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The 2011 Update of the
OECD Guidelines for
Multinational Enterprises:
Balanced Outcome or an
Opportunity Missed?

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**The 2011 Update of the OECD Guidelines for
Multinational Enterprises:
Balanced Outcome or an Opportunity Missed?**

by

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A. Introduction*

The 2011 celebrations of the 50th “birthday” of the Organisation for Economic Co-operation and Development (OECD) cumulated with the OECD’s 50th Anniversary Week from 24 to 26 May 2011. The anniversary celebrations were combined with the annual Meeting of the OECD Council at Ministerial Level at the headquarters of this international organization in Paris.¹ However, the representatives of the OECD, its member countries and other stakeholders did not only celebrate. Rather, as it is frequently the case on such occasions, this event also saw the adoption of a number of declarations and overarching guiding documents, prominently among them the “OECD 50th Anniversary Vision Statement”.² Another notable development intentionally coinciding with the Anniversary Week was the official conclusion of the review process aimed at updating the OECD Guidelines for Multinational Enterprises.³ This instrument, currently adhered to by forty-two states,⁴ is even thirty-five years after its original adoption validly regarded as being among the most influential initiatives in the increasingly important, but also quite multi-faceted, realm of corporate social responsibility. This shared perception justifies a closer look at the most recent amendments.

The initial reactions to this first and quite substantial update of the OECD Guidelines in more than ten years have been – at least at first sight – overall rather favorable. This finding applies in particular to the respective statements made by representatives of the OECD and its member states.⁵ However, it is in general also con-

* The authors would like to thank Prof. Christian Tietje, Cornelia Heydenreich, Emily Sipiorski as well as Nicole Hannemann for their support and very valuable comments on earlier versions of this paper.

¹ See thereto for example the information provided under: <www.oecd.org/document/31/0,3746,en_2649_201185_42842847_1_1_1_1,00.html> (last visited on 16 June 2011).

² OECD Council, OECD 50th Anniversary Vision Statement, OECD Doc. C/MIN(2011)6 of 25/26 May 2011.

³ See OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

⁴ As of May 2011. In addition to all thirty-four OECD members, the OECD Guidelines are also adhered to by the following non-OECD countries: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. See OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 5 note 1, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011). Furthermore, according to the information provided by the OECD, a number of other countries “have recently requested to adhere” to the OECD Guidelines, including Costa Rica, Colombia, Jordan, Serbia, Tunisia and the Ukraine, see OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, para. 2.

⁵ See, e.g., OECD, Secretary-General’s Report to the Ministers 2011, p. 19, available under: <www.oecd.org/dataoecd/56/6/48066007.pdf> (last visited on 16 June 2011) (“a powerful instrument for promoting responsible business conduct by MNEs and improving governance in developing countries”); OECD, Investment News, May 2011, Issue 15, p. 1, available under: <www.oecd.org/dataoecd/51/41/47557611.pdf> (last visited on 16 June 2011) (“World Leaders Promote Ambitious Multilateral Agenda for Responsible Business Conduct”); Remarks at the

firmed by the perceptions voiced by many other stakeholders. The Business and Industry Advisory Committee to the OECD (BIAC) pointed out that “[a]lthough the new text increases the expectations put on business in a number of aspects, the central concerns of business have been addressed in a constructive way”⁶ and thus “the final text represents a balanced outcome that BIAC can accept”.⁷ The Trade Union Advisory Committee to the OECD (TUAC) emphasized that the updated OECD Guidelines “contain a number of positive new elements” and considered “that these elements significantly increase the relevance of the Guidelines and their potential to raise the standard of responsible business conduct in a global context”.⁸ Finally, from the perspective of “civil society”, also OECD Watch highlighted the “valuable additions to the content and scope of the Guidelines”⁹ and “a number of significant advances”¹⁰ as a result of the 2011 update.

Commemoration of the 50th Anniversary of the OECD by the US Secretary of State, *Hillary Rodham Clinton*, 25 May 2011, available under: <www.state.gov/secretary/rm/2011/05/164280.htm> (last visited on 16 June 2011) (“In a few minutes, we will also endorse the OECD’s updated guidelines for multinational enterprises. These guidelines, developed in close consultation with both business and labor, set a new higher standard for how our companies should operate, including an important new chapter on human rights.”); Remarks on the OECD Guidelines for Multinational Enterprises by the US Secretary of State, *Hillary Rodham Clinton*, 25 May 2011, available under: <www.state.gov/secretary/rm/2011/05/164340.htm> (last visited on 16 June 2011) (“This is truly the work of a global policy network in action. [...] I think we all look forward to working closely with you and others committed to raising standards for corporate social responsibility, just as we have done today.”).

- ⁶ See BIAC Statement on the Adoption of the Update of the OECD Guidelines for Multinational Enterprises, 25 May 2011, available under: <www.biac.org/statements/high_level/11-05-25_BIAC_statement_on_updated_Guidelines_for_MCM_%202011.pdf> (last visited on 16 June 2011). Generally on BIAC see also *Aubry*, in: Tietje/Brouder (eds.), *Handbook of Transnational Economic Governance Regimes*, 51 *et seq.*, with further references.
- ⁷ BIAC Press Release “Business Calls on OECD to Promote Updated Guidelines for MNEs in Non-Adhering Countries”, 25 May 2011, available under: <www.biac.org/comms/releases/11-05-25_BIAC_press_release_on_updated_Guidelines_for_MCM_2011.pdf> (last visited on 16 June 2011); see also, e.g., BDA/BDI/DIHK/ZDH, Press Release No. 026/11, “OECD-Leitsätze für verantwortliches Handeln von Unternehmen fördern weltweit fairen Wettbewerb”, 25 May 2011, available under: <[www.csrgermany.de/www/csr/cms_relaunch.nsf/res/PI02611-Gem.pdf/\\$file/PI02611-Gem.pdf](http://www.csrgermany.de/www/csr/cms_relaunch.nsf/res/PI02611-Gem.pdf/$file/PI02611-Gem.pdf)> (last visited on 16 June 2011).
- ⁸ See TUAC Statement on the Update of the OECD Guidelines for Multinational Enterprises, 25 May 2011, available under: <www.tuac.org/en/public/e-docs/00/00/08/E7/document_doc.phtml> (last visited on 16 June 2011).
- ⁹ OECD Watch Press Release “OECD Updates Ethical Business Standards but Fails to Ensure Enforcement”, 25 May 2011, available under: <<http://oecdwatch.org/news-en/oecd-watch-press-release-oecd-updates-ethical-business-standards-but-fails-to-ensure-enforcement/>> (last visited on 16 June 2011).
- ¹⁰ See OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011); see also, e.g., Amnesty International, Public Statement: The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has Come to an End, AI Index: IOR 30/001/2011 of 23 May 2011, available under: <www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (last visited on 16 June 2011) (“significant improvements”); Forum Menschenrechte, Press Release “Chance für einen stärkeren Menschenrechtsschutz – Die neuen OECD-Leitsätze für multinationale Unternehmen”, 24 May 2011, available under: <www.forum-menschenrechte.de/cms/upload/PDF/ab_02_2011/2011-05-24_PM_FORUM_MENSCHENRECHTE_OECD-Leitsaetze_fuer_multinationale_Unternehmen.pdf> (last visited on 16 June 2011).

