

Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises

*By Gefion Schuler**

A. Governance to Secure Corporate Social Responsibility

I. Mediation-based Governance

Botnia S.A./Metsä-Botnia Oy's construction of the Orion pulp mill in Uruguay raised concerns regarding violations of national, regional, and international law with regard to social and environmental protection.¹ On 18 April 2006, the Center for Human Rights and Environment (CEDHA), an Argentinean non-governmental organisation, submitted to Finland's National Contact Point (NCP) a "specific instance" regarding the possible non-compliance of Botnia S.A. (a Finnish enterprise) with the OECD Guidelines for Multinational Enterprises (OECD Guidelines for MNEs, Guidelines)² when building the envisaged pulp mill in Uruguay.³ According to the Center for Human Rights and Environment, Botnia

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¹ OECD Watch, Quarterly Case Update, spring 2007, available at: http://www.oecdwatch.org/docs/OW_quarterlycaseupdate_english.pdf, at 4-5. For the statement of the Finnish NCP on the issue see Ministry of Trade and Industry, Finland's National Contact Point's Statement on the specific instance submitted by CEDHA, an Argentinean non-governmental organization, regarding Botnia S.A./Metsä-Botnia Oy's Pulp Mill project in Uruguay, 21 December 2006, available at: http://www.oecdwatch.org/docs/CEDHA_Botnia_FinnishNCP_statement.pdf.

² OECD, Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Review 2000, DAF/IME/WPG(2000)9, 8 September 2000 (Ministerial Booklet). This document reproduces the text of the Ministerial Booklet published at the 2000 Ministerial Council Meeting containing the Declaration on International Investment and Multinational Enterprises, the Guidelines for Multinational Enterprises (Part 1), the Decision of the OECD Council and the Procedural Guidance (Part 2), and Commentaries (Part 3).

³ OECD Watch, Quarterly Case Update, spring 2007, available at: http://www.oecdwatch.org/docs/OW_quarterlycaseupdate_english.pdf, at 4-5.

S.A. violated the OECD Guidelines for MNEs especially with respect to Chapter II “General Policies”, Chapter III “Disclosure”, Chapter V “Environment” and Chapter VI “Bribery”.⁴ Specific instances concerned with related issues were filed by the Center for Human Rights and Environment with the Swedish and Norwegian NCPs against Nordea, a leading financial services group of the Nordic and Baltic Sea area, for possible financing of Botnia S.A.’s pulp mill project⁵ and against the Finnish state bank Finnvera for providing export guarantees to Botnia S.A.⁶ Other fora that have in the meantime become involved in the issue are the International Court of Justice⁷ and member institutions of the World Bank Group, the International Finance Corporation⁸ and the Multilateral Investment Guarantee Agency.⁹

After the issue relating to Botnia S.A.’s alleged misbehaviour was filed, the Finnish NCP organised a hearing in cooperation with the Finnish Ministry of Trade and Industry. The meeting included representatives from both the Center for Human Rights and Environment and Botnia S.A. as well as representatives from Sweden’s and Norway’s NCPs. In the course of these negotiations, Finland’s NCP had been in contact with the authorities in Uruguay and with representatives from Argentina’s and Spain’s NCPs. The Finnish NCP offered future good offices to help the parties resolve the issue.¹⁰ On 21 December 2006 the NCP posted a comprehensive statement on the facts and procedures of this specific instance on the internet.¹¹

⁴ *Id.* at 4-5.

⁵ *Id.* at 4-5.

⁶ *Id.* at 4-5.

⁷ International Court of Justice, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), pending case, general list no 135, further information available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=au&case=135&k=88>.

⁸ International Finance Corporation, Orion Pulp Mill - Uruguay, available at: http://www.ifc.org/ifcext/lac.nsf/content/Uruguay_Pulp_Mills.

⁹ Multilateral Investment Guarantee Agency, Projects, available at: http://www.miga.org/projects/index_sv.cfm?pid=690.

¹⁰ Ministry of Trade and Industry, Finland’s National Contact Point’s Statement on the specific instance submitted by CEDHA, an Argentinean non-governmental organization, regarding Botnia S.A./Metsä-Botnia Oy’s Pulp Mill project in Uruguay, 21 December 2006, available at: http://www.oecdwatch.org/docs/CEDHA_Botnia_FinnishNCP_statement.pdf.

¹¹ *Id.*

These procedures illustrate that responsible behaviour of MNEs in the course of investment activities is aimed to be secured through multi-level cooperation and a decentralized soft implementation mechanism. The actions taken in this specific instance exemplify that the implementation mechanism relies on mediation realized by the NCPs as well as on information collection and dissemination. The cooperation involves institutional and substantial cooperation.

The effectiveness of such governance through multi-level cooperation and decentralized soft implementation is furthermore illustrated in the following specific instance. The Czech-Moravian Confederation of Trade Unions submitted an instance to the Czech NCP alleging that a Czech subsidiary of the German company Bosch had violated the Guidelines for MNEs' chapter on employment and industrial relations (chapter IV of the Guidelines for MNEs) by denying the employees their right to organize.¹² It submitted that the Bosch subsidiary had prevented the workers from establishing a trade union and that the local management had even used physical force to prevent the workers from exercising their rights. This instance was discussed at four meetings in the Czech NCP. The Czech NCP informed the German NCP as well as the German Embassy and offered a forum for negotiations. In the course of 11 months from the filing of the instance in June 2001 until its conclusion in April 2002, the parent company changed the local management in order to enable constructive negotiations. At the fourth NCP meeting, the new management declared that there were no obstacles for the growth and development of the newly established trade union and for reaching a collective agreement.

The analyzed governance mechanism constitutes an exercise of public authority. The fact that the OECD Guidelines for MNEs and their implementation mechanism are soft law instruments does not contradict this supposition because the Guidelines' mechanisms generate considerable reputational effects on actors outside the OECD. Moreover, the Guidelines regulate a subject matter of high public interest which would call for regulation in domestic or international public law in the absence of the OECD Guidelines for MNEs.

This study proposes that effective governance is achieved through multi-level cooperation and through decentralized soft mediation-based implementation. This project's perspective¹³ sheds light on the governance mechanism's legal

¹² Trade Union Advisory Committee (TUAC), TUAC Internal analysis of the treatment of cases raised with national contact points February 2001-April 2007, available at: http://www.oecdwatch.org/docs/TUAC_ListOfCases_Feb2007.pdf, at 4.

¹³ Armin von Bogdandy, Philipp Dann, Matthias Goldmann, in this issue; Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *Introduction: Global Governance and Global Administrative Law in the*

characteristics. These are in particular the necessity of a concrete mandate for the particular OECD policies, particular legal characteristics of the adherence procedure, and the *de facto* constraint to implement the Guidelines for MNEs.

