

Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises – a Public International Law Perspective

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A. Introduction

Since the 1990s it is possible to witness, in the multiplication of inter- and transnational actors, an increasing diversity in international norm-making processes as well as a growing variation in enforcing these norms, generically labeled under the term “global governance.”¹ The actions of these private, hybrid or intergovernmental actors on the global level are increasingly seen as equivalent to the exercise of political authority formerly reserved for the state.² As in the domestic context, the exercise of such authority raises questions about the procedural guarantees that anyone affected by this action should enjoy. The Organization for Economic Cooperation and Development (OECD) has evaded intensive scholarly attention from the global governance perspective thus far, although by now it is evident that it strongly contributes to this phenomenon through its various activities.³ The OECD Guidelines for Multinational Enterprises (Guidelines) are but one area in which the OECD is said to assume global governance functions by strongly influencing corporate behavior.⁴ Critique on the procedural aspects of the implementation

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¹ KARSTEN NOWROT, *Global Governance and International Law*, 33 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (BTW) 1, 5-12 (2004).

² STEVEN WHEATLEY, *Democratic governance beyond the state: the legitimacy of non-state actors as standard setters*, in NON-STATE ACTORS AS STANDARD SETTERS 215, 220 (Anne Peters et. al. eds., 2009).

³ See the contributions in: RIANNE MAHONE & STEPHEN MCBRIDE, *THE OECD AND TRANSNATIONAL GOVERNANCE* (2008); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1050 (2002-2003); Heather Bowman, *If I Had a Hammer: The OECD Guidelines for Multinational Enterprises as Another Tool to Protect Indigenous Rights to Land*, 15 PAC. RIM L. & POL'Y J. 703, 709 (2006); JAMES SALZMAN, *Decentralized administrative law in the Organization for Economic Cooperation and Development*, 68 LAW & CONTEMP. PROB. 189 (2005).

⁴ Donald J. Johnston, *Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 243, 247, 250 (Ramon Mullerat ed. 2005); Gefion Schuler, *Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises*, 9 GERM. L. J. 1753, 1755-1756 (2008).

is widespread in the literature.⁵ On 25 May 2011, as part of the 50th anniversary of the OECD deliberations on an update of the Guidelines, an adoption of a new version of the Guidelines took place.⁶ The present article makes use of this historic moment in order to analyze whether the implementation procedures of the Guidelines legally reflect its categorization as an example for the exercise of public authority on the international level.

In a first section the content and legal nature of the Guidelines as well as its implementation procedures are described (B), followed by an analysis of public international law rules regulating the exercise of public authority by International Organizations (IO). This section will show that binding principles already exist, that others are currently emerging, and that the principles on the accountability of IOs elaborated by the International Law Association (ILA) present the most valuable combination of these principles *de lege lata* and *de lege ferenda* (C). The third part applies the relevant standards to the implementation mechanisms of the Guidelines (D) before the article is closed by summarizing the performance of the OECD in this regard (E).

B. Content, Implementation and Legal Nature of the Guidelines

I. Elaboration, Content and Implementation of the Guidelines

The OECD Guidelines were created in 1976, within the first wave of international regulation on corporate behavior in the mid 1970s.⁷ The Guidelines were adopted by the OECD Council, within the broader framework of the OECD Declaration on International Investment and Multinational Enterprises, as governments' recommendations that directly addressed the business society.⁸ "They provide voluntary principles and standards for responsible business conduct consistent with applicable laws."⁹

⁵ See Section D of this article.

⁶ See OECD, *OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context* [hereinafter "OECD Guidelines"] (2011), available at: http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html (last accessed: 23 December 2011).

⁷ Other regulation attempts include the UN Resolution on Measures Against Corrupt Practices of Transnational and Other Corporations, their Intermediaries and Others Involved, UN G.A. Res. 3514 (XXX) of 15 December 1975 and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, available at: http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (last accessed: 23 December 2011).

⁸ *OECD Guidelines*, *supra* note 6, Preface at para. 1.

⁹ *Id.* at Preface at para. 1(2).

Regarding the substance of the Guidelines,¹⁰ they are divided into eleven parts dedicated to concepts and principles, general policies, disclosure, a newly included chapter on human rights, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation. Several of these parts refer explicitly or implicitly to other norms of an international character,¹¹ which strengthens their acceptance as a global standard. The provisions on employment and industrial relations for example, have as their base the ILO norms on the same subject matter, although some authors have highlighted various differences and deviations within the different legal regimes.¹² The same holds true for the environment chapter, or the part on combating bribery that largely draws on other international instruments in the field.¹³ Also, the newly adopted chapter on human rights now specifies the human rights instruments that are to be respected.¹⁴

The implementation procedures are laid down in a binding decision of the OECD Council and in an attached procedural guidance. The Investment Committee (IC), the OECD organ responsible for the implementation and interpretation of the Guidelines was to take due account of this guidance in fulfilling its responsibilities for the effective functioning of the Guidelines.¹⁵ The IC itself also issued a commentary to the norms on the implementation procedure, which are not part of the Council Decision, but an authoritative statement for the National Contact Points (NCP) as sub-organs of the IC.¹⁶ The Council decision obliges

¹⁰ For an assessment of the quality of the update as concerns the substantial aspects see *OECD Watch Statement on the Update of the OECD Guidelines for MNEs – Improved Content and Scope, but Procedural Shortcomings Remain* (2011), available at: http://oecdwatch.org/publications-en/Publication_3675 (last accessed: 23 December 2011).

¹¹ Implicit reference means an elucidation of the Guideline provisions within the commentaries issued by the Investment Committee or in the preface of the Guidelines; *OECD Guidelines*, *supra* note 6, Commentary on Chapter IV Human Rights, at para. 39; Preface of the Guidelines, *supra* note 6, at para. 8.

¹² REINGARD ZIMMER, SOZIALE MINDESTSTANDARDS UND IHRE DURCHSETZUNGSMECHANISMEN - SICHERUNG INTERNATIONALER MINDESTSTANDARDS DURCH VERHALTENSKODIZES? (Social Minimum Standards And Their Enforcement Mechanisms – International Assurance, Minimum Standards Of Conduct?) 86-90 (2008).

¹³ Concerning the environment see Michael Klinkenberg, *Die Leitsätze der OECD für multinationale Unternehmen - ein Vorbild für die neue Welthandelsrunde?* (The OECD guidelines for multinational enterprises - a model for the new world trade round?), 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT (ZVR) 421, 424-426 (2002).

¹⁴ The commentary mentions the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work, UN instruments on the rights of indigenous peoples; persons belonging to national or ethnic, religious or linguistic minorities; women; children; persons with disabilities; and migrant workers and their families as well as the standards of international humanitarian law; *OECD Guidelines*, *supra* note 6, Commentary on Chapter IV Human Rights at para. 39.

¹⁵ *OECD Guidelines*— Council Decision, *supra* note 6, at Part. I, National Contact Points 6.

¹⁶ All three documents are contained in the updated version of the Guidelines: Commentary on the Implementation Procedures, *supra* note 6, at 77-89.

member states to set up NCPs responsible for promotional activities, handling of enquiries and the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, in order to further the effectiveness of the Guidelines.¹⁷ The organization of the NCPs follows the idea of functional equivalence and of granting flexibility to the adhering countries, as long as they act within the framework of the fundamental principles of visibility, accessibility, transparency and accountability.¹⁸ An NCP may be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organized as a cooperative body, including representatives of other government agencies. Representatives of the business community, employee organizations and other interested parties may also be included.¹⁹ Although the number of those NCPs that involve other actors increased in the last 10 years, the vast majority still consists of only government officials. However, the absence of formal inclusion of civil society representatives does not necessarily mean that they are not consulted at all, as many of the government NCPs do involve them on a regular but informal base.²⁰

Besides the promotional tasks, the NCP's major function is the handling of specific instances of alleged violations of the Guidelines by MNEs. The NCP will offer a forum for discussion and assist the business community, employee organizations and other parties concerned in dealing with the instances raised in an efficient and timely manner and in accordance with applicable law.²¹ An instance can be instigated by anyone who suspects a violation of the Guidelines, including civil society organizations. Once an issue has been raised, the NCP will assess whether it merits further examination. If this is the case, the "good offices" phase begins, and the NCP will consult the parties, and where relevant, will *inter alia* offer and – with the agreement of the parties involved— facilitate access to consensual and non-adversarial means such as conciliation or mediation to assist in resolving the issues.²² In case an agreement is obtained, the NCP shall issue a report

¹⁷ OECD Guidelines, *supra* note 6, at Part I OECD Council Decision, National Contact Points 1.

¹⁸ OECD Guidelines, *supra* note 6, at Part I, Procedural Guidance— National Contact Points.

¹⁹ *Id.* at A.2. In 2009 17 NCP were organized as single government departments, 11 organized as multiple government departments, 1 bipartite NCP, 9 tripartite NCP's, one quadripartite NCP and one mixed structure of independent experts and governmental representatives. See for detailed information on each NCP: Chair of the Meeting on the Activities of National Contact Points, *Summary Report 4* (2009), <http://www.oecd.org/dataoecd/41/25/43753441.pdf> (last accessed: 23 December 2011).

²⁰ Chair of the Meeting on the Activities of National Contact Points, *Summary Report 3* (2001), available at: <http://www.oecd.org/dataoecd/62/58/2438852.pdf> (last accessed: 23 December 2011), *e.g.* the German "Arbeitskreis OECD Guidelines" involving civil society representatives. The Arbeitskreis delivers general information on current developments without however discussing concrete questions arising within specific instances.

²¹ OECD Guidelines—Procedural Guidance, *supra* note 6, at Part. I. C, Implementation in Specific Instances.

²² *Id.* at 2(d).

containing a description of the issues raised, the procedures the NCP initiated and the date of the agreement.²³ If the parties involved do not reach an agreement, the NCP will issue a statement and make the appropriate recommendations for the implementation of the Guidelines.²⁴

The next level of implementation is carried out by the IC, which carries out a coordinating role for the Guidelines as well as a supervisory function. As a major competence, the IC is required to consider any substantiated submission by an adhering country, an advisory body or, as of 2011, by OECD Watch, on whether an NCP is fulfilling its responsibilities with regard to its handling of a specific instance, or with regard to the correctness of an NCP's interpretation of the Guidelines.²⁵ Advisory bodies of the OECD that are relevant in the field of the Guidelines are the Business and Industry Advisory Committee (BIAC), and the Trade Union Advisory Committee (TUAC).²⁶

II. Legal Nature of the Guidelines

The Guidelines are not a treaty in the sense of Art. 38 lit. (a) of the ICJ Statute. Moreover, they have not yet clearly developed into customary international law, although this is tentatively advocated in the literature.²⁷ They are thus soft-law and their application should not be subject to any concerns on procedural legitimacy for their lack of binding force and direct effect. Given the unsatisfactory character of this generic doctrinal classification, more constructive theoretical approaches do classify OECD activities in the realm of the Guidelines as legally relevant. From an economic and system-theory based approach, the Guidelines are said to clearly develop into a complex of norms displaying characteristics of a legal system, lacking only the necessary second order observation mechanisms.²⁸ The OECD and its Guidelines are also examined as part of the category of

²³ *Id.* at 3(b).

²⁴ *Id.* at 3(c).

²⁵ *Id.* at Part. II, Investment Committee, 2. (a), (b) and (c).

²⁶ Both committees are independent umbrella organizations consisting of either domestic business organizations or domestic trade unions that have a consultative status with the OECD and its committees. For more information see <http://www.tuac.org/en/public/index.phtml> (last accessed: 23 December 2011) and www.biac.org/ (last accessed: 23 December 2011) at 31.

²⁷ Yann Queinnec, *The OECD Guidelines for Multinational Enterprises - an Evolving Legal Status*, available at: http://asso-sherpa.org/sherpa-content/docs/programmes/GDH/Soft_law/Principes_directeurs_de_l_OCDE_Un_statut_juridique_en_mutation.pdf (last accessed: 23 December 2011). Queinnec argues that the core rules of the CSR norm complex have acquired customary international law status. As part of this process also, the Guidelines are partially acquiring customary international law status.

²⁸ Galf P. Calliess & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 *RATIO IURIS* (RJ) 260, 276 (2009).

international actors exercising international public authority,²⁹ and within the focus of the Global Administrative Law approach.³⁰ The latter approaches analyze inter- and transnational actors that assume legal roles that were in the past, with some rare exceptions only attributed to the state in the domestic context. The public law approach articulated by Bogdandy *et. al.* is particularly useful here.³¹ They claim that a measure displays international public authority when it unilaterally shapes the legal or factual situation of a person, independent of whether the measure is binding or not. It is international when it is based on a competence instituted by an international act (dependent on the authors of a measure), and public when it serves a public interest.³² If the Guidelines meet these criteria, their implementation is an exercise of international public authority, making a claim to procedural guarantees perfectly convincing. Starting in reverse order, the determination of the public interest is carried out by reliance on a topical catalogue based on typical instances.³³ Following a more theoretical approach, elaborated in the research on governance in areas of limited statehood, assessing the public character of any measure depends on whether it serves equivalent aims as the state. Measures aimed at the establishment of security, of the security of expectations, of collectively binding decisions, the implementation of those decisions, the limitation of power, the participation in power, economic stability, infrastructure, basic social insurance, public health, education, and securing natural living conditions are then considered as functionally equivalent.³⁴ Among those aims the Guidelines contribute at least to economic stability, infrastructure as well as public health and securing natural living conditions.³⁵ As concerning the second requirement, the Guidelines are an international act, as they are produced by the OECD, which in turn is based on the international Convention on Economic Cooperation and Development. As concerns the unilaterally exercised impact on the legal or factual situation of persons, various arguments can be made in order to attribute this quality to the OECD.

²⁹ Armin von Bogdandy *et. al.*, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERM. L. J. 1375, 1381-1386 (2008). For the OECD Guidelines for Multinational Enterprises see Schuler, *supra* note 4, at 1755.

³⁰ Benedict Kingsbury *et. al.*, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 15 (2005). For the application of this approach to the OECD including its Guidelines for Multinational Enterprises see Salzman, *supra* note 3.

³¹ von Bogdandy *et. al.*, *supra* note 29, at 1381-1386.

³² *Id.* at 1382-1384.

³³ *Id.* at 1384.

³⁴ ANKE DRAUDE, HOW TO CAPTURE NON-WESTERN FORMS OF GOVERNANCE - IN FAVOUR OF AN EQUIVALENCE FUNCTIONALIST OBSERVATION IN AREAS OF LIMITED STATEHOOD 12 (2007).

³⁵ OECD Guidelines, *supra* note 6, at Preface, paras. 4 and 9; General Policies, paras. 1-5.

First, it should be kept in mind that the Guidelines are referring, in large part, to already-existing international standards, of which some present binding law. Secondly, the granting of export credits or other financial support is tied increasingly to the observance of the Guidelines. The strongest linkage can be found in the Netherlands, requiring a declaration from companies that they are aware of the Guidelines and endeavor to comply with them to the best of their ability. In France, Finland, Germany, and Denmark, MNEs applying for and receiving state subsidies have to sign a clause that they are well aware (*avoir pris connaissance*) of the Guidelines. In many other countries, the Guidelines are at least mentioned within the process of granting subsidies to enterprises.³⁶ Taking into account this linkage, it is clear that the Guidelines are not simply voluntary when the enterprise operates with the help of state subsidies.³⁷ This linkage of different government agencies has been strengthened by the new version of the Guidelines, by including a paragraph in the Commentary of the IC indicating that NCPs are encouraged to inform other government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programs.³⁸

An acceptance of the legally binding force of the Guidelines can moreover be seen in the judicial proceedings in the US and in Germany, where public references to a company's adherence to private codes of conduct were considered illegal as long as the companies did not actually comply with these norms.³⁹ Certainly, on this legal track, companies cannot be obliged to comply with a specific code of conduct, but whenever they use it as reputational means, are required to adhere to them. As companies strive for a public image in accordance with the demands of corporate social responsibility by way of private codes, they are trapped by the legal regime of commercial speech. There is no difference in using private codes of conduct, or the OECD Guidelines as regards the requirements established by the national courts. It is even argued that this kind of recognition in commercial speech cases contributes to the genesis of customary international law for MNEs.⁴⁰

³⁶ See for an overview of the different models of linkage: *Annual Report of IC* 21-22 (2010), http://www.oecd.org/document/24/0,3746,en_2649_34889_46530712_1_1_1_1,00.html (last accessed: 23 December 2011).

³⁷ On a possible race to the bottom generated by these different national policies see Mathias Ulbrich, *Enforcing Core Labour Rights through the OECD-Guidelines for Multinational Enterprises? Reflections on the Guidelines' Conciliation Process and the Current Linkage Discussion*, 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES ARBEITSRECHT (ZAIA) 366, 379 (2004).

³⁸ *Commentary of the Investment Committee*, *supra* note 6, at Section I Conclusion of Procedures, at para. 7.

³⁹ On the American case, see Gregory T. Euteneier, *Towards a Corporate "Law of Nations": Multinational Enterprises' Contributions to Customary International Law*, 82 TUL. L. REV. 757, 773-774 (2007); On the German case, see Miriam Saage-Maaß & Anna von Gall, *Fairer Wettbewerb Weltweit! Am Beispiel der "Lidl-Klage"*, (Fairer Competition Worldwide: Using the Example of the "Lidl" Action) 4 Gegenblende (2010), available at: <http://www.gegenblende.de/04-2010> (last accessed: 23 December 2011).

⁴⁰ Euteneier, *supra* note 39, at 777.

Fourth, the compliance pull is fostered through cooperation between the OECD and other organizations. The Global Reporting Initiative (GRI) developed its sustainability reporting framework, of which a due diligence procedure to avoid human rights violations is a relevant part.⁴¹ A specific mention of the OECD Guidelines is not yet included. However, the OECD and GRI signed a Memorandum of Understanding dedicated to mutual cooperation in the next three years, in order to make use of the synergies between the two instruments.⁴² In the same vein, the understanding between the OECD and the International Organization for Standardization (ISO) concluded in 2008 ensures that the ISO Standards on social responsibility take into account and reflect the OECD principles.⁴³ Both liaisons strengthen the regular commitment to the Guidelines by raising their presence in internal company decisions and their external monitoring.

Fifth, the United Nations Security Council applied the Guidelines through the work of the Security Council's Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of wealth in the Democratic Republic of the Congo. Although the Panel clearly states in its reports that the Guidelines confer only a moral constraint on states, the Guidelines are used as a benchmark in order to establish whether a company is acting in conformity with international rules.⁴⁴ The Panel has referred several cases to the NCPs of the United Kingdom, Belgium and Germany,⁴⁵ and the Security Council has endorsed this action in its resolutions and explicitly requested the transmission of relevant information

⁴¹ Global Reporting Initiative, *Sustainability Reporting Guidelines* 32-38, available at: <https://www.globalreporting.org/resource/library/G3.1-Guidelines-Incl-Technical-Protocol.pdf> (last accessed: 23 December 2011); More specifically on human rights reporting in the GRI framework, see *A Resource Guide to Corporate Human Rights Reporting*, available at: <https://www.globalreporting.org/reporting/latest-guidelines/g3-1-guidelines/Pages/Human-Rights-and-Reporting.aspx> (last accessed: 23 December 2011).

⁴² See Press Release, OECD (2010), available at: http://www.oecd.org/document/23/0,3746,en_2649_34889_46674519_1_1_1_1,00.html (last accessed: 23 December 2011); Johnston refers to a document elaborating specifically on the linkage between GRI reporting obligations and the OECD Guidelines, which was however not retrievable from the GRI website. Johnston, *supra* note 4, at 250.

⁴³ *Annual Report of IC 127-130* (2008), available at: http://www.oecd.org/document/39/0,3746,en_2649_34889_42416807_1_1_1_1,00.html (last accessed: 23 December 2011).

⁴⁴ The Annexes of the First Report distinguish between different groups of companies. Annex three lists those companies that are considered to have violated the Guidelines. See the *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc. S/2002/1146, Annex III (2002), at paras. 170-178.

⁴⁵ *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo* (Second report), UN Doc. S/2003/1027, Annexes (2003).

to the IC, in order to bring about procedures concerning the violation of the Guidelines.⁴⁶ It has been noted in the literature that this practice of the Panel as an indirect effect of SC activities amounts to the application of the OECD Guidelines as a global standard.⁴⁷

A last argument for the legal nature of the Guidelines is the binding ability of the implementation process itself. As a result of the compulsory specific instance procedure, the parties agree upon the concrete measures to be adopted by the companies. These include for example, the conclusion of collective bargaining treaties, the elaboration of new social policies, or even the complete withdrawal from a certain country. Equally relevant are those cases in which concrete measures cannot be reached during mediation and particularly if the submission of a specific instance is rejected by the NCP. Both cases become existential for the alleged victims of corporate human rights abuses in situations where the OECD implementation is substituted for national procedures, as in the case of weak governance zones. In the risk awareness tool on weak governance zones produced by the IC and adopted by the Council of Ministers,⁴⁸ these areas are defined as “*investment environments in which public sector actors are unable or unwilling to assume their roles and responsibilities in protecting rights (including property rights), providing basic public services (e.g. social programs, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective.*”⁴⁹

This situation can be of an absolute or partial nature, and either in a territorial or a substantial sense.⁵⁰ In these cases the norms of the OECD and their implementation can be considered a substitute for the national laws as well as for the institutions normally competent and responsible for deciding those issues. In fact, they might be the only norms applicable, and the only remedies available to the societies of these countries.⁵¹ As a

⁴⁶ See SC Res. 1457 of 24 January 2003, at para. 13; Carrying out effective pressure on the relevant actors exploiting the natural resources of the Democratic Republic of Congo was requested after highlighting the report of the Panel of Experts also in SC Res. 1533 of 12 March 2004, at para.6.

⁴⁷ Ole Kristian Fauchild & Jo Stigen, *Corporate Responsibility before international institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1070 (2010).

⁴⁸ *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, available at http://www.oecd.org/document/26/0,3746,en_2649_34889_36899994_1_1_1_1,00.html (last accessed: 23 December 2011); Also the recently adopted *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* can be seen in this context, as conflict usually goes along with a deterioration of the ability to maintain a functioning public order, available at: http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html (last accessed: 23 December 2011).

⁴⁹ *OECD Risk Awareness Tool*, *supra* note 48, at Appendix I, Glossary, “weak governance zones,” 42.

⁵⁰ THOMAS RISSE, REGIEREN IN RÄUMEN BEGRENZTER STAATLICHKEIT. ZUR “REISEFÄHIGKEIT” DES GOVERNANCE-KONZEPTES (Governance Areas of Limited Statehood: The “Journey’s Ability” Concept of Governance) 10 (2007).

⁵¹ The special situation in weak governance zones was highlighted in several instances handled by NCPs. See, the Final Statement of the French NCP, *Nam Theun II Dam, Annual Report of IC 72-73* (2005), available at: http://www.oecd.org/document/45/0,3746,en_2649_34889_35845165_1_1_1_1,00.html (last accessed: 23

recent example shows, the procedures are indeed perceived as a substitute to legal proceedings aimed at the stabilization of the legal relationship between the conflicting parties even outside the context of weak governance zones.⁵²

In sum, the Guidelines are an international act that serve a public interest and impact legally and factually on MNE conduct, and the rights and freedoms of individuals. These effects are intensified in weak governance zones through their function as a substitute for lacking national mechanisms. The Guidelines' implementation presents an exercise of public authority on the international level. As in the domestic parallel, such exercise of authority should be subject to rules guaranteeing the basic procedural rights of the persons and groups affected.

C. Public International Law Standards for Procedural Aspects of IO Activities

The Report on the Accountability of International Organizations prepared by the International Law Association in 2004 (ILA Report or Report)⁵³ states that its principles are derived from two sources: (i) from primary rules of international and domestic law, and (ii) from the rules of the IO (particularly the constituent instrument, the decisions and resolutions adopted in accordance with the constituent instrument, and the established practices of the Organization).⁵⁴ In keeping with the legal character of the recommended rules and practices contained in the report, its authors acknowledge that, "Although many of the Recommended Rules Practices (RRP) reflect existing rules of international law, the Committee's terms of reference did not preclude it from formulating rules constituting, to a reasonable extent, progressive development."⁵⁵ Against the background of the OECD activities, in the context of MNE regulation, it is clear that not all of the principles have a role to play.⁵⁶ Only the standards elaborated within the category of good governance and

December 2011); see also the Final Statement of the UK NCP, *Afrimex and DAS Air*, *Annual Report of IC* 31-56 (2009) available at: http://www.oecd.org/document/12/0,3746,en_2649_34889_45381708_1_1_1_1,00.html (last accessed: 23 December 2011).

⁵² See Unilever and IUF Settlement concerning Lipton factory in Pakistan, *Statement by IUF on the Settlement including information that all court petitions are withdrawn as part of the settlement*, available at: http://www.iuf.org/cgi-bin/dbman/db.cgi?db=default&uid=default&ID=6281&view_records=1&en=1 (last accessed: 23 December 2011).

⁵³ International Law Association, *Berlin Conference Final Report: Accountability of International Organizations* (2004), available at: www.ila-hq.org/en/committees/index.cfm/cid/9 (last accessed: 23 December 2011).

⁵⁴ *ILA Report*, *supra* note 53, at 6.

⁵⁵ *ILA Report*, *supra* note 53, at 6.

⁵⁶ There are four categories of principles in the report: first level of accountability (internal and external scrutiny in general), principles on liability/responsibility of international organizations, secondary principles on responsibility of International Organizations, remedies against International Organizations, *ILA Report*, *supra* note 53, at 1-3.

the principle concerning a right to an effective remedy are useful in the given context. In order to proceed with the analysis of the implementation of the Guidelines, it is necessary to evaluate the degree to which these standards are legitimately held to be applicable. This requires a classification of which principles of the ILA Report already enjoy binding status under public international law, and which principles reflect a progressive development of the law. In the latter case, it is necessary to examine whether the method employed to generate these emerging standards can be said to reflect current trends in international law, in order to convincingly argue for their present application to the OECD.

I. Do Binding norms on procedural aspects of IO activities have an impact on individuals and entities?

The International Court of Justice stated in its WHO Advisory Opinion that “[i]nternational Organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”⁵⁷

The category of constitutional rules is important, as some international organizations have specific rules in their founding instruments that prescribe how activities of the IO must be carried out, so as to satisfy some basic requirements of accountability, participation and transparency.⁵⁸ Only Article 12 of the Convention on the Organization for Economic Co-operation and Development refers to the participation of stakeholders other than states, declaring that NGOs might be invited to participate in the activities of the Organization.⁵⁹ The Convention remains silent, however, on issues of accountability or transparency applicable to the Organization in its entirety. The various Committees carrying out the work of the OECD therefore apply different rules concerning the inclusion of civil society, the transparency of their activities or the available remedies against OECD action.⁶⁰ It is precisely this poor internal standard that necessitates finding other rules that will require IOs to adopt more elaborate norms on its governance activities. These rules may be found in the “general rules of public international law” mentioned in the WHO Advisory Opinion.

⁵⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), ICJ Reports 73, 90 (1980).

⁵⁸ These internal rules are analyzed in particular within the GAL approach. See for various GAL studies, www.iilj.org/gal/bibliography/default.asp (last accessed: 23 December 2011).

⁵⁹ Art. 12 Convention on the Organization for Economic Co-operation and Development, available at: http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html (last accessed: 23 December 2011).

⁶⁰ See for the historic development of the participation of Civil Society in the OECD, Richard Woodward, *Towards Complex Multilateralism? Civil Society and the OECD*, in *THE OECD AND TRANSNATIONAL GOVERNANCE* 77-95 (Rianne Mahone & Stephen McBride eds., 2008).

This reference is commonly understood to include customary international law as well as general principles of international law.⁶¹

As concerning Article 38 lit. (b) of the ICJ Statute, no customary rules directly regulating the exercise of international public authority by an IO are clearly established. There are however structural principles for the exercise of public authority in states, such as norms for democratic governance, for good governance, as well as for the rule of law.⁶² The challenge with these norms is their application to international organizations which can only occur (i) if the laws already enjoy customary status; (ii) if the actions of International Organizations can be considered to be functionally equivalent to state activities for which the norms were originally developed, and (iii) the norms as such are, as relates to their content, transferable to IO activities.

The first requirement is less difficult to fulfill in the context of a norm on democratic governance, at least in a limited sense of requiring progress towards democratic governance,⁶³ whereas it seems rather improbable to assume a customary norm on the rule of law in a thick version.⁶⁴ In a recent study prepared for the United Nations,

⁶¹ *ILA Report*, *supra* note 53, at 18; HENRY SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 832-835 (4th ed. 2003); August Reinisch, *Governance Without Accountability?*, 44 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 270, 281-282 (2001).

⁶² In general, see STEFAN KADELBACH & THOMAS KLEINLEIN, *Überstaatliches Verfassungsrecht* (National Constitutional Law), 44 *ARCHIV DES VÖLKERRECHTS (AV)* 235, 235-266 (2006); For the principle of democratic governance, see Thomas D. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 46-91 (1992); GREGORY H. FOX & BRAD R. ROTH, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000); NIELS PETERSEN, *The Principle of Democratic Teleology in International Law*, 34 *BROOK. J. INT'L L.* 33-84, 334 (2008). For the rule of law, see Sir Arthur Watts, *The International Rule of Law*, *GERMAN YEARBOOK OF INTERNATIONAL LAW* 15, 15-45 (1993); Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331, 331-361 (2008); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* 127-136 (2004). For the principle of good governance, see Beate Rudolf, *Is "Good Governance" a Norm of International Law*, in *VÖLKERRECHT ALS WERTORDNUNG 1007-1028* (Pierre-Marie Dupuy, et. al. eds., 2006).

⁶³ In this sense see PETERSEN, *supra* note 62, at 81-83. The norm on democratic governance is emerging since Franck's seminal article and opinions diverge on whether and in what shape it actually enjoys customary status. For support, see Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 *WIDENER L. REVIEW* 265, 266. Critique to this approach, see SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS* (2000); Jackson Nyamuya Maogoto, *Democratic Governance: an Emerging Customary Norm?*, 55 *UNIVERSITY OF NOTRE DAME AUSTRALIA LAW REVIEW* 55, 55-79 (2003); A regional analysis of this norm might lead to more concrete answers to this question. Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 *INT'L COMP. L. Q.* 225, 246-247 (2002); Christian Schliemann, *Das Demokratiegebot in der Organisation Amerikanischer Staaten* (The principle of democracy in the Organization of American States), 42 *VERFASSUNG UND RECHT IN ÜBERSEE (VRU)* 320, 344-348 (2009).

⁶⁴ In fact, the literature on the international rule of law is dedicated either to the study of the rule of law existent in domestic jurisdictions as a general principle and thus conferrable to the international legal system or to an international rule of law directly applicable to IOs. Both will become relevant in our context but not in this part of the article dedicated to the application of state centered customary norms to IOs, although some elements of the international rule of law are exploitable in the present context justifying the conclusion reached above. For the rule of law as general principle see Chesterman, *supra* note 62, at 340-342.; Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*,

Fassbender argues however that some concrete elements of the rule of law might enjoy customary status— such as when the principle to be heard before an individual measure is taken, which would adversely affect the person's rights and the right to an effective remedy— as these basic assumptions are contained in almost all human rights treaties and internationally agreed upon human rights documents.⁶⁵ According to the results of Fassbender's study, the principle to provide an effective remedy requires that some form of remedy (political, legal, social) must be accessible in a timely manner leading to a reasoned decision.⁶⁶ This is supported by the ILA report, which clearly states that the right to an effective remedy is a basic international human rights standard.⁶⁷

Also, a customary norm on good governance does not yet exist in its entirety.⁶⁸ As with the rule of law, some elements of this norm might be of a customary nature, such as the accountability element derived from the human rights treaties envisaging the right to a remedy comparable to that under the rule of law.⁶⁹

As concerns the functional equivalence of IO measures, it was already shown that the OECD exercises international public authority that must be considered equivalent.⁷⁰ However, as regards the transferability of the norms, their content is still tailored to state action. They therefore have to be adapted to International Organizations, which differ from states in terms of the authors and character of a measure, their institutional structure, and ways and means of implementation. This adaptation is prone to problems concerning a norm on democratic governance.⁷¹ Dahl has already formulated the question of whether a democratic international organization might exist at all.⁷² Many questions remain unanswered. What collectivity or collectivities should participate in the democratic decision-making of IOs? What are the concrete rights of these collectivities? Is there a

1 J. INT'L ECON. L. 25, 30-31 (1998). Combining both approaches, see Watts, *supra* note 62, 17-42.; David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS. 127, 165-166 (2005). For the international rule of law, see Mattias Kumm, *International Law in National Courts: the International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19, 22 (2003).

⁶⁵ Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 INTERNATIONAL ORGANIZATIONS LAW REVIEW 437, 444, 447-450, 464 (2006).

⁶⁶ *Id.* at 480.

⁶⁷ *ILA Report*, *supra* note 53, at 33.

⁶⁸ Rudolf, *supra* note 62, at 1026.

⁶⁹ *Id.* at 1015.

⁷⁰ See the section on the Legal Nature of the Guidelines.

⁷¹ See Gregory H. Fox on the usefulness and problems in transposing the international norm on democratic governance on International Organizations, see Fox, *supra* note 63, at 269, 275-276 (2007).

⁷² Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

possibility of representation, and accordingly, how can the democratic legitimacy of the representatives of civil society, such as NGOs, be assessed?⁷³ The adaptation seems less problematic for the elements of the rule of law, such as a right to a remedy, and for the norms on good governance. The latter norms were developed for governance activities of states.⁷⁴ The change of label from good government to good governance is accompanied by the change of the underlying idea. It is not the classic state as a monolithic block that is envisaged to be regulated with these norms, but rather concrete intra-state processes targeted at achieving specific functional goals and engaging relevant stakeholders.⁷⁵ These kinds of processes are also characteristic for the governance activities carried out by inter- and transnational actors including international organizations⁷⁶, which might elucidate why also the ILA uses the term good governance as the category for the various emerging procedural principles on the institutional and operational decisions of an International Organization.⁷⁷

Thus, although customary norms on the domestic exercise of public authority are emerging, they have either not yet attained a reasonably certain degree of validity, or they are too state-centered to be applied to international organizations. An exception is the right to an effective remedy that seemingly enjoys customary status, and which is, in principle, also applicable to international organizations.⁷⁸

The third set of principles that might contain procedural rules for activities of an IO finds its origin in Article. 38 lit. (c), the general principles of public international law. Although originally used to apply private law principles to a situation of equals, there is, as far as relations with a subordinating character can be found on the international level, no reason not to transfer domestic public law principles to the international context.⁷⁹ It is the rule of law that comes to the forefront here. Scholars assert that the rule of law can be found, at least in some of its elements or its underlying function or idea in the major legal systems of

⁷³ For a proposal, see Anton Vedder, *Towards a Defensible Conceptualization of the Legitimacy of NGOs*, in NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY - SOURCES OF LEGITIMACY 197, at 210-211 (Anton Vedder ed. 2007).

⁷⁴ Rudolf, *supra* note 62, at 1009 *et seq.*

⁷⁵ Hermann Hill, *Good Governance - Konzepte und Kontexte*, in GOVERNANCE-FORSCHUNG 220-223 (Gunnar Folke Schuppert ed. 2006).

⁷⁶ James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4-7 (James N. Rosenau & Ernst-Otto Czempel eds., 1992).

⁷⁷ *ILA Report*, *supra* note 53, at 8.

⁷⁸ For the United Nations, see Fassbender, *supra* note 65, at 447.

⁷⁹ Wolfgang Weiß, *Allgemeine Rechtsgrundsätze des Völkerrechts* (General principles of international law) 39 AV 394, 409 (2001); see for the application of General Principles in the context of international criminal law, Separate Opinion of Judges MacDonald and Vohrah, Prosecutor v. Drazen Erdemovic, ICTY Appeals Chamber, decision of 07 October 1997, reprinted in (1998) I.L.R., vol. 111, at 314, 344.

the world, and is thereby transferable to the international legal order as a general principle.⁸⁰ This is argued for the elements of the supremacy of the law and the equality of subjects before the law.⁸¹ The direct application of these principles to IOs is, however, criticized. Even in case of a hierarchical relationship, the decisions of international organizations rarely have a direct effect on individuals, which is, unless shown to the contrary, the regular case in the domestic context.⁸² Moreover, these principles are naturally abstract and their usefulness also suffers from a lack of legal certainty due to their imprecision. However, even without these empirically proven principles, there are some domestic legal principles that are claimed to be part of any legal order from a theoretical perspective. Any legal system claims by its nature that its subjects are bound by its rules. The supremacy of the law is therefore held to be such a necessary principle.⁸³ This legal statement is strongly supported by the ILA Report on Accountability of International Organizations.⁸⁴ As a conclusion, it might be argued that both the supremacy of the law and the right to have access to an effective remedy (legal, social, political) in a timely manner leading to a reasoned decision enjoy a binding force for International Organizations.

II. Current proposals for the development of public international law standards on the exercise of international public authority?

The classical sources of international law already offer principles for the analysis of IO activities drawn from domestic law principles and customary international law applicable to states. Nevertheless, criteria for the participation of civil society, their access to information, and general rules on oversight through and reporting to parent organs are still not given. Within academia, the widely known approaches of International Institutional Law (IIL) and Global Administrative Law (GAL) increasingly analyze internal norms and practices of IOs. Because of this focus on the proper norms and practices, they cannot be used to critically assess IO activities from a general legal point of view. The idea of constitutionalization proposes the existence of some hierarchically superior norms, but is restricted to finding these norms in customary international law and general principles. It thus leads to the same core human rights principles applicable to IOs without breaking

⁸⁰ Chesterman, *supra* note 62, at 355, but critical as to a transfer of a thick version at 358; For the completeness and certainty of the law as a general principle, see Watts, *supra* note 62, at 25-28; Fassbender, *supra* note 65, at 465; There is however doubt about this assumption, see Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS - ADVANCING INTERNATIONAL INSTITUTIONAL LAW 727, 735-736* (Armin von Bogdandy ed. 2009).

⁸¹ Chesterman, *supra* note 62, at 342.

⁸² von Bogdandy, *supra* note 80, at 740.

⁸³ Rudolf, *supra* note 62, at 1019.

⁸⁴ *ILA Report*, *supra* note 53, at 13, 28.

more ground. Another recent attempt to remedy the lack of relevant norms is the public law approach mentioned above. It proposes starting from the constitution of the organizations and focusing on the principles that are existent in the relevant norms and the practice of the institutions themselves. This approach aims to enrich these standards through domestic public law principles and other international norms as an auxiliary source, due to the often-rudimentary character of the internal legal order of international institutions.⁸⁵

The problem with this framework is the same as with GAL and IIL, namely that the constitutional principles developed within international organizations are a mere description of what these institutions internally consider to be necessary in terms of procedural legitimacy, demoting domestic law principles and other international norms to, at best, a second order observation. A democratic or rule of law critique of the activities of IOs is still not feasible from a general legal point of view. To remedy this shortcoming, Bogdandy entrusts national judges with the task of setting up domestic procedural legitimacy requirements for the recognition of the acts of international institutions, thereby contributing to the emergence of "IO independent" general principles in the sense of Art. 38 lit. (c.)⁸⁶ There is deplorably no guarantee that the actions of international organizations will be reviewed through the national judiciary. For the case at hand, it is doubtful whether such review will arise at all, as there are still only a few jurisdictions that actually deal with cases of corporate accountability for actions committed abroad in which a possible recognition of the rules and decisions of the OECD might arise.⁸⁷

The public international lawyer is faced with a dilemma. Current public international law does not offer a conventionally agreed upon set of rules for the procedural legitimacy of IO actions. The recognition of IO norms and practices as the relevant law in form of customary international law or international general principles⁸⁸ does not allow for the development

⁸⁵ VON BOGDANDY, *supra* note 80, at 746; VON BOGDANDY, et al., *supra* note 29, at 1396.

⁸⁶ *Id.* at 749.

⁸⁷ The only known case is the complaint submitted to the Finnish ombudsman claiming the lack of impartiality of the Finnish NCP in the Botnia Case. See on this: SCHULER, *supra* note 4, at 1756-1757. There is however literature indicating that extraterritorial jurisdiction on corporate accountability before domestic courts is generally possible in many jurisdictions: CEDRIC RYNGAERT & JAN WOUTERS, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 *Geo. Wash. Int'l L. Rev.* 939, 939-975 (2009).

⁸⁸ The international general principles were advocated as the appropriate source in particular for human rights and structural principles for the exercise of governmental authority in the domestic context. See: PHILIP ALSTON & BRUNO SIMMA, *The Sources of Human Rights Law - Custom, Jus Cogens and General Principles*, 12 *Australian Yearbook of International Law* 82, at 102-106 (1988-1989); NIELS PETERSEN, *Der Wandel des Ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung* (The change of the unwritten law in the course of writing a constitution), 46 *AV 502*, at 523 (2008). The contribution of IOs to the formation of international custom is recognized as it concerns customary norms for states. Both ideas are in principle exploitable for the creation of rules directly applicable to IOs.

of more than just a few bottom-line principles applicable to all International Organizations because of their widespread use and acceptance without any critical assessment of the appropriateness of the rules. Moreover, this makes the autonomy of international organizations even stronger. It is therefore advisable to not too easily discard the direct applicability of general principles grounded in domestic law, and the transferral of customary rules for states to IOs. All approaches do share the concern for the rising impact of IO activities that need to be regulated and accept the usefulness of domestic principles and other international norms in determining the rules for IO conduct. The different value attached to the various sources (internal norms and practice, customary norms, international and domestic general principles) seems to be only a question of degree. It is given that dogmatic problems for the applicability of state centered customary norms exist, that both sources suffer from the disease of uncertainty and imprecision, and that a relevant portion in this approach relies on argumentation. Nevertheless it has to be underlined that reliance on principles emanating from domestic legal principles and from customary norms for the exercise of state authority is necessary. They are not only a subsidiary means, but norms directly competing with the internal norms and practices of IOs, and therefore the only basis for the development of a set of standards that offers the possibility for a normative critique without simply redrawing the law according to existing practice.

In conclusion, it can be said that besides the applicable rules mentioned above, the current legal academic approaches propose to more thoroughly take into account the internal norms and practices of IOs, and to set them into context with other domestic and international norms to a varying degree. According to the value attached to the other norms, this allows for a different degree of normative critique inherent in the proposed norms. Best practices of some IOs can be used to critically evaluate other IOs; they lack, however, a binding force. Simply elevating common practice to the applicable standard leads to an apologetic set of norms devoid of any normative critique. Domestic law principles and customary norms on state exercise of public authority do offer a critical perspective and binding force, but are prone to dogmatic and theoretical questions of their applicability. There is thus no single theory solving entirely the riddle of IO accountability. The ILA principles, as has been noted in the beginning, are based on primary international and domestic rules as well as internal IO decisions and practice.⁸⁹ Although the concrete relationship between the different sources is not made explicit in the report, the ILA did basically proceed on the same assumptions as advanced by leading international scholars and obtained a set of principles deeply grounded in public international law, albeit with a certain degree of progressive development, which is at the moment unavoidable in the given context. Given this current scarcity of existing rules for the exercise of public authority by IOs, it is justifiable, if not necessary, to rely on the ILA standards as the only existing set of concrete norms that are perfectly in line with the law as it stands, and as it

⁸⁹ *ILA Report*, *supra* note 53, at 6.

might reasonably develop within the constraints of the doctrine of public international law. The following section will therefore apply several of the proposed ILA principles to evaluate the performance of the OECD within the context of the Guidelines for Multinational Enterprises.

D. Assessment of the OECD performance in terms of the ILA Principles on the Accountability of International Organizations

I. Selection of Relevant Principles

The selection of principles used to assess OECD performance is first based on the desire to cover those areas in which, according to a survey of the relevant literature, acute problems exist. This necessitates an analysis of the principle on reporting obligations, impartiality, access to information, reasoned decision, supervision, and effective remedies. Due to this approach, the principle on the relationship to NGOs is not part of the examination, as the OECD within the context of the Guidelines performs quite well in this regard.⁹⁰ The update process for the revision in 2011 was generally seen as exemplary as concerns the activities of the Investment Committee.⁹¹ However, OECD Watch complains about the rush and the reluctance of other OECD bodies entrusted with the elaboration of specific chapters to include civil society, which led to the disappointing fact, that some proposals could not be properly discussed in public.⁹² Some principles that do present problems are however not treated separately as the principle of transparency, which can be covered together with the principle of access to information and the procedural aspects of the principle of good faith (construed as the requirement to equal treatment of like cases), which is discussed within the section on the principle of constitutionality.

Secondly, those principles that enjoy a binding legal force in public international law were also selected to keep a close link to public international law *de lege lata*. In this context, the principles of constitutionality of an effective remedy and of a reasoned decision are part of the analysis.

II. Access to Information

The ILA Report holds, as a first rule, that documents of an IO should be available to all Member States,⁹³ and secondly, that information held by the IO, including its archives,

⁹⁰ Woodward, *supra* note 60, at 89; Salzman, *supra* note 3, at 217.

⁹¹ OECD Watch Statement, *supra* note 10, at 2.

⁹² *Id.*

⁹³ ILA Report, *supra* note 53, at 9.

should be accessible to the public at large.⁹⁴ IOs should not deny applications for access to information except for compelling reasons on limited grounds such as privacy, commercial and industrial secrecy, or protection of the security of Member States or private parties.⁹⁵ The IO should when appropriate protect the identity of those who provide them with information.⁹⁶

1. General Requirements

As concerns the quasi-legislative activities of the OECD most information on the current update, such as the term of reference and other information, were provided on the Internet and were open to the public. The advisory bodies and OECD Watch also had access to all internal documents based on separate agreements with the OECD.⁹⁷

Access to information on the implementation of the Guidelines is, to the contrary, quite underdeveloped and reveals one of the main criticisms in the literature and in reports issued by civil society organizations.⁹⁸ The critique refers to the opaque and confidential treatment of specific instances.

The OECD Council's Procedural Guidance generally recognizes transparency and visibility as two of the four basic criteria for the actions of NCPs.⁹⁹ The commentary of the IC adds that transparency is an important criterion with respect to its contribution to the accountability of the NCP and to gaining the confidence of the general public. The commentary further reads that as a general principle the activities of the NCPs will be transparent. This formulation is stronger than in the last version of the Guidelines, in which the paragraph on transparency read that "most of the activities" would be transparent. Only when the NCP offers its good offices in implementing the Guidelines will it be in the best interest of the effective implementation of the Guidelines to take appropriate steps to establish

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ BIAC, TUAC and OECD Watch all have separate agreements with OECD bodies on the access to internal information. The agreements were not retrievable on the OECD website. Information obtained in an interview with Kirsten Drew from TUAC of 15 December 2010.

⁹⁸ OECD Watch, *Ten Years O*, 43 (2010), available at: http://www.oecdwatch.org/publications-en/Publication_3550/view (last accessed: 23 December 2011); Utz concluded her analysis on specific instances during 2000-2005 by stating that for one third of instances that were concluded the activities carried out by the NCP could not even be investigated. See Britta Utz, *Die OECD Leitsätze für Transnationale Unternehmen* 67 (2006); Johnston, *supra* note 4, at 250.

⁹⁹ *OECD Guidelines—Procedural Guidance*, *supra* note 6, at section I, National Contact Points.

confidentiality.¹⁰⁰ This means that, without revealing confidential information, at least working methods and the way to access the NCPs should always be transparent. However, not all of the NCPs have a satisfying website providing information on the Guidelines and describing the procedures including the relevant domestic contacts for submitting a specific instance.¹⁰¹ The 2011 Commentary of the IC took this into account and requires the NCP to make public the relevant information for submitting a specific instance and the procedures that will be applied by the NCP.¹⁰²

2. The Initial Assessment of the Merit of a Specific Instance

As concerns the specific instance procedure, three phases have to be distinguished. In the first phase, the assessment of the further merit of the issue raised, the confidentiality requirement does not apply.¹⁰³ NCPs are free to issue public statements, preferably online or via other adequate avenues, concerning the issue that has been raised and the name of the parties.¹⁰⁴ As of 2011, NCPs are obliged to publish a first statement in case of a negative assessment of the submission.¹⁰⁵ This statement should include a description of the issues raised and the reasons for the decision,¹⁰⁶ taking into account the need to preserve the confidentiality of sensitive business and other information.¹⁰⁷ Moreover, in

¹⁰⁰ *OECD Guidelines*— Commentary of the Investment Committee, *supra* note 6, at Section I, Transparency.

¹⁰¹ For an unsatisfactory example, try a search for the Spanish NCP on the Internet. For more information on the Spanish NCP, see JUAN HERNÁNDEZ ZUBIZARRETA, *LAS EMPRESAS TRANSNACIONALES FRENTE A LOS DERECHOS HUMANOS: HISTORIA DE UNA ASIMETRÍA NORMATIVA* (Multinational Companies Against Human Rights: The Story of a Policy Asymmetry) 439-441 (2009).

¹⁰² *OECD Guidelines*— Commentary of the Investment Committee, *supra* note 6, at Section I, Information and Promotion, 3-4.

¹⁰³ *OECD Guidelines*— Procedural Guidance, *supra* note 6, at Section I, National Contact Points, C. 4. Implementation in specific instances; The confidentiality requirement only covers actions during the good offices procedures and therefore not the phase of the initial assessment. There is however indications that the initial assessment phase already involves an exchange of information and first fact-finding so as to resemble the second good offices phase. In this case it might be reasonable to apply the confidentiality principle, but and only with the consequence that the statement on an initial assessment must be as detailed as a final statement as concerns the reasons for its refusal. Information on the initial assessment phase is drawn from an interview with a former employee of the German NCP.

¹⁰⁴ See on the shortcomings of various NCPs: *OECD Watch*, *supra* note 98, at 43.

¹⁰⁵ The Procedural Guidance only requires a statement in case the NCP is of the opinion that the accusation does not merit further attention. Procedural Guidance, *supra* note 6, at Section I, National Contact Points, 3 (a). The commentary of the Investment Committee however clarifies that NCPs may also publish a statement in case the accusation does merit further attention, *Commentary of the Investment Committee*, *supra* note 6, at Section I, Conclusion of the Procedures, at paras. 2-3.

¹⁰⁶ *OECD Guidelines*—Procedural Guidance, *supra* note 6, at Section I, National Contact Points, C. 3(a).

¹⁰⁷ *OECD Guidelines*— Commentary of the Investment Committee, *supra* note 6, at Section I, Conclusion of the Procedures, para. 2.

case the NCP believes that it would be unfair to publicly identify a party in the statement on its decision, it may draft the statement so as to protect the identity of the party.¹⁰⁸ The first restriction of the publication requirement is mirrored by the principles in the ILA Report that IOs should grant access to the public insofar as there are no compelling reasons for confidentiality. Providing the names of the company and the submitting party, as well as information on the alleged violation does not reveal any sensitive information. It is therefore not convincing to include the second restriction on the publication requirement based solely on the notion of fairness, which is neither defined in the guidelines nor a reflection of existing standards. Many NCPs will have to adapt their practice, since up to the 2011 revision only a few NCPs regularly published initial statements, whereas the vast majority remained silent.¹⁰⁹ Sometimes, not even the parties involved were notified of the initial assessment decision,¹¹⁰ although at least the notification of the parties seems to emerge as a general standard.¹¹¹

3. The "Good Offices" Phase

When the conciliation procedures have begun, the further development of the instance remains confidential in order to protect sensitive business information. According to the Investment Committee, other information such as the identity of individuals, as well as the facts and arguments brought forward by the parties, should also be kept confidential in the interests of the effective implementation.¹¹² During the conciliation process, the retaining of information grounded in commercial and industrial secrecy is generally in line with the ILA principle. The ILA Report refers however only to the *public* and only to *specific types* of information. Therefore, the affected parties and their representatives should always have access to all information furnished to the NCP, as long as *they* respect the confidentiality of the information. This is a position that is reflected widely in the practice of experienced NCPs, and should be adopted by other NCPs as well.¹¹³ Moreover, nothing in the Rules on the Implementation suggests that general remarks to the public on the progress of an

¹⁰⁸ *Id.*

¹⁰⁹ Sometimes NCP do not even react to a submission: Utz names for example the Polish NCP and the US NCP, see Utz, *supra* note 98, at 67-70.

¹¹⁰ OECD Watch, *The Confidentiality Principle, Transparency and the Specific Instance Procedure* 5 (2006), available at: http://www.oecdwatch.org/publications-en/Publication_1678/ (last accessed: 23 December 2011).

¹¹¹ See for the general development towards notification of the parties about the results of the initial assessment, *Annual Report of IC* (2008), *supra* note 43, at 89.

¹¹² *OECD Guidelines—Procedural Guidance*, *supra* note 6, at Section I National Contact Points C. 4; Commentary of the Investment Committee, *supra* note 6, at Section I, Transparency and Confidentiality.

¹¹³ *Annual Report of IC* 55 (2003), available at: http://www.oecd.org/document/20/0,3746,en_2649_34889_20589588_1_1_1_1,00.html (last accessed: 23 December 2011).

ongoing specific instance, including references to non-sensitive types of information, are prohibited.¹¹⁴ Especially in case the proceedings take a long time and no further development towards a solution is visible, the upholding of the confidentiality requirement has been questioned in the literature.¹¹⁵ In the new version of the Guidelines, the Commentary of the IC sets general time limits for the different phases of the procedures and requires NCPs to establish a concrete timeframe for each specific instance.¹¹⁶ If the parties fail to reach an agreement within the timeframe and after consultation of the parties on the value of continuing its assistance, the NCP might conclude the process and proceed to prepare a statement, if it deems the conclusion of the procedures to not be productive.¹¹⁷ Within the new Guidelines, there is thus a possibility to make the prolonged pending of an instance public by its conclusion. However, it is up to the NCP to establish the concrete timeframe for each specific instance, and the general rule that the whole process should take no longer than 12 months can be circumvented if circumstances warrant it, such as when the issues arise in a non-adhering country.¹¹⁸ It is therefore still advisable to publish interim statements at least on non-sensitive issues mentioned above.

4. After Conclusion of the Procedures

As soon as the proceedings are finished and an agreement is obtained, the NCP is required to issue a report including a description of the issues raised, the procedures initiated by the NCP and when the agreement was reached.¹¹⁹ Information on the content of the agreement will only be included insofar as the parties agree.¹²⁰ In case there is no agreement or a party was unwilling to participate in the proceedings, the NCP will issue a statement, including a description of the issues raised, the procedures initiated and the reasons why the instance merited further attention; the NCP will also make recommendations, as appropriate, on the implementation of the Guidelines and on the

¹¹⁴ OECD Watch, *The Confidentiality Principle*, *supra* note 110, at 4.

¹¹⁵ Heydenreich refers to this situation, CORNELIA HEYDENREICH, DIE OECD-LEITSÄTZE FÜR MULTINATIONALE UNTERNEHMEN - EIN WIRKSAMES INSTRUMENT ZUR UNTERNEHMENSREGULIERUNG? (The OECD Guidelines for Multinational Companies— An Effective Tool for Corporate Regulation?) 7 (2005), available at: <http://www.germanwatch.org/tw/kw05ls.pdf> (last accessed: 23 December 2011); *see also* ZIMMER, *supra* note 12, at 101, who refers to the average duration of 15 months and one instance that took 36 months, a period in which it is not reasonable to request NGOs or workers unions to remain silent.

¹¹⁶ *OECD Guidelines— Commentary of the Investment Committee*, *supra* note 6, at Section I, Indicative Timeframe 1-3.

¹¹⁷ *Id.* at Indicative Timeframe 2.

¹¹⁸ *Id.* at Indicative Timeframe 3.

¹¹⁹ *OECD Guidelines— Procedural Guidance*, *supra* note 6, at Part. I, National Contact Points, C.3 (b).

¹²⁰ *Id.*

reasons why no agreement was reached.¹²¹ The 2011 version the Commentary of the IC provides for the possibility of the concerned parties to comment on a draft statement; the publication remains however, the sole responsibility of the NCP, which may or may not take into account the comments received.¹²² The formerly included Section 4(b) of the Procedural Guidance—requiring the NCP to make the results publicly available, unless preserving the confidentiality would remain in the best interest of effective implementation¹²³—has been deleted. Up to now, there was no uniform practice of the NCPs as concerning this aspect.¹²⁴ The German NCP interpreted the Guidelines in a way that required them to issue a public statement whenever the specific instances were considered unsuccessful.¹²⁵ Other NCPs did not issue a public statement, either in the case of a successful conclusion, or in the opposite case.¹²⁶ The latter practice already collided with the older IC Commentary, stating that the rule during proceedings is confidentiality, but that results will normally be transparent,¹²⁷ which is a provision that is also included in the 2011 version. In combination with the omission of the restricting confidentiality clause of the old Procedural Guidance, a major improvement has been obtained sending a clear message to NCPs to always issue a statement, including basic information on the case, irrespective of a positive or a negative outcome. Only by publishing final statements which include the facts, the norms and the recommendations can a uniform and non-arbitrary application of the Guidelines and the future accountability of the NCP be ensured.

¹²¹ *Id.* at C.3(c).

¹²² *OECD Guidelines*— Commentary of the Investment Committee, *supra* note 6, at Section I, Conclusion of the Procedures, at para. 6.

¹²³ The 2000 version of the Guidelines, including Procedural Guidance and Commentary of the Investment Committee, is contained in an OECD booklet OECD, <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last accessed: 23 December 2011); Procedural Guidance, Part. I, National Contact Points, C.4.b).

¹²⁴ Utz, *supra* note 98, at 74-76.

¹²⁵ See German NCP, *Leitfaden zum Beschwerdeverfahren* (Procedural Guidance for the Specific Instance Procedure) 4, available at: <http://www.bmwi.de/BMWi/Redaktion/PDF/MO/oecdleitfadenzubeschwerdeverfahren,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf> (last accessed: 23 December 2011).

¹²⁶ Utz, *supra* note 98, at 74-77; For the US NCP, see Christopher N. Franciose, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, 223-236 (2007).

¹²⁷ Commentary of the Investment Committee, *supra* note 123, at para. 19; see against a general rule on publishing the results: BIAC, *Contribution to the Annual Report of IC* (2003), *supra* note 113, at 92. The Commentary of the Investment Committee in the new version also contains the provision cited here that the results will normally be transparent. See the Commentary of the Investment Committee, *supra* note 6, at Section I, Transparency and Confidentiality.

III. Reporting

There are several ILA principles that contain the basic duty to report on institutional and operational activities.¹²⁸ Subsidiary organs should be required to submit periodic reports to their parent organs. The receiving organs should ensure that the reports are regularly submitted in an appropriate form and with a properly debate, whenever required.¹²⁹

According to Section II.7 of the Council Decision, the IC must periodically report to the Council. The IC reports are issued regularly and are accessible on the webpage of the OECD.¹³⁰ Critique was raised that the quality of the IC's reports does not satisfy its role as supervisory organ.¹³¹ It is therefore lamentable that the reports published by the IC are not duly discussed within the Council as the competent parent organ.

Also, the NCPs are required to issue annual reports to the IC, which should contain information on implementation activities in specific instances.¹³² This obligation is clearly not met by all NCPs, as the quality of the reports varies considerably.¹³³ Some NCPs only refer in an abstract manner to the specific instances, without any information on the companies involved or the concrete outcomes, thus failing to meet the requirement of the ILA principles to submit reports in an appropriate form. This negligent NCP practice also contravenes a sub-element of the principle of stating the reasons for decisions, which requires non-plenary organs to reflect in their periodic reports all information of a non-confidential nature forming the basis of their decisions.¹³⁴ The Investment Committee took account of this poor reporting standard, and introduced a new paragraph in its commentary requiring NCPs to include information on all specific instances that have been initiated by the parties, including those that are in the process of an initial assessment, those for which good offers have been extended and discussions are in progress, and those in which the NCP has decided not to extend an offer of good offices after an initial assessment.¹³⁵ This is clearly an improvement in comparison to the old commentary. However its success depends first on the compliance of the NCPs, and second on the

¹²⁸ *ILA Report, supra* note 53, Principle on Reporting and Evaluation, Sections 1- 5, 12.

¹²⁹ *ILA Report, supra* note 53, at Principle on Reporting and Evaluation, Section 2, 12.

¹³⁰ *OECD Guidelines— Council Decision, supra* note 6, at Part. 2, The Investment Committee, 7.

¹³¹ *TUAC Contribution to the Annual Report of IC (2002)* 61, available at: http://www.oecd.org/document/11/0,3746,en_2649_34889_2410315_1_1_1_1,00.html (last accessed: 23 December 2011).

¹³² *OECD Guidelines— Procedural Guidance, supra* note 6, at Section I, National Contact Points, D.(1) (2).

¹³³ *OECD Watch Contribution to the Annual Report of IC (2003), supra* note 113, at 102.

¹³⁴ *ILA Report, supra* note 53, at Principle of Stating the Reasons for Decisions, 14.

¹³⁵ *OECD Guidelines— Commentary of the Investment Committee, supra* note 6, at Section I, Reporting to the Investment Committee.

willingness of the Investment Committee to properly supervise the delivery of appropriate reports. This supervisory function includes more analysis than a simple compilation of the Reports of NCPs within its own annual report, as was already requested by TUAC in 2002.¹³⁶ Specific critique on individual shortcomings as well as concrete clarifications is required here. A further paragraph on the IC's duties to carry out its supervisory function in an appropriate manner was however, not introduced in the new text of the Guidelines.¹³⁷

IV. Constitutionality

The ILA report states that the principle of constitutionality entails a legal obligation for each IO to carry out its functions and exercise its powers in accordance with the rules of the IO.¹³⁸ This means foremost that organs of the IO should act within their legal competences, but also that positive obligations should lead to the required action. This is relevant for the implementation process managed by the NCPs, which is determined by the legally binding Council decision and the Procedural Guidance section.¹³⁹ Particularly problematic is the disregard of the provisions on the handling of the different phases of a specific instance, such as the notification on the initial assessment, or the final statement. These are clearly in violation of the principle of constitutionality, as well as of the principle of good faith.¹⁴⁰ As the provisions on the specific instance procedures have been enlarged in the update process by including time frames and more concrete publication requirements, the principle of constitutionality plays a vital role in reminding NCPs of their duties under those rules. Any violation of the implementation rules should be followed actively within the existing structure of supervision of NCP activities, especially through the IC. Otherwise the current arbitrary and inconsistent application of the Guidelines in specific instances will persist.¹⁴¹

¹³⁶ TUAC Contribution to the Annual Report of IC (2002), *supra* note 131, at 61.

¹³⁷ The Procedural Guidance still only requires the IC to consider the reports of NCPs. *OECD Guidelines—Procedural Guidance*, *supra* note 6, at Section II, 3(a).

¹³⁸ *s*, *supra* note 53, at Principles of Constitutionality and Institutional Balance, Section. 1, 12.

¹³⁹ *OECD Guidelines—Council Decision and Procedural Guidance*, *supra* note 6, at 67-75.

¹⁴⁰ *ILA Report*, *supra* note 53, at Principle of Good Faith 12. This general principle gives rise to sub-principles such as equal treatment of like cases. The equal treatment principle is not respected as regards the procedures and the institutional structure of the NCP including their financial resources as well as regards substantial issues. The 2011 version of the Guidelines remedies this arbitrary implementation to a certain extent. The Procedural Guidance and the Commentary of the IC now require the predictability of the specific instance procedures. The Commentary also introduces a paragraph requiring national governments to equip NCPs with financial resources for their proper functioning. *OECD Guidelines—Procedural Guidance*, *supra* note 6, at Section I, C; Commentary of the Investment Committee, *supra* note 6, at Preface and Section I, Guiding Principles for Specific Instances.

¹⁴¹ OECD Watch, *The Confidentiality Principle*, *supra* note 110, at 5.

V. Supervision

According to the ILA report, “Parent organs have a duty to exercise a degree of control and supervision of subsidiary organs which corresponds to the functional autonomy granted.”¹⁴² They should use this supervision and controlling power to overrule a decision by a subsidiary organ, if that decision is contrary to applicable legal rules.¹⁴³ This power by the supervising organ includes the right to question the way in which the subsidiary organ has exercised its competence.¹⁴⁴

There are two institutional relationships in the context of the Guidelines that might fall under the scope of these principles. First, the control carried out by the OECD Council over the actions taken by the IC and second the supervision exercised by the IC over the NCPs.

The relationship between the IC and the OECD Council is characterized by the annual report of the IC, the only visible sign of their relationship. The OECD Council has the general obligation to require the IC to fulfill its duties. The OECD Council should exploit its hierarchical relationship to the IC more seriously requiring the IC to assume its own supervisory functions in an appropriate manner which in turn puts more pressure on the NCPs as the final implementer of the Guidelines.

As regards the relationship between the IC and the NCPs, the Implementation rules entrust the IC with the responsibility for clarifications of the Guidelines, as concerns first, a substantiated submission by an adhering country, or an advisory body on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances, and second, a substantiated submission on whether an NCP has correctly interpreted the Guidelines in a specific instance.¹⁴⁵ The IC also has the general competence to make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines.¹⁴⁶ The Committee shall however not reach conclusions on the individual conduct of an enterprise.¹⁴⁷ Furthermore, the IC is the organ receiving and evaluating the annual reports of the NCPs.

Before analyzing the norms and their actual implementation, it must be asked whether NCPs can be regarded as sub-organs of the Investment Committee. The implementation

¹⁴² *ILA Report, supra* note 53, at Principle of Supervision and Control, Section 1, 13.

¹⁴³ *Id.* at Section 2, 13.

¹⁴⁴ *Id.* at Section 3, 13.

¹⁴⁵ *OECD Guidelines— Procedural Guidance, supra* note 6, at Section II, Investment Committee, 2(b) and (c).

¹⁴⁶ *Id.* at Section II, 2 (d).

¹⁴⁷ *OECD Guidelines— Council Decision, supra* note 6, at Section II, 4.

rules already suggest such a relationship. This suggestion can be partly supported by the ILC draft articles on the responsibility of international organizations. In the first place, the draft articles consider it irrelevant whether an organ is named as such by the IO.¹⁴⁸ As concerns organs of a state placed at the disposal of the IO, the factual control over the organ is the determining factor for its status and as a consequence the attribution of responsibility.¹⁴⁹ The organ's conduct is to be attributed to the Organization if it has exclusive direction and control and if the organ does not act on the instructions from the sending state.¹⁵⁰ It is obvious that most of the NCPs still consist of only government representatives of the adhering states integrated to a certain extent into the regular state institutions, thus implying their position as state organs. However, the NCPs do not fit well into the concept of a state organ, as they are created exclusively for the purpose of fulfilling the functions foreseen in the implementation rules of the Guidelines. States are not only obliged to set up National Contact Points, but even have to follow guidelines on their structure. The NCPs enjoy a certain degree of independence from national governments, which can amount to a complete independence as in the recently changed Dutch NCP. They are moreover subject to the control of the IC, as clarifications on moot issues are binding for states and NCPs. A contradictory interpretation of domestic organs is, in theory, irrelevant. A clear and unambiguous answer can therefore not be given to the question whether the NCPs are an organ of the OECD due to the differences in their composition and integration in state institutions, although a positive answer seems to be justified. As the OECD norms do provide for supervisory mechanisms on the actions of NCPs as subsidiary organs, it is in any case reasonable to assess their quality.

Since 2000, only two substantial clarifications have been issued: one in response to a British request, and one in response to a Swiss request.¹⁵¹ A clarification on procedural issues, *e.g.* bad performance in handling a specific instance was not yet given. The TUAC has prepared a request for such a procedural clarification that has not yet been submitted.¹⁵² Finally, the IC published *proprio motu* a statement on the necessity of an

¹⁴⁸ International Law Commission, *Report on the 61st session, art. 5 Commentary* 60 (2009), available at: <http://untreaty.un.org/ilc/reports/2009/2009report.htm> (last accessed: 23 December 2011).

¹⁴⁹ *Id.* at art. 6 Commentary, 65.

¹⁵⁰ *Id.* The position in the report of the International Law Association is similar, *see ILA Report, supra* note 53, at section 1-5, 28.

¹⁵¹ The Swiss request concerned the application of the Guidelines in domestic cases, *Annual Report of IC* (2005), *supra* note 51, at 26; The British request concerned the applicability of the old version of the Guidelines, *Annual Report of IC* 64-65 (2004), available at: http://www.oecd.org/document/20/0,3746,en_2649_34889_34325076_1_1_1_1,00.html (last accessed: 23 December 2011).

¹⁵² The request was not submitted as the clarification was considered as strategically counterproductive during the update deliberations. Information received in an interview conducted with Kirsten Drew from TUAC.

investment nexus, which can be considered as a general recommendation, but not as a clarification in the strict sense.¹⁵³

As concerns the quality of this recommendation, the IC elaborated on the necessity of an investment nexus and affirmed it as a relevant condition, but stated as well that flexibility is required, as the Declaration does not provide definitions of international investment.¹⁵⁴ This interpretation lacks any precision, and led to strongly different interpretations of the investment nexus requirement by several NCPs. Some of them included financial relations in the Guidelines, while others did not; a strict test was carried out regarding the petroleum industry, but a rather weak test was used to determine the applicability for the cloth and garment industry.¹⁵⁵ This is disconcerting if one considers the supervisory role the IC should play in contributing to an effective implementation of the Guidelines. It requires recommendations that actually raise the possibility of uniform interpretation by the NCPs. Otherwise the activities have to be considered arbitrary,¹⁵⁶ which clashes with the principles of good faith and constitutionality. As concerns the concrete problem of the investment nexus, the current update widened the scope of application, so that it is now clear that an investment nexus is not necessary and the financial sector is included. This is a result that could have been obtained earlier in the history of the Guidelines.¹⁵⁷

Another negative example of the IC's supervisory role is the treatment of parallel proceedings, a moot issue for at least a decade. The parallel proceedings problem refers to the question of whether NCPs should engage in specific instances, although legal proceedings happen at the same time. It is of particular relevance as regards MNE activities that occur in areas of limited statehood or weak governance zones in which judicial proceedings sometimes take place, but lack impartiality or effectiveness.¹⁵⁸ Some NCPs refused to treat such cases for the adversarial nature transported into the NCP procedures and for the encroachment on the responsibility of other actors and states and further reasons.¹⁵⁹ Other NCPs did not refuse to handle specific instances in parallel with legal

¹⁵³ The statement can be found in the *Annual Report of IC* (2003), *supra* note 113, at 22.

¹⁵⁴ *Id.*

¹⁵⁵ Utz, *supra* note 98, at 84.

¹⁵⁶ ZIMMER, *supra* note 12, at 96.

¹⁵⁷ OECD Watch Statement, *supra* note 10, at 2.

¹⁵⁸ See the statement of the Swedish NCP that judicial proceedings in Ghana, which is certainly not the paradigmatic case of a weak governance zone, are insufficient in resources and capacity. OECD, *Annual Meeting of the National Contact Points, Report by the Chair* 15 (2003), available at: <http://www.oecd.org/dataoecd/3/47/15941397.pdf> (last accessed: 23 December 2011).

¹⁵⁹ A summary of the different position can be found in the *Annual Report of IC* 94 (2006), available at: http://www.oecd.org/document/40/0,3746,en_2649_34889_37785448_1_1_1_1,00.html (last accessed: 23 December 2011).

proceedings for the simple reason that they see added value in the Guidelines procedures.¹⁶⁰ Generally, specific instances in parallel to legal proceedings were not prohibited in the Guidelines, or in the implementation provisions. The IC elaborated on this issue— although not in shape of a clarification— in its Annual Report 2006. It held that because of the complexity and specificity of each situation, a case-by-case approach is advisable. However, it gave some guidance to assess whether a specific instance should be carried out or not. NCPs have to evaluate whether there is actually added value in a specific instance. This value might have resulted from various characteristics of a case listed in the report, such as different actors, different issues, fostering other accountability mechanisms, providing other options than the formal procedures and shortcomings within the parallel proceedings.¹⁶¹ This elaboration clearly gives some guidance on the problem as concerns the content. The report however, states to the contrary that the summary of aspects to be taken into account should not be considered as the final word on this issue.¹⁶² Again the IC failed to assume its role as a supervisory organ by providing a concrete guidance that was directly disqualified as non-conclusive, which left the NCPs free to take them into account or not. The new version of the Guidelines now includes this guidance concerning the issue of parallel proceedings.¹⁶³ Nevertheless several years have elapsed to reach this situation. In order to conform to its supervisory role, the IC should issue more concrete statements and exercise its *proprio motu* competence more often, especially in light of the various procedural shortcomings of the NCPs that have been analyzed in detail by TUAC and NGOs.¹⁶⁴

Another means of enhancing the supervisory mechanisms is the newly introduced peer review mechanism, a process already used once on the Dutch NCP. The peer learning process is however, voluntary, and although Procedural Guidance requires the Investment Committee to facilitate peer-learning opportunities, the Commentary of the Investment Committee delegates this obligation directly to the NCPs. This again is no adequate exercise of its supervisory role.¹⁶⁵

¹⁶⁰ *Id.* at 97.

¹⁶¹ *Id.* at 96-98.

¹⁶² *Id.* at 27.

¹⁶³ OECD Guidelines— *Commentary of the Investment Committee*, *supra* note 6, at Section I, initial assessment, para. 2.

¹⁶⁴ See TUAC's analysis of procedural shortcomings in TUAC Contribution to the *Annual Report of IC* (2002), *supra* note 131, at 58. TUAC requested a clarification by the IC that was however not issued. Only a questionnaire was sent out to the NCP. The findings of the questionnaire were included in the *Annual Report of IC* (2003), *supra* note 113, at 22-25 and 45-56; *OECD Watch Contribution to the Annual Report of IC* (2008), *supra* note 43, at 126.

¹⁶⁵ *OECD Guidelines— Procedural Guidance*, *supra* note 6, at Section II, 5 (c) and *Commentary of the Investment Committee*, *supra* note 6, at Section I, Peer Learning.

VI. Reasoned Decision

The ILA report requires organs of an IO to state the reasons for their decisions or particular courses of action whenever necessary for the assessment of their proper functioning or otherwise relevant from the point of view of their accountability.¹⁶⁶ As regards the degree of detail that has to be met in order to satisfy this requirement, the principle distinguishes between decisions of a general nature and decisions that directly and immediately affect the rights and obligations of states or non-State entities.¹⁶⁷ In the first case, reasons relating to the general character of the decision are sufficient. In the second case, the organ should set out the principal issues of law and fact upon which the decision is based.¹⁶⁸

The decisions of the IC within the clarification procedures concern either general issues of the interpretation of the Guidelines or the correct procedures for specific instances. They are therefore subject to the less severe standards. The two substantial clarifications hitherto given contained reasons explaining the decision. They were thereby complying with the principle of a reasoned decision.¹⁶⁹

The decisions of NCPs neither belong to decisions of a general nature, nor to the second category of decisions directly affecting rights and obligations. However, as has been argued above, the statements and recommendations of NCP do have an impact on the rights and obligations of MNEs and the individuals concerned. The reasons provided by the NCP should therefore resemble the degree of information required for the second category of decisions and should be set out as the principal issues of law and fact. This was however neither reflected in the Procedural Guidance and the Commentary of 2000,¹⁷⁰ nor with some rare exceptions, in the practice of the NCP.¹⁷¹ The requirement to give information on the facts might be less strict when the information is of a confidential nature. However, a general standard that discussions and deliberations are confidential and only the fact of the conclusion as such is public, as advocated by BIAC,¹⁷² is legally unacceptable. The final

¹⁶⁶ *ILA Report*, *supra* note 53, at Principle of Stating the Reasons for Decisions, Section 1, 13.

¹⁶⁷ *Id.* at Section 2, 13.

¹⁶⁸ *Id.* at Section 3, 13.

¹⁶⁹ See the two clarifications in *Annual Report of IC (2005)*, *supra* note 51, at 26; *Annual Report of IC (2004)*, *supra* note 151, at 64-65.

¹⁷⁰ *OECD Guidelines—Procedural Guidance*, *supra* note 123, at Section I, 4(b); *Commentary of the Investment Committee*, *supra* note 123, at Section I, para. 18-19.

¹⁷¹ OECD Watch, *The Confidentiality Principle*, *supra* note 110, at 6; *see also* the answers of 23 NCPs to the question whether they give reasons for their decisions, *Annual Report of IC (2003)*, *supra* note 113, at 53-54.

¹⁷² BIAC, *OECD Guidelines for Multinational Enterprises – Business Brief (2003)*, available at: http://www.biac.org/pubs/mne_guidelines/business-brief-1-2-final.pdf (last accessed: 23 December 2011).

statements should thus, as a general rule, contain information on the outcome of the instance and on the facts as well as a referral to the norms applied to them.¹⁷³ Taking into account the conviction of the UK NCP that there are no circumstances by which the effective implementation of the Guidelines will be served best by not publicizing the outcome of a complaint,¹⁷⁴ it should be highlighted that confidentiality is the exception, and transparency and reasoned decisions the regular standard. The new version of the Guidelines respects this principle and requires NCPs to publish final statements after procedures are closed as well as on negative initial assessments of an instance. These statements should include at least the issues raised, the reasons for the decision and, as appropriate, the recommendations for implementation, and the reasons why no agreement has been reached.¹⁷⁵ On paper the requirements therefore do generally accord with the ILA standard. Only the restriction "as appropriate" for the inclusion of recommendations remains behind the ILA standard, when it opens the possibility for the NCP to omit its legal reasoning based on the Guideline provisions that led to the specific sort of recommendations. Moreover it remains to be seen whether NCPs will actually change their rather silent behavior and adapt to these new rules.

VII. Effective Remedy

The ILA report states that as a general feature of law and as a basic international human rights standard, the right to a remedy also applies to IOs in their dealings with *inter alia* non-state parties,¹⁷⁶ who are affected in their interests or rights by actions or omissions of an organ of an IO or one of its agents.¹⁷⁷ The principle requires first, on a procedural level, the granting of access to remedial procedures, and secondly, on a substantial level, the actual granting of a remedy.¹⁷⁸ These remedies should be adequate, effective and in the case of legal remedies, enforceable.¹⁷⁹ "Adequate" refers to the kind and nature of the

¹⁷³ A good example for a negative outcome is the Final Statement of the French NCP, *Aspocomp*, mentioning the company, the allegations, the facts and the norms violated. See *Annual Report of IC* (2004), *supra* note 151, at 76. A good example for a positive outcome is the Final Statement of the Chilean NCP, *Marine Harvest Chile S.A.*, including information on company, allegations, facts, norms, and solutions to remedy the violations, available at: <http://www.oecd.org/dataoecd/42/13/32429072.pdf> (last accessed: 23 December 2011); A positive example is also given with the Final Statement of the UK NCP, *Peugeot*, *Annual Report of IC* (2008), *supra* note 43, at 61-70.

¹⁷⁴ Stakeholder Consultation Document on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines 15 in, OECD Watch, *The Confidentiality Principle*, *supra* note 110, at 6.

¹⁷⁵ See the section on transparency and access to information.

¹⁷⁶ *ILA Report*, *supra* note 53, at Principle of Effective Remedy, Section 1, at 1, 33.

¹⁷⁷ *Id.* at 33.

¹⁷⁸ *Id.* at 33 *et seq.*

¹⁷⁹ *Id.* at 33.

complaints that should be mirrored by the remedy.¹⁸⁰ “Effective” refers to the independence of the remedial institution from the respondent authority,¹⁸¹ and to the requirement to consider the substance of a complaint with all necessary care and to give a reasoned reply.¹⁸² In the case at hand, the need for an effective remedy might only arise as concerns the specific instances handled by NCPs, impacting on the rights of MNEs and individuals, at least when they present the only available dispute resolution mechanism couched in the language of rights, or when they entail external consequences for future action of the parties. In particular, the shortcomings of the US, Japanese and Korean NCPs raise serious questions of accountability and possible remedies.¹⁸³

Within the context of the Guidelines, it is the IC that can be considered as having the competence to remedy actions of the NCP through the clarification procedures.¹⁸⁴ There are several problems with this procedure. First, the IC as a reviewing institution should be independent, which is currently not the case, as it is comprised of Member States. Sometimes the same person or persons of the same governmental department carry out NCP and the IC tasks, thereby reviewing and remedying their own conduct. Second, up to the 2011 revision, the ability to submit remedial actions only existed for states and the advisory organs, but not for civil society organizations.¹⁸⁵ From the point of view of the affected MNEs, this was rather uncomplicated, as they could refer cases to BIAC, their institutional representative. For the individuals or groups concerned with such a possibility existed only in a substantially limited sense, through the TUAC, which was an institution basically dedicated to advance labor rights. Moreover, only the MNEs had the right to issue statements within the review process.¹⁸⁶ These shortcomings were answered effectively by the adoption of the new version, which allows OECD Watch, as the representative of civil society organizations, to request a clarification, and enables all parties of a specific instance that gave rise to a clarification to express their views orally, or in writing.¹⁸⁷

¹⁸⁰ *Id.* at 34.

¹⁸¹ *Id.*

¹⁸² *Id.* at 37.

¹⁸³ See *TUAC Contribution to the Annual Report of IC (2005)*, naming these three in particular and others that do not comply with the rules on implementation. *Annual Report of IC (2005)*, *supra* note 51, at 122.

¹⁸⁴ Between 1977 and 2000, 35 clarifications were requested. Since the revision in 2000, only 2 more clarification requests were submitted. Utz, *supra* note 98, at 52.

¹⁸⁵ *OECD Guidelines— Procedural Guidance*, *supra* note 123, at Section II, 3 (b) and (c).

¹⁸⁶ *OECD Guidelines— Council Decision*, *supra* note 123, at Section II, Investment Committee, at para. 4.

¹⁸⁷ For the competence of OECD Watch to request clarification, see *OECD Guidelines— Procedural Guidance*, *supra* note 6, at Section II, 2 (b) and (c); for the possibility of the parties to express their views, see *OECD Council Decision*, *supra* note 6, at Section II, 4.

Still, the clarification procedures can only be perceived as a supervisory tool, rather than as a way to obtain an effective remedy, as they neither provide the direct right to submit a clarification to all affected parties, nor guarantee the necessary independence of the reviewing organ. As the IC is excluded from making individual recommendations, a direct reversal of an NCP decision is also not possible.

E. Impartiality

The principle of impartiality and objectivity contained in the ILA report contains an abstract duty to act in an objective, fair and impartial manner.¹⁸⁸ As regards the NCPs, it has been noted in the literature that they lack this quality.¹⁸⁹ This deficiency can only be remedied by granting the government official a high degree of independence from their ministries, and by organizing the NCPs in a tripartite or four-partite way, which creates a counterweight to the government official. The Dutch NCP reorganized its NCP in order to respond to this critique.¹⁹⁰ It consists now of one independent chair and three independent members selected from the various stakeholder communities, who are not bound by government policies. It is however advised by the relevant ministries.¹⁹¹ In contrast to the 2000 version of the Guidelines, the newly adopted Rules introduce the requirement for NCPs to act in an impartial manner.¹⁹² The Procedural Guidance requires impartiality of NCP operations while maintaining an adequate level of accountability to the adhering government.¹⁹³ Relying on impartiality, while at the same time tying the NCP to the government seems to contradict the concerns mentioned above. There are, however, two reasons that might be invoked in favor of a continued relationship with the government. First the principle on impartiality is, despite its fundamental importance, dependent on compliance with the other principles, and can be perceived as being respected if the other principles such as constitutionality, supervision, access to information and transparency are fulfilled.¹⁹⁴ In case these principles are respected and the impartiality given, the

¹⁸⁸ *ILA Report*, *supra* note 53, at Principle of Objectivity and Impartiality, 14.

¹⁸⁹ Schuler, *supra* note 4, at 1756; He describes an instance in which the Finnish NCP was accused before the Ombudsman of the Finnish parliament to be partial in its handling of a specific instance; also Queinnec, *supra* note 27, at 3.2; In the same vein, *Contribution by OECD Watch to the Annual Report of IC (2005)*, *supra* note 51, at 134; see also the statement of the UK parliamentary commission on Human Rights that considered the lack of neutrality of the NCP as one of the major obstacles to an effective remedial body. Statement contained in *OECD Watch, Ten Years On*, *supra* note 98, at 50.

¹⁹⁰ See the Annual Report of IC (2008), *supra* note 43, at 91.

¹⁹¹ See description in the *Annual Report of IC (2008)*, *supra* note 43, at 12.

¹⁹² *OECD Guidelines— Procedural Guidance*, *supra* note 6, at Section I, A (1) and C. Commentary of the Investment Committee, *supra* note 6, at Section I, Guiding Principles for Specific Instances.

¹⁹³ *OECD Guidelines— Procedural Guidance*, *supra* note 6, at Section I, A (1).

¹⁹⁴ In this sense, see the *ILA Report* *supra* note 53, at Principle on objectivity and impartiality, 14.

institutional relationship to the ministry for economy or investment might in fact be considered as the “hidden” teeth of the implementation procedures through its institutional memory.¹⁹⁵ This seems to be implied by the newly adopted paragraph on providing other government agencies with relevant statements of the NCP, if this is relevant for their decisions. As long as neither concrete sanctions nor follow-up or monitoring mechanisms are in place, which is currently the situation, this relationship can be of importance for the effectiveness of the Guidelines. Unfortunately, the other principles are currently not respected by the NCPs, and their impartiality is therefore, not a given.

F. Summary and Recommendations

The article has given concrete advice for the formulation of international procedural principles that should apply to OECD procedures in the context of the OECD Guidelines. The necessity of analyzing the procedural aspects of the Guidelines’ genesis and implementation is justified on the assumption that the Guidelines for MNEs are not well understood if one uses the term soft-law. They are a globally applicable standard, elaborated on the basis of international norms and strengthened through their recognition by external actors such as, most prominently, the Security Council of the UN. They are implemented through specific procedures that factually and legally impact on the rights and duties of MNEs and individuals, especially in cases where no other recourse against alleged corporate misbehavior exists, such as in areas of limited statehood or weak governance zones. It is to be accepted that in the context of the Guidelines, the OECD and its implementing institutions exercise public authority that needs to be analyzed from the perspective of the procedural rights of affected persons and corporations. The classical sources of public international law only provide selected rules on procedural aspects of IO actions, such as the supremacy of the law and a right to an effective remedy, including a reasoned decision. A further effort is necessary to develop these norms. This work should draw from the constitutional norms and practices of the IO and from norms applicable to the domestic exercise of public authority. In order to be valid and generally applicable, they must however be couched in general principles of international law or customary international law. Theoretically, the groundwork for doing so has been produced in the literature. As concerns concrete proposals, it is currently the ILA that has elaborated the most concrete and encompassing set of procedural standards following the basic ideas on the combination of institutional practice and existing customary norms or general principles. The OECD performance as regards these principles can so far be described as poor, at least for the ICs and NCPs regulatory and dispute resolution measures.

¹⁹⁵ I am indebted to a former employee of the German NCP who directed me towards this argument during an interview.

The Investment Committee performs quite well as regards to the elaboration of new norms. Serious concerns exist however, concerning its impartiality and the quality of its supervisory and review measures. Up to now, a critical evaluation of NCP's performance has not taken place. The clarifications and recommendations given by the IC lack the degree of precision necessary to contribute to the uniform application of the Guidelines. The reports given to the OECD Council are a description, not an analysis or critical evaluation of the effectiveness of the Guidelines. The 2011 update also failed to define the IC's supervisory role in accordance with ILA standards, although improvements are given by enabling OECD-Watch to request clarifications and allowing for all parties to express their views on the matter. Moreover the peer review system might be a practicable tool for supervision and future uniformity of application. However, the interpretation given by the IC to its role within the peer review process is again a step away from a proper supervisory organ.

The NCP performance varies heavily from country to country, which raises a general problem with the constitutionality/legality of the actions carried out and the principle of good faith. In particular, the rules on transparency and access to information are circumvented by relying on the confidentiality principle to an extent, and this is not justifiable. Access to information is therefore, in too many cases, not provided. Unfortunately, even in those cases where statements were given by the more transparent NCPs, the statements often lacked a kind of reasoned explanation on which grounds and for what facts a specific decision was reached. This secrecy is maintained in the annual reports of various NCPs. The new Guidelines do confront this issue and include better and stricter rules, as concerns the requirement to publish final and interim statements and annual reports specifying also their necessary content. The new version of the Guidelines also introduces new principles for the operation of the NCPs, such as its impartiality and predictability. These rules present improvements, but their implementation remains to be seen in practice.

In order to remedy some of these shortcomings, the IC as well as the NCPs should first and foremost abide by the rules adopted, following the principle on constitutionality, as the existing rules include useful approaches that wait to be honestly implemented. The IC should focus on its role and function as a parent organ, and pressure NCPs to comply with the implementation rules. NCP should strive for a uniform application of specific instance rules and make use of the newly introduced peer review mechanism. Through the introduction of OECD Watch's competence to request clarification, another critical civil society actor will hopefully make use of the available procedures in order to remind the IC and the NCPs of their respective duties.