Despite what appears to be a quite warm welcome for the amended OECD Guidelines, in their initial evaluations, all of the various non-state actors involved or at least interested in the review process were far from giving unqualified praise of this modified code of conduct. TUAC, for example, stressed that the “success of the Update now depends on its prompt and full implementation” with the adhering countries being now required to “first and foremost upgrade the structures and procedures of their NCPs [National Contact Points]”, implementation institutions that “must consign to the past their reputation for a patchy and often poor performance and operate to a higher common standard”.¹¹ BIAC, taking up a slightly different perspective, explicitly urged and thus admonished the OECD and its member states “to undertake determined efforts to promote convergence between the Guidelines and the business conduct of enterprises of non-adhering countries” in order to provide for the necessary “global level playing field for business”.¹² A further clear indication of the ultimately rather mixed assessment of the success of the 2011 update is provided by the attitude displayed by OECD Watch. Its statement, in addition to listing notable improvements, also includes a detailed and lengthy enumeration of perceived “fundamental shortcomings” with the overall conclusion being that “the revision process achieved some important gains, but missed an opportunity to ensure that the OECD Guidelines become the leading international instrument for promoting corporate accountability and curbing negative impacts of business decisions and operations”.¹³

Against this background, the present contribution is intended to provide an assessment of the 2011 update of the OECD Guidelines. Bearing in mind that “[a]s in the past, the results of the [...] update are more likely to be judged from their actual implementation than from any agreed textual changes or modified procedures”,¹⁴ the outcome of the following analysis of several amendments to and some enduring features of this code of conduct can be – at best – no more than an agreeable first, pre-

¹¹ TUAC Statement on the Update of the OECD Guidelines for Multinational Enterprises, 25 May 2011, available under: <www.tuac.org/en/public/e-docs/00/00/08/E7/document_doc.phtml> (last visited on 16 June 2011). Generally on the NCPs see also *infra* under C.IV.1.

¹² BIAC Statement on the Adoption of the Update of the OECD Guidelines for Multinational Enterprises, 25 May 2011, available under: <www.biac.org/statements/high_level/11-05-25_BIAC_statement_on_updated_Guidelines_for_MCM_%202011.pdf> (last visited on 16 June 2011).

¹³ See OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011); see also, e.g., Amnesty International, Public Statement: The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has Come to an End, AI Index: IOR 30/001/2011 of 23 May 2011, available under: <www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (last visited on 16 June 2011) (“At the same time, Amnesty International also wishes to express its disappointment in relation to a number of missed opportunities, and the resulting gaps and shortcomings in the revised text.”).

¹⁴ See already OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 7, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011); for a related perception see, e.g., OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011) (“Civil society will ultimately measure the success of the update based on the Guidelines’ effectiveness in helping to avoid and resolve conflicts between MNEs and communities, individuals, and workers, and in providing effective remedies for victims of corporate abuses.”).

liminary evaluation of its future potential. Nevertheless, it is submitted that such an initial stocktaking of the review process and its conclusions is precisely what is needed at the current transitional stage in the development of the OECD Guidelines in order to identify the material, procedural and institutional implications resulting from the 2011 update that will or potentially become practically relevant in the subsequent implementation phase from approximately December 2011¹⁵ onwards.

For this purpose, the contribution has been divided into three main parts. The first part (B.) will provide the necessary background with regard to the origins of the OECD Guidelines, its previous amendments as well as in particular the review process which ultimately resulted in the endorsement of the 2011 update by the adhering countries. In the second main part (C.), a description and evaluation of some notable amendments and the potential implications arising from them in light of the overall concept and approach of the OECD Guidelines will be given. Finally, the third and concluding part (D.) is aimed at offering an overall assessment of the 2011 update, including some broader conceptual thoughts on the future challenges faced by this steering regime and its various diverse stakeholders.

B. Background: The Way to the 2011 Update

I. The Origins of the OECD Guidelines

Following eighteen months of intensive and in part considerably polarized negotiations among member countries, the OECD Guidelines were originally adopted by the OECD Ministerial Council and adhering governments on 21 June 1976 as an annex to the “Declaration on International Investment and Multinational Enterprises”.¹⁶ The underlying reasons for the decision to develop this code of conduct as well as the controversial issues raised in the course of the negotiation phase are both manifold, making it impossible to deal with them in detail in the course of this contribution.¹⁷ Basically, the initiation of this process and its ultimate outcome can be attributed to three main and partly interrelated, mutually reinforcing factors.

With regard to the first – and from the perspective of the OECD countries largely external – element, attention needs to be drawn to the well-known undertaking in particular of many developing countries since the 1960s to create a so-called “New International Economic Order” under the auspices of the United Nations.¹⁸ This pro-

¹⁵ See thereto *infra* under C.I.4.

¹⁶ Both documents are reprinted in: I.L.M. 15 (1976), 967.

¹⁷ For a more comprehensive evaluation of the background and negotiation process see, e.g., *Robinson*, *Multinationals and Political Control*, 111 *et seq.*; *Kline*, *International Codes and Multinational Business*, 54 *et seq.*; *Muchlinski*, *Multinational Enterprises and the Law*, 658 *et seq.*; *Schwamm*, *Journal of World Trade Law* 12 (1978), 342 *et seq.*; *Karl*, in: Addo (ed.), *Human Rights Standards*, 89 *et seq.*; *Plain*, *International Lawyer* 11 (1977), 339 *et seq.*

¹⁸ Generally thereto for example *Bedjaoui*, *New International Economic Order*, 19 *et seq.*; *Magallon*, *Philippine Law Journal* 53 (1978), 267 *et seq.*; *Singh*, *A New International Economic Order*, 1 *et seq.*; *Tietje*, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 51 *et seq.*; *Weiß*, *German Yearbook of International Law* 46 (2003), 171 (173 *et seq.*), each with further references.

ject was largely abandoned only in the beginning of the 1990s.¹⁹ Among the central components of this venture was the development of an international framework for effective (host state) control over the activities of multinational enterprises.²⁰ The implementation of this idea gained increasing momentum, first with the decision by the UN Economic and Social Council (ECOSOC) in July 1972 to task the UN Secretary-General with the appointment of a “Group of Eminent Persons” to prepare a report on the role and influence of multinational enterprises in the international economic system.²¹ Second, the idea was further supported with a subsequent ECOSOC resolution of December 1974 establishing a “Commission on Transnational Corporations” aimed at drafting a code of conduct applicable to this category of non-state actors.²² Against this background, the OECD members, among them initially in particular the United States, agreed in January 1975 on an – ultimately successful – attempt to counter these developments by adopting their own guiding principles on multinational corporations with the aim of also directing the respective activities of the United Nations away from the perceived unduly regulatory and thus restrictive approach to international business.²³

While these developments provided an important impetus, it was not only external circumstances and conditions that inspired the members of this international organization to initiate the process that would ultimately lead to the emergence of the OECD Guidelines. A number of OECD countries – among them Canada, the Netherlands, and Scandinavian states – as well as TUAC were already for quite some time

¹⁹ See *Tietje*, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 53, with additional references.

²⁰ For an almost simultaneously initiated and closely related project under the auspices of the International Labour Organization (ILO) see as a result of five years of negotiations the “Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy”, adopted on 16 November 1977 and last amended in March 2006. The original ILO Declaration is reprinted in: I.L.M. 17 (1978), 422; the most recent version is available under: <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (last visited on 16 June 2011). On this steering instrument see, e.g., *Nowrot*, Normative Ordnungsstruktur, 60 *et seq.*, 277 *et seq.*; *Clapham*, Human Rights Obligations of Non-State Actors, 211 *et seq.*; *Hennings*, Über das Verhältnis von Multinationalen Unternehmen zu Menschenrechten, 139 *et seq.*; *Koeltz*, Menschenrechtsverantwortung, 153 *et seq.*

²¹ ECOSOC-Res. 1721 (LIII) of 28 July 1972; see also subsequently the 1974 Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, reprinted in: I.L.M. 13 (1974), 800; as well as thereto, e.g., *Fatouros*, *Journal du Droit International* 101 (1974), 495 (517 *et seq.*); *Sen*, *Multinational Corporations*, 43 *et seq.*

