



## Columbia FDI Perspectives

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### **Responsible business conduct: Re-shaping global business**

by

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The *Guidelines for Multinational Enterprises* of the Organisation for Economic Co-operation and Development (OECD) is the Organisation's flagship instrument for responsible business conduct. The *Guidelines* provide non-binding recommendations to multinational enterprises (MNEs), drawn up and implemented by governments. Updated in 2011, they consist of principles and standards in such areas as sustainable development, governance, disclosure, human rights, employment and industrial relations, the environment, anti-corruption, consumer interests, and taxation. The 42 adhering governments are required to promote the *Guidelines* and to contribute to the resolution of issues arising under the *Guidelines*, including by setting up a complaints mechanism -- "National Contact Points" (NCPs) -- to which trade unions and non-governmental organizations (NGOs) are able to submit specific instances concerning alleged breaches of the *Guidelines*.

Manfred Schekulin stated that the *Guidelines* are the most "comprehensive government-backed" instrument for responsible business conduct and that the recent *Update* achieved its objective of "redefining the 'gold standard.'"<sup>1</sup>

I agree that the *Guidelines* are special. The government-backed complaints mechanism sets them apart from other instruments, significantly increasing their potential to close global governance gaps and to ensure that the fruits of FDI are more equally shared among countries and between labor and capital. However, this potential has not been fulfilled. While, at their best, NCPs have contributed to the timely and effective resolution of issues raised under the *Guidelines*, at their worst, NCPs -- shielded from outside scrutiny -- have failed even to answer their mail.

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<sup>1</sup> Manfred Schekulin, "Shaping global business conduct: The 2011 update of the OECD Guidelines for Multinational Enterprises," *Columbia FDI Perspectives*, No. 47 (September 26, 2011).

I also agree that the *Update* delivered significant improvements in the content of the *Guidelines*, in particular by establishing due diligence as an over-arching principle for responsible business conduct, requiring enterprises to “identify, prevent, mitigate and account for how they address their actual and potential adverse impacts;”<sup>2</sup> clarifying that the *Guidelines* apply to the full range of business relationships, including throughout supply chains; adding a chapter on human rights; and requiring companies to pay best possible wages at least adequate to meet the basic needs of workers and their families. Importantly, the Council Decision on the Implementation Procedures also included a new instruction to governments to make available the necessary human and financial resources so that NCPs “can effectively fulfil their responsibilities.” However, overall, the *Update* did not do enough to strengthen the rules governing the functioning of NCPs, falling short in two key areas:

- **Weak authority of the NCPs.** The best performing NCPs play two distinct roles: offering their good offices for mediation and, where this fails, making an assessment of a company’s observance of the *Guidelines* (determination). These mediation and determination roles are inter-dependent: mediation is the “carrot” and the threat of determination the “stick” to bring parties to the NCP mediation table. While the *Update* strengthened mediation, it failed to strengthen determination, thus leaving the NCP system weak.
- **Lack of oversight.** Peer review, pioneered by the OECD, is an examination of a government’s performance by its peers; it derives its strength from peer pressure. The peer review system of the *OECD Anti-bribery Convention* is widely regarded as a model, underpinning the strength of OECD’s flagship anti-corruption instrument. Yet, despite this best practice, the *Update* rejected mandatory peer review in favor of voluntary peer evaluation. It also failed to require NCPs to set up steering or review boards so as to strengthen national level oversight.

The *Update* has generated high expectations. For the *Guidelines* to be regarded as the “gold standard,” however, by those workers and communities around the world whose lives and livelihoods are affected by MNEs, the *Guidelines* have to make a difference on-the-ground. This depends on NCPs significantly improving their performance: namely handling cases in a transparent, impartial, predictable, and equitable manner. Now that the latest round of multilateral negotiations is over, adhering governments need to address the remaining deficits. In particular, they should meet their commitments on resources, strengthen their determination role and set up national oversight mechanisms, in line with NCP best practice, and sign up for rigorous transparent and participatory country peer review, based on OECD best practice. And the OECD should take steps to strengthen accountability and transparency by expanding the reporting requirements of NCPs to reflect their new commitments and procedures and by introducing more regular reporting by NCPs at meetings and on-line.

It is essential that governments meet their responsibilities to ensure that the updated *Guidelines* fulfil their potential to promote responsible business conduct in a global context. I join Manfred Schekulin in calling for a sustained effort on the part of the OECD and adhering governments to close global governance gaps that leave millions of women and men around the world working in conditions of poverty, hardship and insecurity and denied access to their fundamental rights. This is long overdue.

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<sup>2</sup> “Commentary on general policies,” in *OECD Guidelines for Multinational Enterprises, 2011*,” para. 14, available at [http://www.oecd.org/document/28/0,3746,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html).

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The Vale Columbia Center on Sustainable International Investment (VCC – www.vcc.columbia.edu), led by Dr. Karl P. Sauvant, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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