcome of discussions should not be prejudged in particular given that the proposed legally binding instrument will in all likelihood provide for a certain degree of flexibility. This flexibility, could come by way of provisions with differing degrees of "legally binding" nature.

Thus, Case 1 focused on a fundamental principle of "functional equivalence", being one setting the outcome to be achieved but leaving the countries to determine how to reach it. This was a particularly successful model that enabled countries the requisite freedom and flexibility to achieve the Anti-Bribery Convention's objectives within their own domestic legal systems. We must also take into account provisions containing options and/or alternatives, as well as those encouraging countries but not prescribing them directly. As part of this process, it is also key to define clearly the relevant targets and goals to be addressed by the relevant frameworks.

Case 2, on the other hand, put the accent on provisions containing options (opt in or opt out) and/or alternatives as well as on setting out provisions within the Treaty identified as "minimum standards".

Case 3 was built on a different structure composed of a set of prescriptive provisions and principles but allowing in some cases for exceptions or derogations.

In all cases while introduction of a binding framework would be an important achievement, effective implementation of the instrument would be key. The success of Cases 1 and 2 is also due in large part to the fact that both enshrine a credible mechanism to monitor their implementation. It is far more effective to have a balanced legally binding instrument that contains a credible monitoring system, than an allegedly strong instrument on paper with no follow up.

3. How can the G7 help build broad acceptance and constructive engagement by all parties in discussions about a legally binding standard or instrument in the area of business and human rights

First and foremost G7 members should collectively agree on a common objective, one which can be spelled out clearly and publicly, through a joint statement/declaration. This would kick-start intergovernmental discussions between G7 members and ultimately establish a foundation upon which the G7 can expand and act with broader focus. A joint front on a collective objective that is articulated clearly and publicly would pave the way for engagement with other stakeholders, including non-G7 members, civil society and NGOs.

The G7, could certainly act as facilitator, a provider of expertise in partnership with research and academia centres in the search for consensus. In this way, the G7 could position itself as the vehicle fostering open dialogue as to how best to protect human rights in business practice and value chains.

The G7 could also promote a process focused on ensuring an inclusive multi-stakeholder approach.

This could be done through the setting up of a multi-stakeholder "task force" taking a bottom-up approach. The task force could be invited to provide the G7 (and possibly the international community at large) with an assessment on pertinent themes and topics to inform the potential framework being discussed. This would include current guidance and frameworks, points of improvements or clarification, areas for convergence and topics for further discussion. The open and inclusive multi-stakeholder "task force" could inform intergovernmental discussions while not impinging on the necessary negotiation process. As part of this, a representative set of relevant stakeholders should be invited ensuring that the discussions are broadly inclusive and capture relevant groups.

At the same time the G7 could collectively encourage all G7 members to replicate the multi-stakeholder approach domestically as well as opening lines of communications with non-G7 members.

Last but not least, the G7 could solemnly reaffirm the imperative of the State duty to protect and the necessity to provide a regulatory and law enforcement framework designed to facilitate and promote the respect of human rights by business.

Conclusion

With respect to the final outcome of ongoing or future discussions "towards an internationally accepted binding standard on business and human rights", and without prejudging them in any way, this paper has sought to present some of the features of a potential legally binding instrument, as follows:

- balanced and allowing for some flexibility if and when needed;
- reflecting as much as possible a bottom up approach;

- built upon and reinforcing the existing non-legally binding instruments;
- complemented by a monitoring mechanism designed to ensure a "level playing field";
- complemented by some form of intergovernmental commitment to provide a regulatory framework designed to facilitate and promote the respect of human rights by business.

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Endnotes

1 The author would like to recognize the input of Ludovico Giannotti and other Paul Hastings associates.

2 https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

3 https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

4 https://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf

5 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

6 https://www.oecd.org/corporate/mne/

7 https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm

8 For example the High Level Principles for the effective protection of whistleblowers https://www.bmj.de/SharedDocs/Downloads/EN/G20/G20_2019_High-Level-Principles_Whistleblowers.pdf?__blob=publicationFile&v=1

9 'The Effect of the OECD Convention in Reducing Bribery in International Business', Subarna Samanta and Rajib Sanyal, Global Business and Management Research: An International Journal Vol. 8, No. 1 (2016)

10 Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention, Nathan M. Jensen and Edmund J. Malesky, International Organization, Vol. 72, No. 1 (2018)