²² ECOSOC-Res. 1913 (LVII) of 5 December 1974; see thereto also *Rubin*, *American Journal of International Law* 70 (1976), 73 *et seq.* For the third and final draft of this code of conduct see Draft Code of Conduct on Transnational Corporations, UN Doc. E/1990/94 of 12 June 1990; generally on this project, the respective negotiations and its ultimate abandonment in the beginning of the 1990s for example *Feld*, *Multinational Corporations*, 35 *et seq.*; *Acquaah*, *International Regulation*, 108 *et seq.*; *Seidl-Hohenveldern*, in: Simmonds (ed.), *Legal Problems*, 43 *et seq.*; *Metaxas*, *Entreprises Transnationales*, 97 *et seq.*; *Nowrot*, Normative Ordnungsstruktur, 54 *et seq.*; *Dell*, *United Nations and International Business*, 55 *et seq.*; *Fatouros*, in: Horn (ed.), *Legal Problems*, 103 *et seq.*

²³ See, e.g., *Muchlinski*, *Multinational Enterprises and the Law*, 659; *Clapham*, *Human Rights Obligations of Non-State Actors*, 201; *Morgera*, *Corporate Accountability*, 102; *Robinson*, *Multinationals and Political Control*, 111 *et seq.*

supporting and promoting an international regulatory mechanism to control and channel the economic and political influence of large corporations.²⁴ These proponents had originally the adoption of a legally binding instrument in the traditional sense in mind. Other OECD members, however, and in particular BIAC – and this appears to be the third notable factor contributing to the final form and content of the OECD Guidelines as well as their accompanying declarations and documents – were not only strongly in favor of voluntary recommendations but also argued for and succeeded in achieving a close connection of this instrument to or even embeddedness in the issue of the promotion of foreign investments.²⁵

II. Previous Amendments

In the two decades following their adoption the OECD Guidelines were amended on three occasions in the years 1979, 1984 and 1991. These amendments resulted, *inter alia*, in modifications on the issue of collective bargaining, a stronger emphasis on the protection of consumer interests as well as – again reflecting a sign of the times – the incorporation of a separate chapter on environmental protection.²⁶ The subsequent 2000 Review which formally commenced in November 1998 and was concluded with the adoption of the updated OECD Guidelines on 27 June 2000,²⁷ bore witness to more substantial textual changes²⁸ including the introduction of a new chapter on combating bribery and a more comprehensive revision of the implementation procedures. The procedural revisions included the possibility for non-governmental organizations and the public to formally bring concerns about company compliance with the OECD Guidelines to the attention of National Contact Points (NCPs).²⁹ However and almost naturally, also the outcome this revision and its subsequent implementation in practice did not fully meet the expectations of all stakeholders in-

²⁴ On this factor see *Muchlinski*, *Multinational Enterprises and the Law*, 659, with further references.

²⁵ See *Robinson*, *Multinationals and Political Control*, 111 *et seq.*; *Clapham*, *Human Rights Obligations of Non-State Actors*, 201 *et seq.*; *Blanpain*, *The Badger Case*, 41 *et seq.*; *Muchlinski*, *Multinational Enterprises and the Law*, 659.

²⁶ On these earlier amendments of the OECD Guidelines see, e.g., *Tully*, *International and Comparative Law Quarterly* 50 (2001), 394 *et seq.*

²⁷ For the text of the OECD Guidelines as amended in 2000 see, e.g., Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL of 31 October 2001; as well as I.L.M. 40 (2001), 237. On the negotiations leading to the 2000 Review see, e.g., *Jones*, in: *Blanpain* (ed.), *Multinational Enterprises*, 141 *et seq.*; *Tully*, *International and Comparative Law Quarterly* 50 (2001), 394 *et seq.*; *Blanpain*, in: *Blanpain* (ed.), *Multinational Enterprises*, 29 *et seq.*; *Huner*, in: *Kamminga/Zia-Zarifi* (eds.), *Liability of Multinational Corporations*, 197 (203 *et seq.*).

²⁸ See for example Committee on International Investment and Multinational Enterprises, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, OECD Doc. DAFFE/IME(2000)20 of 8 November 2000, p. 2 (“In comparison with earlier reviews the changes to the text of the Guidelines are far-reaching [...]”).

²⁹ See thereto also *infra* under C.IV.1.b).

volved in the process.³⁰ A further notable development, broadly related to the purposes of the OECD Guidelines, is the subsequent adoption of the “OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones” by the OECD Council on 8 June 2006.³¹ Although the OECD Risk Awareness Tool “cannot be used as a basis for bringing specific instances” under the implementation scheme of the OECD Guidelines, the close connection between these two instruments is demonstrated by the fact that “NCPs [National Contact Points] and interested parties might use it as a complementary source of information and ideas when confronted with the issue of responsible investment in weak governance zones”.³²

III. The Processes Leading to the 2011 Update

At their annual meeting on 16/17 June 2009, the first indications of a possible new review process to update the OECD Guidelines became publicly known when the National Contact Points³³ stated that with “the 10th anniversary of the 2000 Review approaching, [...] this is an appropriate time to consider the merits of updating the Guidelines” and “recommended that the OECD Investment Committee use the coming period to generate a list of substantive and procedural issues that have arisen from experience with the Guidelines of the past ten years with a view to defining the terms of reference for any future update of the Guidelines”.³⁴ The idea gained considerable further momentum when the OECD Ministerial Council, less than ten days

³⁰ For a more in-depth evaluation of the 2000 Review of the OECD Guidelines and their subsequent operation in practice see for example *Böhmer*, The Revised 2000 OECD Guidelines, 2 *et seq.*; *Tully*, International and Comparative Law Quarterly 50 (2001), 394 (395 *et seq.*); *Utz*, Die OECD-Leitsätze für multinationale Unternehmen, 31 *et seq.*; *Heydenreich*, in: Fonari (ed.), Menschenrechts-, Arbeits- und Umweltstandards, 41 *et seq.*; *Acconi*, Journal of World Investment 2 (2001), 123 *et seq.*; *Venzules*, Colorado Journal of International Environmental Law and Policy 21 (2010), 451 (460 *et seq.*); *Morgera*, Corporate Accountability, 103 *et seq.*, 229 *et seq.*; *Schuler*, in: von Bogdandy *et al.* (eds.), The Exercise of Public Authority, 197 *et seq.*; *Jägers*, Corporate Human Rights Obligations, 101 *et seq.*; *Murray*, Industrial Law Journal 30 (2001), 255 *et seq.*; *Klinkenberg*, Zeitschrift für Vergleichende Rechtswissenschaft 101 (2002), 421 *et seq.*; *Franciose*, Boston College International and Comparative Law Review 30 (2007), 223 (227 *et seq.*); *Rieth*, Global Governance, 124 *et seq.*; *Hamm*, in: von Arnim *et al.* (eds.), Jahrbuch Menschenrechte 2003, 191 (193 *et seq.*); *Köpke/Röhr*, Codes of Conduct, 45 *et seq.*; as well as the evaluation by OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011).

³¹ OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, 6 June 2006, available under: <www.oecd.org/dataoecd/26/21/36885821.pdf> (last visited on 16 June 2011). On the development of this steering instrument and for an assessment of its potential see *Nowrot*, OECD Risk Awareness Tool, 2 *et seq.*

³² OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, 6 June 2006, p. 13, available under: <www.oecd.org/dataoecd/26/21/36885821.pdf> (last visited on 16 June 2011); see also *Nowrot*, OECD Risk Awareness Tool, 8 *et seq.* For further details on the implementation procedure of the OECD Guidelines see *infra* under C.IV.

³³ See thereto *infra* under C.IV.1.

³⁴ OECD, 2009 Annual Meeting of the National Contact Points, Report by the Chair, 16-17 June 2009, at VI (“Considerations for Future Actions”), available under: <www.oecd.org/dataoecd/41/25/43753441.pdf> (last visited on 16 June 2011).

later at its meeting on 24/25 June 2009, welcomed in its 2009 Ministerial Conclusions “further consultation on the up-dating of the OECD Guidelines for Multinational Enterprises to increase their relevance and clarify private sector responsibilities”.³⁵

In the following months and prior to the formal decision on whether and how to launch an update, the first phase of the process was characterized by various rounds of consultations with an impressive number of diverse governmental and non-governmental actors. Among the participants envisioned by the OECD were respective OECD committees and bodies, including the Committee on Corporate Governance, the Employment and Social Affairs Committee, the Environmental Policy Committee, the Working Group on Bribery in International Business Transactions, the Consumer Policy Committee, the Competition Committee and the Committee on Fiscal Affairs. Also included were the accredited stakeholders, BIAC, TUAC and OECD Watch. Interested non-adhering countries such as China, India, the Russian Federation, Indonesia, South Africa and Saudi Arabia were also envisioned to be included in the consultations. Finally, international organizations and institutions thereof, intermediate as well as private bodies and steering regimes such as the International Labour Organization (ILO), the Office of the UN Secretary-General’s Special Representative for Business and Human Rights, the UN Global Compact, the International Finance Corporation (IFC), the Global Reporting Initiative (GRI), the UNEP Finance Initiative and the International Organization for Standardization (ISO), as well as other non-governmental stakeholders from the realm of civil society, academia and specialized business were regarded as potential participants.³⁶ Thus, also the process leading to the 2011 update of the OECD Guidelines confirms the for valid reasons increasingly shared perception of an “inherent heterogeneity of modern partnerships in international law-making”.³⁷ Among the specific discussion venues opened in this connection were a first round of deliberations by the Working Party of the OECD Investment Committee, including consultations with BIAC, OECD Watch and TUAC in October 2009, discussions with government officials and private sector representatives in Bangkok on 4 November 2009 and a number of preliminary inputs provided by OECD committees, international governmental, intermedi-

³⁵ OECD, Meeting of the Council at Ministerial Level, 24-25 June 2009, 2009 Ministerial Conclusions, OECD Doc. C/MIN(2009)5/FINAL of 25 June 2009, para. 15.

³⁶ See already OECD, Working Party of the Investment Committee, Preparing for Consultations on an Update of the OECD Guidelines for Multinational Enterprises, Note by the Secretariat, OECD Doc. DAF/INV/WP(2009)4 of 28 August 2009, para. 22; as well as subsequently, e.g., OECD, Consultations on an Update of the OECD Guidelines for Multinational Enterprises, Consultation Note, December 2009, para. 27, available under: <www.oecd.org/dataoecd/32/62/44168690.pdf> (last visited on 16 June 2011). Other organizations that contributed to the consultation process on the basis of written submissions were for example Amnesty International, Consumers International, the International Bar Association and Transparency International, see OECD, Report by the Chair of the 2010 Meeting of the National Contact Points, p. 4, available under: <www.oecd.org/dataoecd/15/23/46385752.pdf> (last visited on 16 June 2011). See also subsequently OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, para. 7.

³⁷ *Dupuy*, in: Wolfrum/Röben (eds.), *Developments of International Law in Treaty Making*, 537 (541).

ate and non-governmental institutions and other participants.³⁸ Furthermore, a public consultation took place in Paris on 8 December 2009 which provided interested governmental and private actors with an opportunity to express their views on potential issues to be considered in the course of an updating process in the three main areas of substantive provisions, procedural provisions and institutional arrangements.³⁹

Already a respective background document prepared by the OECD Secretariat, dated 28 August 2009, contained a list of main topics that had been brought up with regard to the content and implementation of the OECD Guidelines since the conclusion of the previous 2000 review. These topics were therefore regarded as potential candidates to be considered for the purposes of a new update.⁴⁰ However, the ultimate decision on launching this process and the particular scope of review took a more specific shape only with the development of the terms of reference by the Working Party of the OECD Investment Committee at its session on 24 March 2010. Participants at this session included representatives of the eight non-OECD adhering governments. Furthermore, this session followed renewed consultations with BIAC, OECD Watch and TUAC.⁴¹

After explaining the overarching purpose of the update to ensure the continued role of the OECD Guidelines “as a leading international instrument for the promotion of responsible business conduct” and highlighting the intention of the OECD to undertake a more limited amendment process as compared to the previous 2000 review,⁴² the terms of reference outline the main underlying motives and reasons for an adaption of this code of conduct to the “rapidly” changing landscape of the international economic system since the start of the new millennium. Among the recognized changes are the “new and more complex patterns of production and consumption” and the increasing importance of transnational corporations from developing and transition countries not adhering to the OECD Guidelines. In addition, these changes

³⁸ OECD, Consultations on an Update of the OECD Guidelines for Multinational Enterprises, Consultation Note, December 2009, paras. 6 and 28, available under: <www.oecd.org/dataoecd/32/62/44168690.pdf> (last visited on 16 June 2011).

³⁹ See thereto, e.g., OECD, Consultation on an Update of the OECD Guidelines for Multinational Enterprises, 8 December 2009, Agenda, available under: <www.oecd.org/dataoecd/56/27/44087676.pdf> (last visited on 16 June 2011); see also for example OECD Watch, Key Issues for a Review of the OECD Guidelines, December 2009, available under: <http://oecdwatch.org/publications-en/Publication_3419/> (last visited on 16 June 2011).

⁴⁰ OECD, Working Party of the Investment Committee, Preparing for Consultations on an Update of the OECD Guidelines for Multinational Enterprises, Note by the Secretariat, OECD Doc. DAF/INV/WP(2009)4 of 28 August 2009, paras. 7 *et seq.*; see also subsequently OECD, Consultations on an Update of the OECD Guidelines for Multinational Enterprises, Consultation Note, December 2009, paras. 8 *et seq.*, available under: <www.oecd.org/dataoecd/32/62/44168690.pdf> (last visited on 16 June 2011).

⁴¹ See OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 2, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011); see also, e.g., OECD Watch, Response to the Draft Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, March 2010, available under: <http://oecdwatch.org/publications-en/Publication_3461/> (last visited on 16 June 2011).

⁴² OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 2, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011) (“the intention is not to embark in a revision of the scale of the 2000 Review of the Guidelines”).

also included “the financial and economic crisis and the loss of confidence in open markets, the need to address climate change, and reaffirmed international commitments to development goals”. The economic crisis specifically has resulted in renewed expectations and calls by governmental and non-governmental actors for “high standards” in the realm of corporate social responsibility.⁴³

The subsequent list of specific issues to be investigated, discussed and potentially addressed on the basis of new or modified provisions in the course of the review process were divided into substantive matters on the one side and procedural provisions and institutional questions on the other side. In addition to a – only at first sight – merely technical update of the citations of international steering instruments adopted by the OECD and other international organizations and institutions referred to in the OECD Guidelines, the respective substantive issues included in particular a clarification or development of further guidance on the controversially discussed⁴⁴ application of the OECD Guidelines to supply chains, the introduction of a separate chapter on human rights as well as possible amendments to most of the other chapters. The chapters considered for amendments were on disclosure, labour and industrial relations, anti-corruption, environment, consumer interests and taxation.⁴⁵ With regard to procedural and institutional issues, it is hardly surprising that the terms of reference drew particular attention to the functions of and roles played by the NCPs in the largely decentralized implementation framework as a characteristic feature of the OECD Guidelines.⁴⁶ In this connection, the terms of reference specifically requested to take “due account”, *inter alia*, of the respective recommendations formulated by the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises in his 2008 Report to the UN Human Rights Council.⁴⁷ Aside from more general suggestions such as the possibility of peer learning and review among as well as the provision of training and capacity-building by NCPs, the document also required for example an evaluation of other controversial issues. Among these were the intensively discussed questions relating to the institutional structure and composition of NCPs,⁴⁸ and more innovative ideas like a “right of appeal on procedural grounds”.⁴⁹ Lastly, but surely not the least with regard to its effect on the subsequent deliberations, the terms of reference foresaw concerning

⁴³ *Ibid.*, p. 2.

⁴⁴ See thereto also *infra* under C.I.3.

⁴⁵ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 2-5, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

⁴⁶ See thereto also *infra* under C.IV.1.

⁴⁷ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011), referring to Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/5 of 7 April 2008, paras. 92, 96 *et seq.*

⁴⁸ See thereto also *infra* under C.IV.1.a).

⁴⁹ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5-6, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

the envisioned timeframe for the review process “the broad aim of completing the update in 2011, if at all possible, by the time of the 2011 Annual NCP Meeting”.⁵⁰

Following the approval of the terms of reference by all OECD and non-OECD adhering governments on 30 April 2010,⁵¹ the actual work on the update officially started – in line with the expectations expressed in this document⁵² – on the occasion of the annual meeting of the National Contact Points that took place from 29 June until 1 July and the accompanying 10th OECD Roundtable on Corporate Responsibility on 30 June/1 July 2010.⁵³ In accordance with the modalities provided for in the terms of reference, the subsequent negotiation process and the development of draft recommendations took place under the responsibility of the Working Party of the OECD Investment Committee with its chair having been assisted by an “advisory group of interested adhering governments, representatives of BIAC, TUAC and OECD Watch and experts, which he will convene as needed to help him prepare working sessions on the update in the Working Party and elaborate proposals on issues requiring special attention”.⁵⁴ Known and notable events in connection with the update process include consultations by representatives of adhering governments and the accredited stakeholders BIAC, OECD Watch and TUAC with the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *John G. Ruggie*, on 4 October 2010.⁵⁵ Furthermore, a special consultation and negotiation session among the adhering governments and the above mentioned stakeholders took place on 13 December 2010 with the discussions apparently focusing on “human rights, employment and

⁵⁰ *Ibid.*, p. 2.

⁵¹ *Ibid.*, p. 2; see also OECD, Meeting of the Council at Ministerial Level, 27-28 May 2010, 2010 Ministerial Conclusions, OECD Doc. C/MIN(2010)6/FINAL of 28 May 2010, para. 12.6 (“We welcome the formal launch of the update of the OECD Guidelines for Multinational Enterprises and note the important role they play in contributing to responsible business conduct and, thus, to broad societal support for open markets.”).

⁵² OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 2, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

⁵³ See OECD, Report by the Chair of the 2010 Meeting of the National Contact Points, available under: <www.oecd.org/dataoecd/15/23/46385752.pdf>; and OECD, 10th Roundtable on Corporate Responsibility “Launching an Update of the OECD Guidelines for Multinational Enterprises”, Preliminary Programme, available under: <www.oecd.org/dataoecd/58/40/45363061.pdf>; as well as the additional information on the Roundtable provided under: <www.oecd.org/document/43/0,3746,en_2649_34889_45356907_1_1_1_1,00.html> (all last visited on 16 June 2011).

⁵⁴ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 8, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

⁵⁵ For this consultation see the respective information under: <www.oecd.org/document/36/0,3746,en_2649_34889_46078244_1_1_1_1,00.html>; see also Remarks at OECD Investment Committee, Professor John G. Ruggie, 4 October 2010, available under: <www.reports-and-materials.org/Ruggie-remarks-to-OECD-Investment-Committee-4-Oct-2010.pdf>; as well as for prior contributions by the UN Special Representative to the update process, e.g., Updating the Guidelines for Multinational Enterprises, Discussion Paper of 30 June 2010, available under: <www.oecd.org/dataoecd/17/35/45545887.pdf>; and The Corporate Responsibility to Respect Human Rights in Supply Chains, 30 June 2010, available under: <www.oecd.org/dataoecd/17/50/45535896.pdf> (all last visited on 16 June 2011).

labour, due diligence, supply chains and procedural provisions, including those relating to the functioning of National Contact Points”.⁵⁶

Aside from the fact that these consultations indeed took place, however, not much is publicly known about the respective negotiations among the members of the Working Party of the OECD Investment Committee and its Advisory Group themselves. In particular, there appear to be no draft recommendations and specific textual proposals available on the basis of which one might be able to broadly reconstruct and thus also analyze the course of the negotiations. Although previously and also still currently far from uncommon in particular in the international sphere, it nevertheless should be highlighted that such an approach seems to be difficult to reconcile not only with the currently emerging trend towards transparent and inclusive deliberations in the field of international negotiations.⁵⁷ Rather, and measuring the OECD against its own benchmarks, it also appears questionable whether this process can comprehensively and without reservations be qualified as “transparent, participatory, [and] inclusive” as stipulated in the terms of reference.⁵⁸ In light of these findings, the criticism recently voiced for example by OECD Watch “that the update process was rushed and lacked public consultation”⁵⁹ seems to be not completely without merits.

Even though providing for as well as, particularly, in fact adhering to a comparatively narrow timeframe is a rare and laudable achievement in these days of, *inter alia*, what appears to many as an almost indefinitely prolonged WTO “trade round”, such an approach ultimately also always entails the danger of compromising public participation. This result partly forecloses the possibility to benefit from the information and

⁵⁶ See thereto the information provided under: <www.oecd.org/document/27/0,3746,en_2649_34889_46568795_1_1_1_1,00.html> (last visited on 16 June 2011).

⁵⁷ From the numerous contributions on this issue see, e.g., *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 220 *et seq.*, 326 *et seq.*; *Benedek*, in: Fastenrath *et al.* (eds.), Essays in Honour of Judge Bruno Simma, 201 *et seq.*, each with further references.

⁵⁸ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 7, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

⁵⁹ OECD Watch, Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011); see also, e.g., Amnesty International, Public Statement: The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has Come to an End, AI Index: IOR 30/001/2011 of 23 May 2011, available under: <www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (last visited on 16 June 2011) (“This also had an impact on the extent to which key external experts could participate and provide their input, and governments could give them careful consideration. It also meant that groups with a direct stake in the standards under consideration, such as women’s or Indigenous Peoples’ groups were not consulted. While Amnesty International appreciates the need to adhere to a timely process, we believe that simple measures could have been taken which would have brought more credibility to the review process.”); International Federation for Human Rights (FIDH), Open Letter to OECD Investment Committee on the Review Process of the OECD Guidelines for Multinational Enterprises, 29 April 2011, available under: <www.corporatejustice.org/open-letter-to-oecd-investment.html?lang=en> (last visited on 16 June 2011) (“[...], FIDH nevertheless regrets the revision process has not been more inclusive. FIDH deplors the lack of transparency and openness of the review process. At no stage have the negotiated drafts been made available online nor made accessible otherwise in the public domain for stakeholders within and outside adhering countries.”).

experience of affected and/or interested actors.⁶⁰ In addition, it might eventually lead to some important issues receiving a comparatively and undeservingly light treatment in the course of the negotiations.⁶¹ A telling example in this connection concerns the application of the OECD Guidelines to the activities of multinational financial institutions.⁶² Although explicitly and quite prominently mentioned in the terms of reference as a notable area of investigation,⁶³ the final report of the Chair of the Working Party of the Investment Committee concedes that “[d]ue to time constraints, the treatment of this issue in the updated text is limited to a short reference in the commentary on General Policies”.⁶⁴

Nevertheless, what became again publicly known is the fact that the Working Party of the OECD Investment Committee concluded its work on the update on 28 April 2011 and forwarded the proposed amendments to the OECD Guidelines, the Council Decision on the Guidelines for Multinational Enterprises and the Commentaries thereto to the Investment Committee⁶⁵ which in turn approved or respectively adopted them already on 29 April 2011.⁶⁶ Following the adoption of the updated OECD Guidelines by all forty-two adhering governments⁶⁷ and the corresponding acceptance by the OECD Ministerial Council of the amended Decision thereto, the revised steering mechanism was published and became – subject to an informal transition period of approximately six months⁶⁸ – in principle effective on 25 May 2011.

⁶⁰ Generally on the close connection between the optimal realization of the common interest and the need for inclusive governance mechanisms see, e.g., *Mattli/Woods*, in: *Mattli/Woods* (eds.), *The Politics of Global Regulation*, 1 (4). Specifically on the importance of expertise and information provided by non-state actors in the decision- and law-making processes of the international economic system see for example *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 255; *Charnovitz*, in: *Wolfrum/Röben* (eds.), *Developments of International Law in Treaty Making*, 543 (550); *Nowrot*, *Normative Ordnungsstruktur*, 444 *et seq.*, 635 *et seq.*

⁶¹ See also, e.g., Amnesty International, Public Statement: The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has Come to an End, AI Index: IOR 30/001/2011 of 23 May 2011, available under: <www.amnesty.org/en/library/asset/IO30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (last visited on 16 June 2011) (“Many important issues were not addressed, or where inadequately addressed, due to the accelerated pace of the review process, in which quality was sometimes sacrificed in the name of promptness.”).

⁶² See thereto also *infra* under C.I.1.

⁶³ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 3, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011) (“The update should investigate how the instruments and tools that have emerged on responsible lending or investment by financial institutions [...] could assist in clarifying the application of the Guidelines to multinational financial institutions, including by introducing specific provisions in the Guidelines for that purpose.”).

⁶⁴ OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 7.

⁶⁵ See OECD, Investment Committee, Update of the OECD Guidelines for Multinational Enterprises, OECD Doc. DAF/INV(2011)4 of 29 April 2011, p. 3 *et seq.*

⁶⁶ OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, para. 8.

⁶⁷ See thereto *ibid.*, para. 12 (“The amendments to the Guidelines will be adopted by adherents to the Declaration and the Council is called upon to adopt the amendments to the Decision.”).

⁶⁸ See in this connection OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 6 (“The updated Guidelines will require changes to policies and practices by adhering countries and multinational enterprises. At the OECD, there is an informal understanding that, when a legal

C. The 2011 Update in the Limelight: Retained Characteristics and Notable Modifications

With the review process having been formally successfully concluded, general attention is now most certainly primarily shifting to the results achieved in the form of textual changes and modified procedures. Against this background, this part of the contribution is devoted to a description and initial evaluation of specific amendments agreed upon with regard to the OECD Guidelines, the respective Council Decision including the Procedural Guidance as well as the accompanying Commentaries thereto, bearing in mind that the overarching Declaration on International Investment and Multinational Enterprises itself⁶⁹ was not subjected to any changes. Thereby, it hardly needs to be emphasized that it is neither possible nor necessary to address all of the various individual textual modifications in a comprehensive way. Rather, the following analysis confines itself to highlight a selection of amendments and some enduring features that are likely – or at least offer the potential – to co-determine whether, how and to what extent the regime established by the OECD Guidelines will (continue to) be able to exercise a noteworthy influence on the activities of corporations in the years to come. For this purpose, this section will subsequently address four separate yet closely interrelated aspects: the scope of application of the OECD Guidelines, their preface, the substantive provisions, as well as, finally, the implementation procedures, including the respective institutional framework.

I. The OECD Guidelines' Scope of Application

As with all normatively relevant steering instruments – a qualification which undoubtedly also applies to the OECD Guidelines despite their retained status as voluntary recommendations from governments to companies –, a first and decisive question concerns the scope of application of the regime constituted by them and their accompanying declarations. Defining what conduct undertaken by whom is considered to be relevant for the purposes of the OECD Guidelines, the scope of application has a canalizing function, the importance of which can hardly be overestimated. It controls not only which actors are under what conditions encouraged and expected to comply with the various substantive and procedural recommendations as stipulated in this document. Rather, the scope of application thereby also, *inter alia*, predetermines and thus limits the possibility of interested persons and entities to successfully bring so-called “specific instances” to the attention of the respective NCP.⁷⁰ The individual facets connected with the question of applicability are commonly systemized and di-

document is adopted or revised, a reasonable length of time – approximately six months – is needed in order to implement its provisions.”); see thereto also *infra* under C.I.4.

⁶⁹ The text of the Declaration on International Investment and Multinational Enterprises is reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 5 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

⁷⁰ See thereto also *infra* under C.IV.1.b).

vided into four categories, namely the personal, territorial, material and temporal scope of application.

1. *Personal Scope of Application*

The personal scope of application basically concerns the question of to whom the OECD Guidelines are addressed. In this connection, it first should be emphasized that, contrary to what its title might imply, this code of conduct is not only applicable to companies. In order to facilitate their effectiveness, the OECD Guidelines are first and foremost also addressed to the currently forty-two adhering countries, thereby mirroring the general responsibility of states to promote and ensure the realization of community interests like the protection of human rights, labour and social standards as well as the environment also in relations exclusively involving individuals and other private actors.⁷¹ It is to be applauded that this – admittedly already previously in principle undisputed – governmental dimension of the OECD Guidelines' scope of application is now as a result of the 2011 update explicitly and prominently stressed in paragraph one of the Preface with the insertion of a new sentence: “However, the countries adhering to the *Guidelines* make a binding commitment to implement them in accordance with the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises*.”⁷² This increasing focus on the indispensable role played by the respective governmental actors in the effective functioning of the OECD Guidelines is also, for example, indicated by the fact that paragraph eleven of the Concepts and Principles no longer stipulates that the adhering governments “will promote”⁷³ but rather that they “will implement” this mechanism.

Furthermore, and again in partial deviation of what the designation of this document might imply, the substantive and procedural recommendations enshrined in the OECD Guidelines are also applicable to the corporations having their seat in the territory of one of the adhering countries that are not multinational in character. The perception that this instrument “reflect[s] good practice for all” is stipulated in what is

⁷¹ Generally on this protective dimension of human rights and other community interest as well as the corresponding obligations arising for states in this connection see, e.g., Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, paras. 1 *et seq.*; Clapham, Human Rights in the Private Sphere, 89 *et seq.*; Kamminga, in: International Law Association (ed.), Report of the Seventy-First Session, 422 (424); specifically on the extraterritorial aspects of this dimension in connection with the activities of corporations see also for example De Schutter, in: Bekker/Dolzer/Waibel (eds.), Essays in Honour of Detlev Vagts, 245 (249 *et seq.*); Weschka, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 625 (629 *et seq.*); von Bernstorff, Archiv des Völkerrechts 49 (2011), 34 *et seq.*, with further references.

⁷² Emphases in the original.

⁷³ See paragraph ten of the Concepts and Principles in the previous version of the OECD Guidelines, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL of 31 October 2001, p. 9.

now paragraph five (previously paragraph four) of the Concepts and Principles which adds the conclusion that “multinational and domestic enterprises are subject to the same expectations in respect of their conduct”. The broad personal scope of application is further confirmed by the following paragraph six expressing the adhering government’s encouragement of even small- and medium-sized enterprises to observe the OECD Guidelines “to the fullest extent possible”. Thereby, the explicit acknowledgement made in this connection that these last-mentioned business actors “may not have the same capacities as larger enterprises” should not be interpreted as small- and medium-sized enterprises enjoying a greater kind of “leeway” or “margin of appreciation” on whether and how to adhere to the respective recommendations. Instead, taking recourse to the structural distinction between rules and principles,⁷⁴ this finding merely illustrates the unexpressed, normative structure of the substantive and procedural recommendations stipulated in the OECD Guidelines as principles in the sense of optimization requirements which abstractly entail “that something be realized to the greatest extent possible given the legal and factual possibilities”.⁷⁵ Although these two paragraphs were in themselves not subject to any further amendments during the 2011 update, nevertheless attention needs to be drawn to the likelihood that in particular the heightened emphasis on the observance of the OECD Guidelines in all business relationships – a potential indirect external dimension of the material scope of application often referred to as corporate “supply chain responsibility” – as being one of the results of the review process⁷⁶ might eventually considerably increase the importance of this reformed code of conduct for the activities of domestic corporations, in principle also including small- and medium-sized enterprises.

That said, and thus illustrating the quite broad personal scope of application, it hardly needs to be pointed out that among the primary addressees of the OECD Guidelines are most certainly the multinational enterprises or – frequently used synonymously – transnational corporations.⁷⁷ The prominent position of this category of actors in the framework of the OECD Guidelines rightly reflects their important status as one of the “driving forces” of the processes of globalization.⁷⁸ While they are already for quite some time considered as “a major, perhaps *the* major, phenomenon of the international economy today”,⁷⁹ multinational enterprises are influential participants in the current international system from more than an economic perspective.

⁷⁴ The contributions in the field of legal theory and other areas of law on the distinction between rules and principles as well as the controversially discussed suitability of this approach as such are by now more than legion. See for example *Esser*, Grundsatz und Norm, 14 *et seq.*; *Dworkin*, Taking Rights Seriously, 22 *et seq.*; *Alexy*, A Theory of Constitutional Rights, 44 *et seq.*; *Poscher*, Rechtswissenschaft 1 (2010), 349 *et seq.*, with numerous further references.

⁷⁵ See *Alexy*, A Theory of Constitutional Rights, 47.

⁷⁶ See thereto also *infra* under C.I.3.

⁷⁷ Generally on the wide range of terms taken recourse to in order to address this category of actors with numerous further examples *Voon*, Adelaide Law Review 21 (1999), 219 (220); *Merciai*, Les Entreprises Multinationales, 36 *et seq.*; *Nowrot*, Normative Ordnungsstruktur, 40 *et seq.*

⁷⁸ *Jetto-Gillies*, in: Michie (ed.), Handbook of Globalization, 139 (144); *Kleinert*, The Role of Multinational Enterprises, 28; generally on the various processes of globalization see already *Delbrück*, Indiana Journal of Global Legal Studies 1 (1993), 9 *et seq.*

⁷⁹ See already in the 1970s *Cox*, in: Modelski (ed.), Transnational Corporations and World Order, 414 (emphasis in the original).

They are also increasingly, albeit in many cases still indirectly, involved in the law-making and law-enforcement processes on the international scene.⁸⁰ Thereby, it is now in principle almost universally recognized that the growing importance of multinational enterprises as economic and political steering actors in the international system results – as prominently acknowledged also in the Preface of OECD Guidelines – in chances for, but especially also risks to, the promotion of community interests such as, for example, the protection of human rights and the environment, as well as the enforcement of core labour and social standards. On the one side, these non-state actors, because of their potential influence on the home as well as the host countries, can in the course of their economic and political activities effectively contribute to the enforcement of global public goods. On the other side, however, it is well-known that multinational corporations also have the potential to frustrate the universal promotion and protection of the environment, as well as human and labour rights either directly through their own conduct or indirectly by way of supporting state and other non-state actors, predominantly in oppressive regimes, in their respective actions.

In light of this overall quite ambivalent potential of multinational enterprises,⁸¹ the question arises – and is indeed already for some time intensively and controversially debated – whether and, if so, by which means, to what extent and on the basis of which conceptual approaches, they can and should be integrated into the international normative framework as addressees of legal obligations and/or guiding principles concerning the promotion and realization of the above mentioned and other international community interests.⁸² Against this background, the OECD Guidelines are first and foremost to be regarded as a government-backed and -guided undertaking to contribute to a realistic, workable and acceptable solution of this complex issue on the basis of a set of standards for responsible business conduct by multinational enterprises combined with a rather unique implementation mechanism.

⁸⁰ Generally on the participation of multinational enterprises in the various and diverse normatively relevant steering mechanisms in the international system *Tully*, Corporations and International Lawmaking, 52 *et seq.*; *Nowrot*, Normative Ordnungsstruktur, 217 *et seq.*; *Flohr/Rieth/Schwindenhammer/Wolf*, The Role of Business in Global Governance, 3 *et seq.*

⁸¹ See thereto, e.g., *Nowrot*, Philippine Law Journal 80 (2006), 563 (564 *et seq.*), with numerous additional references. Specifically on the distinctive features of and challenges arising from the activities of multinational enterprises as compared to other business actors, see also *Stiglitz*, American University International Law Review 23 (2008), 451 (474 *et seq.*).

⁸² From the ever-growing literature on this issue, see for example *Ruggie*, American Journal of International Law 101 (2007), 819 *et seq.*; *Weissbrodt/Kruger*, in: Alston (ed.), Non-State Actors and Human Rights, 315 *et seq.*; *Muchlinski*, in: Noortmann/Ryngaert (eds.), Non-State Actor Dynamics, 9 *et seq.*; *De Schutter*, in: Bekker/Dolzer/Waibel (eds.), Essays in Honour of Detlev Vagts, 245 *et seq.*; *Zerk*, Multinationals and Corporate Social Responsibility, 7 *et seq.*; *Heinemann*, in: Fastenrath *et al.* (eds.), Essays in Honour of Judge Bruno Simma, 718 *et seq.*; *Cata Backer*, ILSA Journal of International and Comparative Law 14 (2008), 499 *et seq.*; *Alston*, in: Alston (ed.), Non-State Actors and Human Rights, 3 *et seq.*; *Deva*, Connecticut Journal of International Law 19 (2003), 1 *et seq.*; *Joseph*, Netherlands International Law Review 46 (1999), 171 *et seq.*; *Chopra*, Valparaiso University Law Review 29 (1994), 235 *et seq.*; *Köster*, Die völkerrechtliche Verantwortlichkeit, 32 *et seq.*; *Bantekas*, Boston University International Law Journal 22 (2004), 309 *et seq.*; *Beisinghoff*, Corporations and Human Rights, 42 *et seq.*; *Weilert*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 69 (2009), 883 *et seq.*; *Nowrot*, Philippine Law Journal 80 (2006), 563 *et seq.*, each with numerous further references.

For the specific purposes of the present section, it is of particular interest how this instrument has adapted its scope of application to the challenge of adequately covering this category of actors in its rather diverse manifestations. It is well-known that the organizational structure and form of multinational enterprises can take up various different appearances. This is also one of the primary reasons why – despite numerous attempts by international institutions as well as in the literature⁸³ – as of today still no generally accepted definition of their constitutive characteristics has emerged⁸⁴ and is unlikely to be developed in the foreseeable future. However, the continued uncertainties connected with the question of how to define these entities do not pose a serious obstacle to the application of the OECD Guidelines. Since this code of conduct is also addressed to corporations that are undoubtedly not of a multinational nature, the adhering countries were and are in the fortunate position to rightly point out in what is now paragraph four (previously paragraph three) of the Concepts and Principles that a “precise definition of multinational enterprises is not required for the purposes of the *Guidelines*”.⁸⁵ Nevertheless, the following sentences in this paragraph provide at least an illustrative description of their typical characteristics: “They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.”

The emphasis on the existence of corporate entities in at least two countries, the possibility of coordinated undertakings among them and the exercise of a more or less centralized control by one or more of these entities over the multinational enterprise as a whole as the main characteristic elements of this category of actors is broadly in line with the respective views expressed in the literature.⁸⁶ Of particular importance is – again in conformity with the predominant opinion among scholars⁸⁷ – also the inclusion of state-owned and mixed corporations. It serves as another clear indication for the adhering countries’ intention to comprehensively extend the personal scope of application to all profit-oriented entities “operating in or from their territories”,⁸⁸ with

⁸³ On the challenges and controversies connected with the definition of multinational enterprises see, e.g., *Muchlinski*, *Multinational Enterprises and the Law*, 5 *et seq.*; *Wallace*, *The Multinational Enterprise*, 102 *et seq.*; *Aharoni*, *Quarterly Review of Economics and Business* 11 (No. 3, 1971), 27 *et seq.* For a more comprehensive description and evaluation of the respective approaches suggest and taken recourse to by international institutions and in the literature see *Nowrot*, *Normative Ordnungsstruktur*, 39 *et seq.*, 51 *et seq.*, 79 *et seq.*

⁸⁴ On this perception see also for example *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 245; *Duruigbo*, *University of Pennsylvania Journal of International Economic Law* 26 (2005), 1 (29); *Krajewski*, *Rechtliche Steuerung transnationaler Unternehmen*, 3 *et seq.*; *Hörtreiter*, *Die Vereinten Nationen und Wirtschaftsunternehmen*, 13 *et seq.*; *Geldermann*, *Völkerrechtliche Pflichten*, 28.