II. Political Implications of Mediation-based Governance

Mediation-based governance brings about positive consequences for the effectiveness of an instrument. The NCP procedures are relatively easy to operate, they are flexible, and they do not require explicit juridical knowledge nor do they involve a financial risk. However, mediation-based governance is a political process and impartial problem-solving capacity becomes critical when a specific instance is filed on a politically sensitive issue for the government where the NCP is located. Moreover, since NCPs are mainly located in the government departments concerned with foreign investment, it is the same people who are responsible for a successful foreign investment policy who are expected to judge the behaviour of their investing enterprises. Coming back to the specific instance filed with the Finnish NCP of alleged violations of the OECD Guidelines for MNEs by Botnia S.A./Metsä-Botnia Oy in the Orion pulp mill project in Uruguay, the difficulties become explicit. Based on its decision in the comprehensive statement issued on 21 December 2006¹⁴, Finland's NCP stated that Botnia S.A. had complied with the OECD Guidelines for MNEs with respect to its pulp mill in Uruguay.¹⁵ Following this statement, the Center for Human Rights and Environment filed a complaint to the Finnish Parliament Ombudsman.¹⁶ In the complaint the Center for Human Rights and Environment cited, among other issues, concerns over the impartiality of Finland in the specific instance procedure. The Center for Human Rights and Environment claimed that the chemical supply company Kemira, the Metso Corporation, the export credit agency Finnvera and the Nordic Investment Bank were the key stakeholders in the Orion pulp mill project and that they are all enterprises with Finnish ownership. For this reason, the Center for Human Rights and Environment claimed that the Finnish NCP, located in the ministry of trade

International Legal Order, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1-13 (2006); Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006).

¹⁴ See (note 10).

¹⁵ The Ministry of Trade and Industry's decision on Botnia S.A./Metsä-Botnia Oy's pulp mill project: Metsä-Botnia has complied with the OECD Guidelines in Uruguay, 22 December 2006, available at: <http://www.oecd.org/dataoecd/17/42/38053102.pdf>.

¹⁶ Pulp Mill Conflict: Finnish Ombudsman receives complaint in Botnia S.A. Investment conflict, 31 January 2007, available at: http://www.oecdwatch.org/docs/CEDHA_vs_BOTNIA_PR_Ombudsman.pdf.

and industry, did not engage in impartial negotiations with regards to alleged violations of the OECD Guidelines for MNEs by Botnia S.A.¹⁷

III. The OECD's Engagement in Governance to Secure Corporate Social Responsibility

The analyzed governance aims to secure and promote responsible behaviour of MNEs during their investment activities.¹⁸ The OECD's involvement in corporate social responsibility was part of a wider package of measures aimed at greater stability and liberalization of investment conditions between OECD states.¹⁹ Industrialized states feared that interference by MNEs might provoke hostile reactions in developing states and possibly lead to the imposition of restrictions on the rights of foreign investors. A kind of regulatory gesture was required to help defuse mounting public concern about the lack of accountability of MNEs within the international economic system, but the majority of OECD member states did not want an instrument with legal sanctions against MNEs.²⁰ They adopted the OECD Guidelines for MNEs as a soft law code of conduct.

Concerns about the social responsibility of MNEs are not new. A need for regulation to ensure the accountability of MNEs towards workers, communities and consumers was first identified in the early 1970s.²¹ It was seen with unease that, as states are the traditional addressees of international treaty and customary law, MNEs can, in contrast to their amount of power and influence, hide behind the "state veil".²² A wide variety of international instruments addressing corporate social responsibility have since been developed to fill this regulatory gap. Sources comprise public international law instruments, NGO guidelines, individual business codes of conduct and domestic legislation.²³

¹⁷ *Id.*

¹⁸ JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY* 248 (2006).

¹⁹ *Id.* at 248.

²⁰ IOANNIS N. ANDROULAKIS, *DIE GLOBALISIERUNG DER KORRUPTIONSBEKÄMPFUNG* 190 (2006), ZERK (note 18), at 248.

²¹ ANDROULAKIS (note 20), at 128; James Salzman, *Decentralized Administrative Law in the Organisation for Economic Cooperation and Development*, 68 *LAW AND CONTEMPORARY PROBLEMS* 189, 212 (2004-2005); ZERK (note 18), at 22 *et seq.*

²² Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* 309 (2004).

²³ *Id.*

B. Analysis of the Governance

I. Governance Through Multi-level Cooperation

Effective governance to promote and secure corporate social responsibility of MNEs during their investment activities is achieved through multi-level institutional and substantial cooperation. Substantial cooperation is realized by reference to other instruments relating to this area. Increased unity in the substantive prescriptions is thereby furthered. Institutional cooperation involves exchanges of views, invitation of experts from other organizations and non-member states and sharing of institutional infrastructure. This leads to a pooling of knowledge and institutions. Resulting from multi-level cooperation is rationalization and enhanced effectiveness of the particular initiatives addressing corporate social responsibility.

The OECD Guidelines for MNEs are a prime example of effective governance through multi-level cooperation. The OECD as the Guidelines for MNEs' institutional framework is characterized by cooperation with other organizations, non-member states and experts. The procedures that led to the revised Guidelines for MNEs in 2000 involved a variety of actors. Furthermore, the Guidelines for MNEs' implementation mechanism is characterised by multi-level institutional cooperation. With relation to substantial cooperation, the Guidelines for MNEs widely refer to substantive norms of other institutions' instruments.

1. Institutional Cooperation to Promote Corporate Social Responsibility

The multi-level cooperation to promote corporate social responsibility is realized through a network of international organisations, NGOs and experts. The principal actor of the network is the OECD.

a) The OECD as the Principal Actor

The OECD was founded in 1961 as the successor of the Organisation of European Economic Cooperation (OEEC).²⁴ Currently, thirty states are members of the OECD. These are the source of most of the world's direct investment flows and home to most MNEs.²⁵ According to Article 5 of the OECD Convention, the OECD

²⁴ The OEEC was founded in 1948 to implement the European Recovery Program (Marshall Plan). Cf. Convention on the Organisation of Economic Co-operation and Development (Convention on the OECD), 14 December 1960, Art. 15, UNTS vol. 888, 180.

²⁵ United Nations Conference on Trade and Development, World Investment Report, 2007, available at: http://www.unctad.org/en/docs/wir2007_en.pdf, at 3 and 24.

“may (a) take decisions which, except as otherwise provided, shall be binding on all the members; (b) make recommendations to members; and (c) enter into agreements with members, non-member states and international organisations.”²⁶ To fulfil its tasks, the OECD is provided with a budget by the member states which amounted to EUR 342.9 million in 2008.²⁷ The OECD has its Secretariat in Paris²⁸ which is staffed by around 2,500 employees coming from all the member states.²⁹ The substantive work of the OECD is conducted in about 200 Committees and Working Groups by about 40,000 senior officials from national administrations and independent experts.³⁰ The highest decision making organ in the OECD is the Council which convenes annually in sessions of Ministers and in between in sessions of Permanent Representatives.³¹ Decisions in the Council are taken by consensus.³² The Council is assisted by an Executive Committee³³ that meets in composition of senior officials.³⁴

b) Cooperation with other Organizations, Non-member States and Experts

The responsible body for the Guidelines for MNEs' mechanism is the Investment Committee which is attributed to the Directorate for Financial and Enterprise Affairs. The OECD member states send senior officials of national ministries and central banks to the Investment Committee. Observing states in the Investment Committee are Argentina, Brazil, Egypt and Chile, which are countries adhering to the Guidelines without being members of the OECD. International organisations, namely the International Monetary Fund, the United Nations Conference on Trade and Development, the World Bank and the World Trade Organisation send

²⁶ Convention on the OECD (note 24), Art. 5.

²⁷ OECD, OECD Annual Report 2008, available at: <http://www.oecd.org/dataoecd/39/19/40556222.pdf>, at 11.

²⁸ Other permanent OECD bases are in Berlin, Mexico City, Tokyo and Washington D.C.

²⁹ *Id.* at 101.

³⁰ *Id.* at 107.

³¹ Convention on the OECD (note 24), at Art. 7.

³² Convention on the OECD (note 24), at Art. 6.

³³ Convention on the OECD (note 24), at Art. 9; Council, Resolution of the Council on a new governance structure for the organisation, C(2006)78/FINAL, 24 May 2006, para. 31.

³⁴ ROGER BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS, 1976-1979, 29 (1979).

observers to the Investment Committee.³⁵ The OECD furthermore invites observers from international governmental and non-governmental organisations as well as from non-member states into the Investment Committee facilitating extensive cooperation.³⁶

The Investment Committee was created by the OECD Council on 1 March 2004 by a merger of the Committee on Capital Movements and Invisible Transactions and the Committee on International Investment and MNEs (CIME).³⁷ The mandate of the Investment Committee among other responsibilities is to carry out the tasks assigned to it by the OECD Declaration on International Investment and MNEs and the related Council Decisions on the Guidelines for MNEs and the Procedural Guidance.³⁸ The Investment Committee established the Working Party of the Investment Committee that supports the Committee in its work concerning the Guidelines for MNEs.³⁹ A system of reporting duties from the Working Parties to the Committees to the Council enhances cooperation between the individual OECD bodies.⁴⁰

Multi-level cooperation with the OECD as the principal institution is furthermore realized by formal relations the OECD maintains with representatives of trade

³⁵ Resolution of the Council on the Terms of Reference of the Investment Committee, C(2004)3 and CORR1, 22 April 2004; Convention on the OECD (note 24), Art. 12; Rules of Procedure of the Organisation, (C(61)21), 30 September 1962, as amended in 1962 (C(62)115(Final)) and 1970 (C(70)133(Final)), rules 8(a), 9; Note by the Secretary-General, Participation of non-members in the activities of the organisation: legal aspects of the issue, C(98)211, 2 December 1998, para. 3; Resolution of the Council concerning the participation of non-members in the work of subsidiary bodies of the organisation, C(2004)132/FINAL, 5 August 2004.

³⁶ See Note by the Secretary-General, Participation of non-members in the activities of the organisation: legal aspects of the issue, C(98)211, 2 December 1998; Resolution of the Council concerning the participation of non-members in the work of subsidiary bodies of the organisation, C(2004)132/FINAL, 5 August 2004.

³⁷ Rules of Procedure of the Organisation, (C(61)21), 30 September 1962, as amended in 1962 (C(62)115(Final)) and 1970 (C(70)133(Final)), rules 22(a), 18(a)(iii); Resolution of the Council on the Terms of Reference of the Investment Committee, C(2004)3 and CORR1, 22 April 2004.

³⁸ Resolution of the Council on the Terms of Reference of the Investment Committee, C(2004)3 and CORR1, 22 April 2004 Art. 3; Ministerial Booklet (note 2), Council Decision, chapter II, Procedural Guidance chapter II, Commentary on the implementation procedures of the Guidelines, chapter II.

³⁹ The Investment Committee: Strategy and Organisation, Mandate of the Working Party of the Investment Committee, DAF/INV(2004)1, 20 September 2004, para. 1(i).

⁴⁰ Ministerial Booklet (note 2), Procedural Guidance chapter I D (stipulating reporting duties of NCPs to the Investment Committee) and Commentary on the Implementation Procedures, para. 3 (stipulation of reporting duties of the Investment Committee to the Council).

unions and of businesses and industry in the member countries through two organisations. These two organizations are the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). BIAC and TUAC are officially recognized as advisory bodies to the OECD by the OECD Council.⁴¹ A close and continuing cooperation with business and industry and trade unions through BIAC and TUAC is secured by the fact that the Guidelines for MNEs oblige the OECD Investment Committee to hold exchanges of views with the two organisations on matters covered by the Guidelines and in the experience gained from their application.⁴² The exchanges of view with business representatives and trade unions enhance effectiveness and rationalisation. The early involvement of both sides of the bargaining table, business and industry through BIAC and trade unions through TUAC, makes sure that their viewpoints and objections are taken into consideration at all stages of the negotiation, adoption and implementation of the instrument. In addition to reinforcing transparency this involvement leads to higher levels of support by the people and acceptance of the instrument and thereby to increased effectiveness.⁴³

BIAC and TUAC are furthermore very involved in the Guidelines for MNEs' processes. TUAC in particular plays an important role since the specific instances are to a great part filed by TUAC. TUAC also takes over special training responsibilities, conducting seminars to train interested organisations (mainly representing the work force) how to initiate the implementation procedures in the NCPs.⁴⁴

⁴¹ BIAC was constituted in 1962 as an independent organisation with the task to represent business and industry in the work of the OECD and to express opinions on questions of common interest. TUAC is one of the oldest international trade union groupings with direct consultative status with an international organisation. It was founded in 1948 to allow European trade unions to play a full role in the administration of the Marshall Plan by the OEEC and vis-à-vis the European Recovery Program. With the creation of the OECD in 1961, TUAC was officially accredited with consultative status by the OECD, representing the organized workers of OECD member countries. TUAC maintains a permanent Secretariat in Paris. Cf. Labour/Management Programme (LMP) Final Reports, 2002, available at: http://www.oecd.org/document/61/0,2340,en_2649_201185_1944829_1_1_1_1,00.html; Homepages of BIAC and TUAC are available at: <http://biac.org/> and <http://www.tuac.org/en/public/index.phtml>; BLANPAIN (note 34), 36, 40.

⁴² Ministerial Booklet (note 2), Council Decision, chapter II 1. The "exchanges of view" can also be requested by BIAC and TUAC. Individual MNEs also have the opportunity to express their views concerning the Guidelines, but only on issues involving their interests. Cf. Ministerial Booklet (note 2), Council Decision, chapter II, paras. 1-5.

⁴³ See A. Laurence Dubin & Rozen Nogellou, *Public Participation in Global Administrative Organizations*, working paper, presented at the 3rd global administrative law seminar, Viterbo, 15-16 June 2007, at 26.

⁴⁴ For example, a seminar held by TUAC on the European Works Councils and the OECD Guidelines for MNEs, available at: <http://old.tuac.org/statemen/communiq/TUAC%20training%20En.pdf>.

Another organisation involved in the mechanism of the Guidelines for MNEs is OECD Watch, an umbrella organisation that was established in 2003 to coordinate the work of NGOs on the OECD Guidelines for MNEs.⁴⁵

2. *Substantial Cooperation in the Field of Corporate Social Responsibility*

The OECD Guidelines for MNEs form the normative nucleus of such governance.

a) *The OECD Guidelines for MNEs as the Normative Nucleus*

The OECD Guidelines for MNEs are part of an investment package contained in four documents. They were first adopted in 1976 and in their present form at the Ministerial Council Meeting in 2000.⁴⁶ Two of the four interrelated documents, the OECD Declaration on International Investment and MNEs and their annex, the OECD Guidelines for MNEs, stipulate substantive law. The other two documents, the Council Decision on the Guidelines for MNEs and the attached Procedural Guidance, prescribe implementation procedures for the OECD Guidelines for MNEs. The OECD's Investment Committee further prepared Commentaries on these four documents to provide information on and explanation of the Guidelines' text and the Council Decision. The commentaries are neither an integral part of the Declaration on International Investment nor of the Council Decision on the Guidelines.⁴⁷ While the Declaration on International Investment and MNEs and the Guidelines for MNEs are non-binding, the Council Decision on the Guidelines for MNEs and the attached Procedural Guidance are binding on adhering states.⁴⁸

The standards stipulated in the OECD Guidelines for MNEs contain the substantive prescriptions of corporate social responsibility and are arranged in eight chapters. The prescriptions are formulated broadly and MNEs have to design specific measures in order to implement the Guidelines for MNE's standards themselves. Following a chapter on concepts and principles and one on general policies, the Guidelines address eight subject fields, namely policies of disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and finally taxation.⁴⁹

⁴⁵ Homepage of OECD Watch, available at: <http://www.oecdwatch.org/>.

⁴⁶ Ministerial Booklet (note 2). Previous revisions were carried out in 1979, 1982, 1984 and 1991. See OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 7 (1994); BLANPAIN (note 34), at 34.

⁴⁷ Ministerial Booklet (note 2), at Commentaries.

⁴⁸ Convention on the OECD (note 24), at Art. 5a); Ministerial Booklet (note 2), at Introduction.

⁴⁹ Ministerial Booklet (note 2), at OECD Guidelines on MNEs.

The OECD Guidelines address MNEs, however they stipulate only a vague definition of an MNE. According to the OECD Guidelines, MNEs usually comprise companies or other entities established in more than one country that are linked so that they may co-ordinate their operations in various ways.⁵⁰ The Guidelines for MNEs' applicability however is not restricted to MNEs; the OECD Guidelines are also intended to direct domestic as well as small and medium-sized enterprises.⁵¹ They are designed to influence the behaviour of those MNEs located in an adhering state, and to those MNEs located in non-adhering states that have their headquarters in one of the adhering states.⁵²

b) Reference to Other Instruments

The Guidelines for MNEs are characterized by the fact that they extensively refer to substantive norms in other international treaties and soft law instruments. The OECD Guidelines explicitly state that they are intended to stand beside and not conflict with other instruments in the subject field of corporate social responsibility.⁵³

For example, the provisions of the Guidelines' chapter on employment and industrial relations echo relevant provisions of the International Labor Organizations' (ILO) 1988 Declaration on Fundamental Principles and Rights at Work as well as the ILO's 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.⁵⁴ Among other ILO Conventions and Recommendations, the Guidelines' chapter on employment and industrial relations furthermore refers to the ILO Conventions 182 concerning the worst forms of child labor.⁵⁵

The text of the Guidelines' chapter on the environment reflects the principles and objectives contained in the Rio Declaration on Environment and Development in Agenda 21. It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in

⁵⁰ *Id.* at OECD Guidelines on MNEs, chapter I, para. 3.

⁵¹ *Id.* at OECD Guidelines on MNEs, chapter I, paras. 4, 5.

⁵² *Id.* at OECD Guidelines on MNEs, Foreword.

⁵³ *Id.* at OECD Guidelines on MNEs, Foreword, chapters IV, V, IX.

⁵⁴ *Id.* at Commentary on the OECD Guidelines for MNEs, paras. 19-29.

⁵⁵ *Id.* at Commentary on the OECD Guidelines for MNEs, paras. 19-29.

Environmental Matters and reflects standards in such instruments as the ISO Standard on Environmental Management Systems.⁵⁶

The chapter on combating bribery refers to the OECD Convention on Combating Bribery of Foreign Public Officials as well as the respective OECD Recommendations on combating bribery.⁵⁷ The Guidelines' chapter on consumer interest draws on the work of the OECD Committee on Consumer Policy, as well as that embodied in various individual and international corporate codes (such as those of the ICC), the UN Guidelines on Consumer Policy, and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.⁵⁸

The remaining chapters of the Guidelines for MNEs similarly refer to the relevant international norms in the respective subject matter.⁵⁹ Other organisations promote the Guidelines for MNEs, e.g. in the European Union the Guidelines for MNEs are promoted by the European Commission.⁶⁰

II. Governance Through Decentralized Soft Implementation

Effective governance to promote and secure corporate social responsibility of MNEs during their investment activities is furthermore achieved through decentralized soft implementation. This proposition is supported by the fact that the effectiveness of the Guidelines for MNEs' was significantly enhanced due to decentralization of the implementation mechanism of the Guidelines for MNEs. The enhanced decentralization was instituted as a result of the revision of the Guidelines for MNEs in 2000. Before 2000, NCPs located in the governments of adhering states only served as the initial stage of consideration for issues and conflicts arising under the Guidelines for MNEs. They regularly passed the issues

⁵⁶ *Id.* at Commentary on the OECD Guidelines for MNEs, paras. 30-42.

⁵⁷ *Id.* at Commentary on the OECD Guidelines for MNEs, paras. 43-47.

⁵⁸ *Id.* at Commentary on the OECD Guidelines for MNEs, paras. 48-52.

⁵⁹ *Id.* at Commentary on the OECD Guidelines for MNEs, para. 52.

⁶⁰ Commission of the European Communities, Directorate-General for Employment and Social Affairs, Promoting a European Framework for Corporate Social Responsibility: Green Paper, COM (2001) 366 final, 18 July 2001, at 6; EC Directive on the establishment of a European Works Council on a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of information and consulting employees, 94/45 of 22 September 1994. This directive established European Works Councils to inform employees in the EU of their rights and to promote the OECD Guidelines for MNEs; TUAC held seminars on the European Works Councils and the OECD Guidelines for MNEs and disseminates information, available at: <http://old.tuac.org/statemen/communiq/TUAC%20training%20En.pdf>.

to the OECD Investment Committee that was ultimately responsible for the clarification and interpretation of the Guidelines for MNEs.⁶¹ In the revised documents NCPs were significantly strengthened. They are now the main institutions to decide on a specific instance. Today they are responsible for taking up specific instances, investigating the facts, deciding whether the Guidelines for MNEs were violated and for issuing reports that name the MNE involved in the instance.⁶²

Statistics on the numbers of cases filed and considered illustrate that the revised Guidelines for MNEs are more effective than before the revision in 2000. Between 1976 and 2000 just over forty specific instances were brought before an NCP. Since the 2000 revision of the Guidelines about 156 requests to consider specific instances were filed, 134 of these were actively taken up and considered and 84 of these of these have been concluded.⁶³

1. Decentralized Cooperation: The Principle of Functional Equivalence

The institutional setup and the procedures for the decentralized implementation are prescribed by the Council Decision on the Guidelines and the attached Procedural Guidance.⁶⁴ According to these documents, NCPs must be instituted in each adhering state according to the principle of functional equivalence.⁶⁵ This principle effectuates the subsidiarity principle, affording discretion to the individual state with regard to the institutional arrangement of the NCP. The strengthening of the subsidiarity principle through the principle of functional equivalence provides for further evidence that decentralization is a target of OECD policies in the examined form of governance. The principle of functional equivalence merely requires states to set up their NCPs so that they meet certain basic prerequisites. These prerequisites which are binding on all adhering states

⁶¹ The Committee's decisions had to be taken by consensus, they had no retrospective applicability and a case was merely used to clarify the meaning of how a provision in the Guidelines should be applied in future cases. These decisions were not binding and resulted in no penalties for violation. See James Salzman, *Decentralized Administrative Law in the Organisation for Economic Cooperation and Development*, 68 LAW AND CONTEMPORARY PROBLEMS 189, 213 (2004-2005); Michael Klinkenberg, *Die Leitsätze der OECD für multinationale Unternehmen*, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 421, 421 (2002).

⁶² Ministerial Booklet (note 2), at Council Decision chapter I, Procedural Guidance, chapter I C.

⁶³ Report by the Chair, 2007 Annual Meeting of the National Contact Points, at 14, available at: <http://www.oecd.org/dataoecd/23/26/39319743.pdf>.

⁶⁴ Ministerial Booklet (note 2), Council Decision, chapter I, Procedural Guidance, chapter I.

⁶⁵ *Id.* at Council Decision, chapter I, Procedural Guidance, chapter I.

include visibility, accessibility, transparency and accountability of the respective NCP.⁶⁶

The NCPs located in the governments of adhering states are envisaged to act according to the OECD's Procedural Guidance. The Guidelines for MNEs' implementation procedures connect national governments and the OECD. These two instruments stipulate institutional and procedural prescriptions. To this extent, NCPs are independent from national law. To the extent that the binding Procedural Guidance and the oversight procedures for the Investment Committee are effective, the national governments could be seen as an implementation organ of the international mechanism. This could be seen as constituting a form of hierarchy. However, the principle of functional equivalence prescribed in the Procedural Guidance grants discretion to the national governments. The relationship between national governments and the OECD with relation to the implementation mechanism is based on and best characterized by decentralized cooperation.

2. Procedures for a Mediation-based Decentralized Implementation

The procedures for implementation in specific instances are prescribed by the Council Decision on the Guidelines and the attached Procedural Guidance.⁶⁷ According to these documents, NCPs are envisioned to serve as a forum for negotiations with the aim to reach an equitable settlement between the individual MNE charged with the violation and the complainant.⁶⁸ Common functions of an NCP include the dissemination, promotion and, to the extent necessary, explanation of the Guidelines and the collection of information concerning past experience with the Guidelines for MNEs at the national level. NCPs should further provide a forum for discussion, particularly for businesses and trade unions, on problems which may arise in relation to the Guidelines and on facilities which could contribute to their solution. NCPs should stay in direct contact with other NCPs, if necessary.⁶⁹ The NCPs' main function is to provide a forum for and organize negotiations relating to the implementation of the OECD Guidelines for MNEs in specific instances.

⁶⁶ *Id.* at Procedural Guidance, chapter I; Commentaries on the Implementation Procedures, chapter I. In effect, the current NCP structure consists of: 20 NCPs single government departments; 7 NCP multiple departments; 1 bipartite NCP (involving government and business); 9 tripartite NCPs (involving governments, business, and trade unions); and 2 quadripartite NCPs (involving governments, business, trade unions and NGOs). Report by the Chair, 2007 Annual Meeting of the National Contact Points, at 20, available at: <http://www.oecd.org/dataoecd/23/26/39319743.pdf>.

⁶⁷ *Id.* at Council Decision, chapter I, Procedural Guidance, chapter I.

⁶⁸ *Id.* at Council Decision, chapter I 1, Procedural Guidelines, chapter I C.

⁶⁹ *Id.* at Council Decision, chapter I, Procedural Guidance, chapter I.

The implementation procedures in a particular instance filed with an NCP have four phases. In the first phase the NCP procedures are initiated. Any interested party can file a “specific instance”, a certain conduct by an MNE that is allegedly not in accordance with the OECD Guidelines for MNEs.⁷⁰ In most specific instances these interested parties are trade unions and NGOs.⁷¹ In the second phase of the procedures, the NCP decides according to the OECD Procedural Guidance whether it has the competence to take up the specific instance.⁷² One debated issue during this stage is whether specific instances must have an “investment nexus” or whether the NCP can get involved in merely trade-related instances.⁷³ Another debated issue relates to the consequences of existing national parallel proceedings since NCPs can neither override national rules and regulations nor override or interfere with national legal or administrative procedures.⁷⁴ If the NCP decides that it is responsible for the instance, the NCP will in the third phase of the proceedings start to facilitate negotiations between the involved parties.⁷⁵ In the course of negotiations, the particular NCP might contact other NCPs or state institutions as in the case described in the introduction of this study in which the Czech NCP contacted the German NCP. Concluding the procedures with a fourth phase, NCPs are required to issue a “statement” declaring that the MNE does or does not comply with the Guidelines in the specific instance, in case the parties involved do not

⁷⁰ *Id.* at Procedural Guidance, chapter I C.

⁷¹ See Trade Union Advisory Committee (TUAC), TUAC Submission to the OECD Annual Meeting of National Contact Points (NCPs), para. 2 (2007), available at: http://www.tuac.org/en/public/e-docs/00/00/00/72/document_doc.phtml; OECD-Watch, List of OECD Guidelines cases filed by NGOs as of October 3, 2007, available at: http://www.oecdwatch.org/docs/List_OECD_Guidelines_cases_3October2007.pdf.

⁷² Ministerial Booklet (note 2), at Procedural Guidance, chapter I C. Approximately two-thirds of the specific instances concerned MNEs’ operations in non-adhering countries, but the procedural prescriptions do not determine which NCP will be responsible for an issue that took place in a non-adhering country. In practice issues arising in a non-adhering country are generally dealt with in the home country of the MNE. See *id.* at Commentary on the Implementation Procedures, para. 20.

⁷³ See OECD Watch, The Guidelines for Multinational Enterprises and Supply Chain Responsibility (2004), available at: <http://www.germanwatch.org/tw/kw-sup04.pdf>; Trade Union Advisory Committee (TUAC), TUAC Submission to the OECD Annual Meeting of National Contact Points (NCPs), paras. 41, 44 (2007), available at: http://www.tuac.org/en/public/e-docs/00/00/00/72/document_doc.phtml.

⁷⁴ Trade Union Advisory Committee (TUAC), TUAC Submission to the OECD Annual Meeting of National Contact Points (NCPs) paras. 39, 44 (2007), available at: http://www.tuac.org/en/public/e-docs/00/00/00/72/document_doc.phtml.

⁷⁵ Ministerial Booklet (note 2), at Procedural Guidance, chapter I C.

reach agreement.⁷⁶ In this statement, the NCP may make recommendations on the implementation of the Guidelines as appropriate.⁷⁷ The statements are envisaged to be published by NCPs in those specific instances where negotiations between the MNE and the complainant fail.⁷⁸

3. *Cooperation to Implement Effectively*

Particular NCPs cooperate in the course of the specific instances as illustrated in the specific instances described above. Moreover, in order to enhance effectiveness through rationalisation of institutions the German NCP and the German Network of the UN Global Compact agreed to share their infrastructure to promote and implement their instruments in the field of corporate social responsibility. The German NCP is located in the Federal Ministry of Economics and Technology.⁷⁹ It established a working group on the OECD Guidelines (Arbeitskreis "OECD-Leitsätze") bringing together representatives of diverse government resorts, social partners, trade associations and NGOs.⁸⁰ The Ministry promotes the Guidelines on its website and composed a brochure⁸¹ which is supplied through German embassies, the national and international chambers of commerce and via the internet. The German NCP has concluded three specific instances⁸² and assisted other NCPs in seven specific instances.⁸³ The arrangement with the UN Global

⁷⁶ *Id.* at Procedural Guidance, chapter I C.

⁷⁷ *Id.* at Procedural Guidance, chapter I C.

⁷⁸ *Id.* at Procedural Guidance, chapter I C. This obligation is often broken by NCPs. They more often report on the proceedings when they were successful, than when they were unsuccessful. OECD-Watch, List of OECD Guidelines cases filed by NGOs as of October 3, 2007, available at: http://www.oecdwatch.org/docs/List_OECD_Guidelines_cases_3October2007.pdf.

⁷⁹ Information available on the Homepage of the Federal Ministry of Economics and Technology: <http://www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=177082.html>.

⁸⁰ Bundesministerium für Wirtschaft und Technologie, Jahresbericht für den Berichtszeitraum Juni 2006-Juni 2007, at 1, available at: <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/oecd-nks-jahresbericht,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

⁸¹ Bundesministerium für Wirtschaft und Technologie, Verantwortliches unternehmerisches Handeln im Ausland, "Die OECD-Leitsätze für multinationale Unternehmen", (2006), available at: <http://www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=26126.html>

⁸² The statements of the German NCP with regard to these three cases are available for download at: <http://www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=178196.html>.

⁸³ Bundesministerium für Wirtschaft und Technologie, Verantwortliches unternehmerisches Handeln im Ausland, "Die OECD-Leitsätze für multinationale Unternehmen" (2006), available at: <http://www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=26126.html>.

Compact foresees that the German NCP will use the procedural prescriptions of the OECD Procedural Guidance to implement the UN Global Compact when an issue comes up involving alleged violations of the standards prescribed in the UN Global Compact.⁸⁴

III. Legal Characteristics of the Governance

The governance mechanism's legal characteristics come to light when viewed from the present project's perspective. One legal aspect that can be observed is the necessity of a concrete mandate for the particular OECD policies. Furthermore, the international adherence procedure for the Guidelines for MNEs comprises characteristics of international ratification procedures for a hard law instrument. However, national parliaments are not involved in the processes. In this context a remarkable aspect from a legal viewpoint is the *de facto* constraint to implement the Guidelines for MNEs. The *de facto* constraint is implied due to the implementation mechanism linked to the OECD Guidelines for MNEs that is binding on adhering states.

1. Necessity of a Concrete Mandate

One legal characteristic of the governance mechanism is the requirement of a concrete mandate for each policy taken. The mandate for the examined governance is attained through concretizations of the aims of the OECD set out in Article 1 OECD Convention. According to Article 1 OECD Convention the OECD aims "to promote policies designed (a) to achieve highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations".⁸⁵

Corporate social responsibility is contained in these aims of the OECD. Corporate social responsibility is today part of economic and development policies. In that respect, a change of the meaning of the concept of economic development can be observed. An indication for corporate social responsibility as an aim of OECD policies can also be found in the aim to contribute to "sound economic expansion".

⁸⁴ Report by the Chair, 2007 Annual Meeting of the National Contact Points, at 6, available at: <http://www.oecd.org/dataoecd/23/26/39319743.pdf>.

⁸⁵ Convention on the OECD (note 24), at Art. 1.

However, Article 1 OECD Convention is formulated broadly. Particular OECD policies need more concrete mandates. Concretizations are formulated by the OECD Council through its permanent representatives and by experts in the Executive Committee and in the general committees.⁸⁶

The first concretization with regard to the OECD Guidelines for MNEs is carried out in order to provide a mandate for the Investment Committee. The Investment Committee received its mandate from the OECD Council through a Council Resolution.⁸⁷ The Council resolution authorizes the Investment Committee to follow up on the work of the Committee on International Investment and MNEs (CIME). One responsibility the Investment Committee was established to carry out concerns the tasks assigned to it by virtue of the OECD Declaration on International Investment and Multinational Enterprises and related Council Decisions.⁸⁸ The specific mandate to formulate the OECD Guidelines for MNEs was provided for by a Council resolution establishing the Committee on International Investment and MNEs (CIME) in 1975.⁸⁹

In a second concretization the working groups are provided a mandate by the OECD Committee whose work they are established to assist.⁹⁰ With regards to the OECD Guidelines for MNEs the Investment Committee established the Working Party of the Investment Committee with the mandate among other tasks, “to assist the Investment Committee in implementing the Declaration on International Investment and Multinational Enterprises and related Decisions, including with respect to its responsibilities in relation to the 2000 Guidelines on Multinational Enterprises”.⁹¹

2. *The Adherence Procedure*

Another legal aspect of the governance mechanism that can be traced through this project’s perspective relates to the procedures for becoming an adhering state to the

⁸⁶ BLANPAIN (note 34), at 34.

⁸⁷ Rules of Procedure of the Organisation (note 37), at rules 22(a), 18(a)(iii).

⁸⁸ Resolution of the Council on the Terms of Reference of the Investment Committee, C(2004)3, 22 April 2004, Art. 3 no. 3.

⁸⁹ Committee on International Investment and MNEs (CIME), Experience with the OECD Guidelines for MNEs, DAF/IME(98)15, 3 November 1998, para. 11; BLANPAIN (note 34), 31.

⁹⁰ Rules of Procedure of the Organisation (note 37), at rule 21(b).

⁹¹ The Investment Committee: Strategy and Organisation, ‘Mandate of the Working Party of the Investment Committee’, DAF/INV(2004)1, 20 September 2004, para. 1(i).

OECD Guidelines for MNEs. It is possible to adhere to the OECD Guidelines for MNEs without being a member state of the OECD. The Declaration on International Investment and MNEs and the related instruments have been adhered to by ten non-member states.⁹² The last state to become an adhering state to the Guidelines for MNEs was Egypt in 2007. The international adherence procedures involved the signing of the OECD Declaration for International Investment and MNEs by Egypt's Minister of Investment. Internationally, the adherence procedure exhibits elements that characterise the international ratification procedure of hard law instruments. On the national level however, the soft law Guidelines are not presented to national parliaments. This is especially noteworthy in light of the following aspect relating to the *de facto* constraint to implement the Guidelines for MNEs.

3. *De facto* Constraint to Implement Soft Law

A third legal feature of the governance mechanism is a *de facto* constraint to implement soft law. It was explained above that the instruments comprising the substantive investment and corporate social responsibility norms are non-binding while the instruments prescribing the institutional and procedural requirements of the implementation mechanism are binding on adhering states.⁹³ This qualification leads to the situation that MNEs are addressed with an instrument the implementation of which is not mandatory. However, as soon as an outside actor files a specific instance with an NCP the adhering state is required to take action with respect to the specific instance according to the OECD Guidelines for MNEs' Procedural Guidance. To the extent that the implementation mechanism is effective, the binding nature of the procedural prescriptions creates a *de facto* constraint for MNEs to implement the soft law Guidelines for MNEs.⁹⁴ It was discussed contrariwise during the negotiations of the 2000 revision whether a *de facto* constraint to implement the Guidelines was created and if so, whether this was in the parties' interest when they were setting up the implementation mechanism in a Council Decision that is binding on adhering states.⁹⁵

⁹² Argentina (1997), Brazil (1997), Chile (1997), Egypt (2007), Estonia (2001), Israel (2002), Latvia (2004), Lithuania (2001), Romania (2005) and Slovenia (2002).

⁹³ Convention on the OECD (note 24), Art. 5(a); *cf.* above at Part B I 2a.

⁹⁴ See CIME, Aide-mémoire of the informal consultations between BIAC, TUAC, NGOs and the CIME Working Party on the Guidelines on the Review of the OECD Guidelines for MNEs, held on 14 April 2000, DAFFE/IME(2000)13, 15 May 2000, paras. 9-13.

⁹⁵ CIME, Aide-mémoire of the informal consultations between BIAC, TUAC, NGOs and the CIME Working Party on the Guidelines on the Review of the OECD Guidelines for MNEs, held on 14 April 2000, DAFFE/IME(2000)13, 15 May 2000, paras. 9-13.

IV. Accountability

Accountability of the Guidelines for MNEs is characterized by the fact that the OECD is to a large degree independent from national governments. All instruments examined in the Guidelines for MNEs' procedures are soft law instruments and do not need ratification in national parliaments. They are adhered to by national ministers without involvement of national governments. The Guidelines for MNEs' implementation mechanism through NCPs is to a certain degree overseen by the OECD Investment Committee. However, the oversight powers of the Investment Committee are very weak. Participation of a variety of actors from outside the OECD characterized the revision procedures of the Guidelines for MNEs in 2000. The extensive cooperation ensures participation in all stages of the Guidelines for MNEs' procedure. Accountability is therefore ensured to a certain degree through participation. Transparency is prescribed and must be given effect by adhering governments. However, *de facto* implementation of transparent procedures and disclosure of NCP documents is problematic.

1. Independence of the International Mechanism from National Governments

All four interlinked instruments of the mechanism were adopted by consensus by the OECD's highest decision making organ, the Council in composition of ministers. National parliaments are not involved in the process. OECD activities are not directly mandated by the Convention of the OECD that was officially adopted and ratified in national parliaments. Rather, the OECD's aims are concretized by the Council and the Committees, even though in the case of corporate social responsibility the general aims of the OECD provide for a starting point for concretization.

2. Internal Oversight

The responsibilities of the Investment Committee were changed in the 2000 revision and today the Investment Committee conducts a form of oversight over the mechanism.⁹⁶ An adhering state or an advisory body can make a substantiated submission on whether an NCP has correctly interpreted the Guidelines for MNEs

⁹⁶ Ministerial Booklet (note 2), at Procedural Guidance, II 3 b): "The Committee will consider a substantiated submission by an adhering country or an advisory body on whether an NCP is responsible with regard to its handling of specific instances." Ministerial Booklet (note 2), at Commentary on the Implementation Procedures, para. 4: "[The Committee] is the OECD body responsible for overseeing the functioning of the Guidelines"; see Report of the International Law Association, Berlin Conference (2004), Accountability of International Organisations, reprinted in: 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 237 (2004).

in a specific instance. The Investment Committee was involved in the Botnia S.A. pulp mill investment described above.⁹⁷ The Center for Human Rights and Environment filed a complaint to the OECD Investment Committee for failure to correctly interpret and implement the Guidelines.⁹⁸ In case the Investment Committee decides that the NCP did not follow the procedures according to the Procedural Guidance and did not interpret the Guidelines correctly in the abstract, it can issue a clarification how the Guidelines for MNEs should correctly be interpreted.⁹⁹ The clarifications are posted on the internet.¹⁰⁰ This oversight function of the Investment Committee is similar to a second instance. But due to the non-binding nature of the Guidelines, the Investment Committee is precluded from acting as a judicial or quasi-judicial organ and the documents make explicit that the Investment Committee cannot reinvestigate the facts of a specific instance and review the decision of an NCP and that it cannot reach conclusions on the conduct of individual enterprises.¹⁰¹ The oversight is thereby limited in the sense that the Investment Committee does not have powers to overrule the statements made by the NCPs.¹⁰²

The Investment Committee has so far been involved in this oversight function in only a few specific instances. The benchmarks in the reports it published were not specific. In a report on a submission by the Swiss NCP on a request concerning the clarification of the procedural prescriptions, the Investment Committee did not provide for specific criteria on how to interpret the Guidelines for MNEs in the future and merely stressed that the Guidelines should be interpreted in a way to enhance their effectiveness.¹⁰³

⁹⁷ Compare above at A I.

⁹⁸ Pulp mill project: CEDHA appeals to OECD Investment Committee over Finnish NCP handling of Botnia S.A. specific instance, 23 January 2007, available at: http://www.oecdwatch.org/docs/CEDHA_vs_Botnia_PR_InvCom.pdf.

⁹⁹ Ministerial Booklet (note 2), at Procedural Guidance, chapter II 3c.

¹⁰⁰ They are contained in the annual reports of TUAC and in the annual reports of the Investment Committee on the NCPs.

¹⁰¹ Ministerial Booklet (note 2), at Commentary on the Implementation Procedures of the Guidelines for MNEs, para. 23.

¹⁰² See Report of the International Law Association, Berlin Conference (2004), *Accountability of International Organisations*, reprinted in 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 237 (2004).

¹⁰³ In July 2004, the Swiss NCP made a formal request for clarification to the Investment Committee concerning the applicability of the Guidelines and the admissibility of the case because the company was based in Switzerland and not in a foreign country. In its reply the Committee recognized that the Guidelines were applicable to both domestic and international operations of companies, but it stressed the fact that the implementation procedures involving NCPs had been created to deal with issues arising

3. Participation and Transparency

The multi-level cooperation leads to increased participation and transparency. In addition to the cooperation displayed above,¹⁰⁴ the 2000 revision procedures for the Guidelines for MNEs were characterized by large-scale cooperation. In these preparation procedures for the revised Guidelines for MNEs in 2000,¹⁰⁵ numerous NGOs¹⁰⁶, international trade union organisations, external experts and the Guidelines' addressees, MNEs, were involved and had the opportunity to state their opinions on the drafts for the revised Guidelines for MNEs on the internet.¹⁰⁷ Furthermore, NGOs have a strong influence on effective implementation of the Guidelines for MNEs since the implementation mechanism relies on their participation to initiate the specific instance procedures. Participation of NGOs ensures a degree of accountability of a policy.¹⁰⁸ But the involvement of NGOs is ambiguous.¹⁰⁹ Taking NGOs as the predominant representatives of civil society, their participation is problematic since they themselves are not democratically

in the context of international investment and in conclusion merely encouraged the Swiss NCP to address the issue in terms of how to further the effectiveness of the Guidelines. Cf. Trade Union Advisory Committee (TUAC), TUAC Internal analysis of the treatment of cases raised with national contact points February 2001-April 2007, at 18, available at: http://www.oecdwatch.org/docs/TUAC_ListOfCases_Feb2007.pdf.

¹⁰⁴ Compare above at B I.

¹⁰⁵ The procedures taken to revise the Guidelines in 2000 are the result of the lessons learned from the experience the OECD made during the negotiations for a Multilateral Agreement on Investment (MAI) in 1998 when NGO opposition took the OECD and the MAI negotiators by surprise and forced the supporting governments to drop out of the negotiations. See GÜNTER METZGES, *NGO-KAMPAGNEN UND IHR EINFLUSS AUF INTERNATIONALE VERHANDLUNGEN* 69 (2006); Salzman (note 21), at 189, 196.

¹⁰⁶ Amnesty International, ANPED, Alliance of Northern Peoples for Environment and Development, Friends of the Earth, GERMANWATCH, OXFAM, Reform the World Campaign, SOMO, Centre for Research on Multinational Corporations, TOBI, NGO Task Force on Business and Industry; Tradecraft Exchange, World-Wide Fund for Nature. See Working Party on the Guidelines, OECD Guidelines for MNEs Proposals Submitted by BIAC TUAC and NGOs, DAFPE/IME/WPG/RD(2000)16, 9 May 2000.

¹⁰⁷ Committee for Investment and Multinational Enterprises, Aide-mémoire of the informal consultations between BIAC, TUAC, NGOs and the CIME Working Party on the Guidelines on the Review of the OECD Guidelines for MNEs, DAFPE/IME(2000)13, 15 May 2000, para. 2.

¹⁰⁸ Report of the International Law Association, Berlin Conference (2004), *Accountability of International Organisations*, reprinted in: 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 230 (2004).

¹⁰⁹ Jan Klabbbers, *The Changing Image of International Organisations*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 221, 244 (J.-C. Coicaud & V. Heiskanen eds., 2001).

legitimized: they are not elected, they do not necessarily involve a wide membership and they are not necessarily democratically structured.¹¹⁰

Another means to gain accountability is through transparency.¹¹¹ The Investment Committee collects information that is provided by the NCPs and publishes this information in annual reports. It thereby generates transparency regarding the institutions and procedures of the implementation mechanism.¹¹² The transparency during the NCPs procedures themselves is prescribed by the Procedural Guidance as a basic prerequisite that all adhering states have to further in the setup and the procedures of their respective NCPs.¹¹³ However, there is a tension between the right to confidentiality of business operations and the principle of transparency and the necessity to provide information to an NCP during a specific instance procedure; and in fact, transparency is problematic. The Procedural Guidance acknowledges that while procedures in a specific instance are underway, confidentiality of the proceedings will be maintained.¹¹⁴ Transparency is further aimed to be achieved for the particular specific instances. NCPs are required to issue a statement on the procedures in cases where negotiations fail and the involved parties do not reach agreement. However, statements are not posted on the internet in all required cases.

C. Assessment and Conclusion

I. Principles

From the above analysis of the mechanism two structural regularities according to which the governance is organized and effectuated become apparent. These two are

¹¹⁰ Steve Charnovitz, *Nongovernmental Organisations and International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 348, 363 (2006); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99/1 AMERICAN POLITICAL SCIENCE REVIEW 29, 38 (2005); GÜNTER METZGES, NGO-KAMPAGNEN UND IHR EINFLUSS AUF INTERNATIONALE VERHANDLUNGEN 189 (2006).

¹¹¹ Report of the International Law Association, Berlin Conference (2004), *Accountability of International Organisations*, reprinted in: 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 229 (2004).

¹¹² Report by the Chair, 2007 Annual Meeting of the National Contact Points, (2007) available at: <http://www.oecd.org/dataoecd/23/26/39319743.pdf>, forms part of the forthcoming Annual Report on the OECD Guidelines for Multinational Enterprises 2007.

¹¹³ Compare above at Part B IV 1.

¹¹⁴ See. Ministerial Booklet (note 2), The Procedural Guidance, chapter I C 4. NCPs are advised to take appropriate steps to protect sensitive business information, cf. Ministerial Booklet (note 2), Commentary on the Implementation Procedure of the Guidelines for MNEs, no. 19.

multi-level cooperation and decentralization. The principle of functional equivalence is a specific expression of these two structural principles.¹¹⁵

II. Effectiveness

The implementation procedures of the OECD Guidelines for MNEs are characterized by the fact that the initiation of the mechanism is voluntary and does not take place regularly. It depends on NGOs, BIAC and TUAC and other interested actors to file a specific instance with an NCP. Implementation by NCPs is not comprehensive. Neither all substantial parts of the Guidelines are covered nor all observing MNEs in the scope of application of the Guidelines. The Guidelines for MNEs' chapters implemented through the NCPs are to a certain extent predetermined by those who file a specific instance with an NCP. Those are for the most part trade unions and human rights NGOs and as a consequence the chapter of the Guidelines enjoying most attention is the chapter on employment and industrial relations.¹¹⁶ Other chapters are much less controlled. An analysis of the most frequently addressed NCPs – the US, Dutch and French NCPs – concluded that implementation in areas outside of labour relations was not substantial.¹¹⁷ For these reasons the implementation of the OECD Guidelines for MNEs has been characterized as “piecemeal and inconsistent” in its impact.¹¹⁸ However, the chapter on labour relations is a very important chapter in the context of MNEs' behaviour during investment activities. The numbers concerning utilization of NCPs set out above indicate an enormous growth in the perceived problem-solving capacity of the Guidelines for MNEs' governance mechanisms.¹¹⁹

¹¹⁵ Compare above at Part B IV 1.

¹¹⁶ Report by the Chair, 2007 Annual Meeting of the National Contact Points 15 (2007), available at: <http://www.oecd.org/dataoecd/23/26/39319743.pdf>; see Michael Klinkenberg, *Die Leitsätze der OECD für multinationale Unternehmen*, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 421, 428 (2002); CORNELIA HEYDENREICH, DIE OECD-LEITSÄTZE FÜR MULTINATIONALE UNTERNEHMEN – EIN WIRKSAMES INSTRUMENT ZUR UNTERNEHMENSREGULIERUNG? 7, May 2005, available at: <http://www.germanwatch.org/tw/kw05ls.pdf>.

¹¹⁷ For a critical assessment of the United States' implementation of the OECD Guidelines for Multinational Enterprises, see Christopher N. Franciose, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 BOSTON COLLEGE INTL & COMPARATIVE LAW REVIEW 229, 232 (2007).

¹¹⁸ ZERK (note 18), at 243.

¹¹⁹ Compare above at B V.

III. Conclusion

This study proposed that effective governance is achieved through multi-level cooperation and through decentralized soft implementation based on mediation. The OECD Guidelines for MNEs were chosen as an instrument to illustrate this proposition and to prove its validity with regard to corporate social responsibility. Concerning the second proposition, it was argued that effectiveness was enhanced as a result of the 2000 revision of the Guidelines for MNEs due to further decentralization of the implementation mechanism. For future enhancement it is necessary that the implementation of the basic prerequisites for the institutional set up prescribed by the OECD, *viz.* (namely) visibility, accessibility, transparency and accountability, is enhanced. In particular transparency needs to be implemented more vigorously. This leads to the first proposition of this study. Effective governance is achieved through cooperation. In the future, adhering governments need to enhance cooperation with the OECD and secure effective implementation of the basic prescriptions.

In view of the overall project, this study proposed that the project's perspective sheds light on legal characteristics of such governance. In particular, legal characteristics were examined as regards the necessity of a concrete mandate for the Guidelines for MNEs and the *de facto* constraint to implement the Guidelines for MNEs. Concerning the acts taken in order to become an adhering state to a soft law instrument, elements are instituted that characterise the international ratification procedures of hard law instruments without the involvement of national parliaments.