11 Information sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, OECD. https://www.oecd.org/gov/ethics/2406452.pdf

12 https://www.europeantax.blog/post/102h9sq/the-time-it-takes-to-update-tax-treaties-the-case-of-the-founding-oecd-member-co

13 https://oecd.ai/en/ai-principles ..."The development of the Recommendation was participatory in nature, incorporating input from a broad range of sources throughout the process"

Annex: A preliminary analysis of strengths and weaknesses of some OECD processes

1. OECD Anti-Bribery Convention

What has been the benefit of a legally binding standard or instrument at the international level?	• Empirical evidence that the level and growth of corruption has been altered by the adoption of the Convention.	• http://www.natemjensen.com/wp-content/uploads/2014/09/MaleskyJensen.pdf
	• It focuses exclusively on the supply side of bribery. • Parties to the Convention commit to criminalize the bribery of foreign public officials under their laws and to investigate, prosecute, and sanction this crime. • The enforcement of the Convention is implemented and monitored by the OECD Working Group on Bribery through a peer-review monitoring system.	• https://biac.org/wp-content/uploads/2020/10/FIN-09-2020-Overview-OECD-AB-work-2.pdf
	• Widely implemented by 44 countries, incl. 7 non OECD members. • OECD note a profound impact, with (within 20 years of implementation) about ~800 companies and individuals sanctioned for foreign bribery, ~125 individuals incarcerated, and 500+ investigations underway across 30 countries. • Harmonisation of frameworks leading to greater collaboration between signatories (of which there are now 44) – with "functional equivalence" recognizing the various legal systems of each signatory. • Strong on-going influence and maintenance/improvement of standards through The OECD Working Group on Bribery's peer-review pressure on signatories and recommendations.	• https://www.oecd.org/gov/ethics/2406452.pdf • https://baselgovernance.org/blog/20-years-oecd-anti-bribery-convention-nudging-good

What are the critical success factors with regard to both content and process in building consensus around such standards or instruments?	• The language in the legislation was very specific and tailored to ABC. • The offence regime was specific, and provided clear and well regulated definitions for certain corrupt acts. • Anti-corruption is business friendly, as corruption is anti competitive.	• https://biac.org/wp-content/uploads/2020/10/FIN-09-2020-Overview-OECD-AB-work-2.pdf
	• Key factors contributing to success have included: 1. **Public Support:** both from a public and private perspective. Key component to introduction was "heightened public awareness" on bribery/corruption and, given rapid globalization and international operations of companies, a "growing awareness unilateral measures could have a limited impact". The introduction of ABC controls noted to "strike a chord with the public sector" 2. **Consensus:** there was a noted "consensus on a shared objective" amongst stakeholders, including companies, who identified a potential issue, from a reputational and economic perspective, of not being seen to take steps to tackle corruption and bribery within organisations. 3. **Moderate Scope:** there is a noted reluctance between states to "negotiate treaties that build in strong sanctions" so the limited scope of application is important. 4. **Freedom:** the "functional equivalence" approach to enforcement has been praised and lead to a strong collaborative approach, with "a co-operative, problem-solving approach rather than coercive mechanisms for enforcement". Therefore, the OECD non-prescriptive approach has been praised in allowing states to "transpose agreed standards in line with their own legal transaction with clear and focused controls". 5. **Transparency:** key successful factor was the focus of the OECD on developing transparency in the framework with freedom for strategic interaction in exchange of information and expertise. This allowed the development of a "tightly woven fabric that shape relations with one another".	• "Domestic Impact Of The Management Process Under The OECD Anti-Bribery Convention" • https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1968&context=jil • https://baselgovernance.org/blog/20-years-oecd-anti-bribery-convention-nudging-good
What have been the failures and pitfalls?	• Bribery appeared to increase among non-subject nations after the ABC was adopted, and is now referred to as regulatory leakage. • Issues noted in enforcement of ABC. Transparency International Report noted that only 4 countries (US, UK, Switzerland and Israel) were seen to actively enforce against foreign bribery and that active enforcement against foreign bribery significantly decreased since 2018 in OECD countries and other major exporters. • Several signatories are shown to implement the rules but not enforce them. • Issues also related to the limited initial scope and the subsequent need to expand on the offences. General recommendations from commentators on how to expand the scope of offences.	• https://sites.duke.edu/malesky/files/2020/11/OECD-ABC.FINAL_.pdf • https://transparencycanada.ca/news/worlds-largest-exporters-fail-to-punish-bribery-in-foreign-markets

2. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

What has been the benefit of a legally binding standard or instrument at the international level?	• Key benefit here was efficiency from three perspectives: 1. **Time:** a recent empirical study concluded that it takes founding OECD member countries on average over 18 years to update their bilateral tax treaty network – the Multilateral Convention achieved this in a significantly shorter timeframe. 2. **Alignment:** having the relevant multilateral agreements within one master instrument harmonises the approach, particularly in light of the current tax treaty network of over 3,000 treaties. 3. **Flexibility:** facilitates amendments/negotiations of future changes or revisions. • Key benefit was a clear message to the public – a coherent and collaborative approach to tackle tax evasion. This was particularly important given political/public sensitivity on this topic, as the MLI was negotiated as part of the OECD/G20 BEPS Project, which got underway around the time of the Offshore Leaks in 2013.	• https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm • https://www.europeantax.blog/post/102h9sq/the-time-it-takes-to-update-tax-treaties-the-case-of-the-founding-oecd-member-co
What are the critical success factors with regard to both content and process in building consensus around such standards or instruments?	• Key components to its success were as follows: 4. **Scope:** the MLI aims were distinctively targeted, it sought simply to mitigate specified tax loopholes and country-to-country inconsistencies to ensure alignment such that corporations could not shift profits from a country with a high corporate tax rate to countries with a low tax rate. 5. **Flexibility:** the Convention was not prescriptive in its approach, instead it presented flexibility in its implementation (i.e. giving signatories choices as to which BEPS measures to adopt predicated upon a set of minimum standards). 6. **Public Pressure:** strong public focus on tax evasion in light of various scandals, starting when the OECD/G20 BEPS Project (i.e. Offshore Leaks) was initiated and carrying on during its implementation (i.e. Panama Papers in 2017 and Pandora Papers in 2016). 7. **Political/Economic:** there was a strong consensus from a political perspective for governments to be seen to crack down on tax evasion given the negative impact on economics and dynamics of fair taxation within society. There was also a broader view that a multilateral agreement would facilitate trade and investment, provide greater predictability and fairness for taxpayers w/r/t their tax obligations in foreign jurisdictions.	• https://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf • https://www.oireachtas.ie/en/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/
What have been the failures and pitfalls?	• Criticism lies in the actual intended effect of the Convention/Treaty itself, given that to broaden its appeal to signatories it does not include a mandatory framework or enforcement mechanism and does not require jurisdictions to commit to eliminating double non-taxation scenarios.	• https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1843&context=njilb

3. Proposed Multilateral Agreement on Investment 1998

Requests	Response	Resources
What has been the benefit of a legally binding standard or instrument at the international level?	• The genesis of this proposal was to "provide a broad multilateral framework for international investment with high stadards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries".	• https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm
What are the critical success factors with regard to both content and process in building consensus around such standards or instruments?	N/A	
What have been the failures and pitfalls?	• **Negative Public Response:** there was a strong backlash from civil society groups and developing countries over fears that the agreement would negatively impact foreign investors. There was in fact not just a lack of public/company support. Governments were actively disincentivised from proceeding from Lobbying efforts and global campaigns against it. • **No Consensus:** critics noted fundamental, substantive and irreconcilable differences between negotiating parties in how the Multilateral Agreement should take place. • **Lack of NGO Support:** core NGOs were not consulted in the negotiations, leading to a significant campaign against it. • **Lack of Transparency:** academics have noted that the exclusion of key actors in the negotiations, including non-OECD countries, led to a "negative dynamic of opposition and a spiral of non-cooperation which several damaged the potential for international outcome". • **Benefit Analysis:** it was viewed that the implementation of the proposal went against "political tendency towards economic liberalization" and the process of globalization underway at the time. • **Broad Agenda:** the proposal when announced was deemed to be overly ambitious and broad. A lack of specificity meant that the potential impact of such Agreement could have far-reaching and adverse consequence. As a result, this created a lot of public anxiety and opposition.	• http://www.unctad.org/en/docs//iteiit9v7n3_en.pdf • https://archive.org/details/globalpoliticale0000cohn • https://web.archive.org/web/20120214110423/http:/www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf • https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf