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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Jennifer Reimer (FDIPerspectives@gmail.com)

<u>Towards the successful implementation of the updated *OECD Guidelines for Multinational Enterprises*</u>

by
Tadahiro Asami*

The Business and Industry Advisory Committee to the OECD (BIAC) has accepted[1] the updated *OECD Guidelines for Multinational Enterprises* (*Guidelines*), adopted on May 25, 2011 after a series of negotiations and consultations among members of the Organisation for Economic Co-operation and Development (OECD), adhering governments, BIAC, the Trade Union Advisory Committee to the OECD, and OECD Watch, an international network of civil society organizations. The *Guidelines* are the most comprehensive government-endorsed code of responsible business conduct. The *Update* upheld the voluntary and non-legally binding character of the *Guidelines*, and while the new text introduces important new elements, the *Update* is very carefully formulated and its changes are accompanied by extensive conditionalities.[2]

The new *Guidelines* more clearly define responsible business conduct of multinational enterprises (MNEs), particularly in the area of human rights. The incorporation of a human rights

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* Tadahiro Asami (asami@biac.org) is Secretary General of the Business and Industry Advisory Committee to the OECD (BIAC). The view contained here is his personal assessment. The author is grateful for Winand Quaedvlieg, the former Chairman of, and Stephen Canner, Chairman of the BIAC Investment Committee for their input. The author also wishes to thank Alberto Echarri Ardanaz and Soichiro Sakuma for their helpful comments on a previous version of this text. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] See BIAC, "BIAC statement on the adoption of the update of the OECD Guidelines for multinational enterprises at the OECD Ministerial Council meeting on 25-26 May 2011;" see USCIB, "Business calls on OECD to promote updated Guidelines for MNE's in non-adhering countries," (press release May 25, 2011) available at http://www.uscib.org/index.asp?documentID=4103.

[2] This Perspective is in response to Manfred Schekulin, "Shaping global business conduct: The 2011 update of the OECD Guidelines for Multinational Enterprises," Columbia FDI Perspectives, No. 47, September 26, 2011; and John Evans, "Responsible business conduct: Re-shaping global business," Columbia FDI Perspectives, No. 50, November 7, 2011.

chapter in the *Guidelines* represents a significant milestone. The OECD and United Nations Special Representative John Ruggie worked together to draft this chapter. As a result, the *Guidelines* fully reflect the *Guiding Principles on Business and Human Rights,*[3] which were unanimously endorsed by the United Nations Human Rights Council in June 2011.

A key provision that has been newly introduced in the *Guidelines* states that MNEs should avoid causing or contributing to adverse impacts on the social, environmental and other interests to which the *Guidelines* relate. This provision covers MNEs' activities and also the direct involvement of MNEs in activities in the supply chain.[4] When an adverse impact occurs to which MNEs did *not* contribute, MNEs are expected to examine possibilities to avoid such impacts if there is a direct linkage between the impacts and the activities of MNEs as a consequence of a business relationship. However, this is *not* intended to shift responsibility from the entity causing an adverse impact to the MNE with which it has a business relationship: the adverse impact provision is only applicable if there is at least some form of direct involvement of the MNE in the adverse impact.

A new provision expects companies to carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts as mentioned above. This new provision is applicable to all chapters, apart from those dealing with science and technology, competition and taxation. The *Guidelines* do not formulate any procedural requirements for due diligence, except for in the human rights field.

The procedural aspects of the "National Contact Points" (NCPs) have been substantially improved, for example by establishing an indicative timeframe, the availability of adequate human and financial resources and measures to avoid unmeritorious claims or frivolous campaigns. However, NCPs' role as mediators to resolve potential issues remains unchanged. No (quasi-judicial) prerogative to formulate a judgement on the behavior of companies was introduced.

From the business point of view, the success of the new *Guidelines* will depend primarily on two factors.

- First, success depends on the extent to which the *Guidelines* are incorporated or referred to in MNEs' own codes of conduct for improving corporate responsibility. The *Guidelines* expect the NCPs to play a role in the promotion of the *Guidelines* and also require the OECD Investment Committee to develop initiatives for the effective implementation of the *Guidelines*. BIAC is willing to contribute to these efforts by cooperating with the OECD.
- Second, the extent to which emerging markets adhere to the *Guidelines* is fundamental to securing a global level playing field. The *Guidelines* are currently adhered to by the 34 OECD members and 8 non-OECD countries, but not by major emerging markets such as

[3] Guiding Principles on Business and Human Rights: Implementing the Guiding Principles on Business and Human Rights, General Assembly, UN Doc. A/HRC/17/31, March 21, 2011.
[4] The *Guidelines* are not specific as to the tier/level in the supply chain.

China, India, Indonesia, Russia, or South Africa. The OECD must undertake determined efforts to encourage emerging markets to adhere to the *Guidelines*.

The *Guidelines* form part of the *OECD Declaration on International Investment and Multinational Enterprises* (*Declaration*). Business considers this link essential, precisely because the *Declaration* also assures that adhering governments promote an open and predictable investment climate by granting MNEs national treatment and avoid conflicting requirements on them. Such a commitment by governments is essential for business to promote responsible business conduct in accordance with the provisions of the *Guidelines*. It is these mutual commitments by governments and business that make foreign direct investment prosper.

For further information please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, FDIPerspectives@gmail.com or jreimer@lyphlaw.com.

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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