⁸⁵ Emphasis in the original.

⁸⁶ See *Nowrot*, *Normative Ordnungsstruktur*, 79 *et seq.*, with numerous additional references.

⁸⁷ On this controversially discussed issue see, e.g., *Krajewski*, *Rechtliche Steuerung transnationaler Unternehmen*, 6 *et seq.*; *Nowrot*, *Normative Ordnungsstruktur*, 87 *et seq.*, with further references.

⁸⁸ See Declaration on International Investment and Multinational Enterprises, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 6, para. I.

the last-cited wording having been probably also employed in order to circumvent the rather “thorny” issue of how to determine the nationality of a multinational enterprise.⁸⁹ Finally, this perception is further confirmed by the sixth sentence of paragraph four which states that the OECD Guidelines “are addressed to all the entities within the multinational enterprises (parent companies and/or local entities)”.

While the content of paragraph four on multinational enterprises of the Concepts and Principles discussed so far has not been subjected to any notable amendments, it is worth drawing attention to the incorporation of a new second sentence, stressing that “[t]hese enterprises operate in all sectors of the economy”. This addition was primarily motivated by the aspiration of the adhering countries and in particular a number of other stakeholders to clarify that this instrument also applies to multinational enterprises operating in the financial sector.⁹⁰ Although a more general consensus on this issue itself had apparently already been reached in the course of the previous decade,⁹¹ the specific implications arising from it, in particular the question of adequate approaches on the operationalization of the OECD Guidelines in the realm of financial services, are – also in the wake of the 2011 update – at present far from clear and thus quite obviously an area where further investigations and deliberations are required in the future.⁹² Nevertheless, this explicit clarification is already currently at least insofar of practical relevance as it again confirms and underlines the authors’ determination to extend the personal scope of application of the OECD Guidelines, without any exceptions, to all profit-oriented actors.

⁸⁹ On the challenges connected with this issue see, e.g., *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Parts 2 to 4, 859 *et seq.*; *Tietje*, in: Tietje (ed.), *International Investment Protection*, 17 (20); *Staker*, *British Yearbook of International Law* 61 (1990), 155 *et seq.*

⁹⁰ See thereto already for example OECD, *Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises*, 4 May 2010, p. 3, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

⁹¹ See, e.g., OECD, Council, *OECD Guidelines for Multinational Enterprises: Update 2011*, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 7 (“During the update, there was a general understanding that was in line with earlier conclusions, reached at the 2007 Corporate Responsibility Roundtable, that the Guidelines are addressed *inter alia* to multinational enterprises operating in the financial sector.”) (emphases in the original). Concerning the 2007 Corporate Responsibility Roundtable on “The OECD Guidelines for Multinational Enterprises and the Financial Sector” itself see the information under: <www.oecd.org/document/34/0,3746,en_2649_34889_38389666_1_1_1_1,00.html> (last visited on 16 June 2011).

⁹² See thereto also the findings and recommendations made by the Chair of the Working Party of the Investment Committee, reprinted in: OECD, Council, *OECD Guidelines for Multinational Enterprises: Update 2011*, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 7 (“I would advocate undertaking further work in this area as part of the proactive agenda for Guidelines implementation, in close co-operation with the relevant parties, [...]. The practical meaning of the Guidelines’ due diligence recommendations for the financial sector has been identified as a theme deserving serious attention and there has been demand for future work in this area from the financial sector representatives with whom we consulted.”); see also already, e.g., OECD Watch, *Submission to the OECD Investment Committee, Effective Application of the OECD Guidelines to the Financial Sector*, 23 March 2009, available under: <http://oecdwatch.org/publications-en/Publication_3051/> (last visited on 16 June 2011).

2. Territorial Scope of Application

A further essential facet of the OECD Guidelines' scope of application deals their territorial reach. While the substantive as well as procedural recommendations enshrined therein undoubtedly applied and continue to apply to the activities of corporations in the territories of the adhering countries, it was – at least prior to the 2000 review – far from certain whether this instrument is also addressed to the conduct of these corporate actors when operating in other states or internationalized areas.⁹³ The importance and implications of this question for the effectiveness of the OECD Guidelines can hardly be overstated, bearing in mind that enterprises undertaking business activities in non-adhering countries can and frequently do face not only very different political, economic and social conditions from the ones they are accustomed to when operating in the broader OECD context. Rather, and closely related to these factors, they also often experience a quite dissimilar legal environment, in particular, but not exclusively, when operating in so-called “weak governance zones”.⁹⁴

Against this background and taking into account the specific relevance of providing for an external dimension of the OECD Guidelines, the adhering governments decided already in the course of the previous 2000 review to explicitly extend the territorial scope of application to the activities of the respective corporations in other countries as well as internationalized areas. Paragraph three of the Concepts and Principles stipulates in its relevant parts that “[s]ince the operations of multinational enterprises extend throughout the world, [...] [g]overnments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host state”.⁹⁵ Addressing the obvious implementation challenges potentially connected with this approach, also the Commentary on the Implementation Procedures provides some broad guidance for NCPs when dealing with “specific instances” arising in a non-adhering country.⁹⁶ While the thus in principle all-encompassing territorial scope of the OECD Guidelines as well as the procedural advice relating to their implementation in the context of non-adhering countries remained virtually unchanged in the course of the 2011 update, it is – also in this context – worth highlighting that the

⁹³ See for example OECD, Conference on the Role of International Investment in Development, Corporate Responsibilities and the OECD Guidelines for Multinational Enterprises, Paris, 20-21 September 1999, Analytical Summary of the Discussions, p. 7 *et seq.*, available under: <<http://www.oecd.org/dataoecd/34/26/1920207.pdf>> (last visited on 16 June 2011).

⁹⁴ Generally on the arising challenges and consequences resulting from them see, e.g., *Nowrot*, The Relationship between National Legal Regulations and CSR Instruments, 14 *et seq.*, with further references.

⁹⁵ Emphases in the original.

⁹⁶ See OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 82, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011); see also already the Commentary on the Implementation Procedure of the OECD Guidelines for Multinational Enterprises, para. 20, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAF/IME/WPG(2000)15/FINAL of 31 October 2001, p. 52.

growing attention devoted to the issue of corporate “supply chain responsibility”⁹⁷ as being among the prominent results of the recent review process is highly likely to eventually increase the relevance of this aspect for the implementation of this steering mechanism in practice.

3. *Material Scope of Application: Internal, Direct External and ... Indirect External Dimension?*

The material scope of application is in connection with the OECD Guidelines primarily concerned with the range of different business activities and relations covered by the recommendations listed therein. In this regard, it goes virtually without saying that the material scope of application entails what might be appropriately qualified as an internal dimension in the sense of enclosing the relationships between the respective companies and in particular the workers employed by them. Equally uncontested is furthermore the fact that the OECD Guidelines apply to the own activities of corporations and, in the case of multinational enterprises, to their foreign affiliations in relation to all other actors. This is a facet of the material scope of application that could be characterized as its direct external dimension.

To the contrary, what happens to be quite controversially perceived, as well as discussed, is the existence and possible extent of what might consequently be labeled an indirect external dimension of the material scope of application. It concerns the question whether and, in the affirmative, to what degree and under which conditions the respective corporations are also expected to comply with the OECD Guidelines in their external production, trade and services relationships with other actors that are not based on the undertaking of an investment. On the one side, the significance of this issue for the effectiveness of the OECD Guidelines hardly needs to be emphasized. These business relations, in the broader sense, make up a significant share of a companies’ network of economic interactions, among them especially the frequently global contract-based supply and production chains that often pose particular challenges with regard to the matters covered by the OECD Guidelines. Thus, excluding these business relationships from the material scope of application would indeed considerably constrain the influence potentially exercised by this steering instrument on corporate conduct as a whole.⁹⁸ On the other side, however, a required all-encompassing evaluation of this issue also needs to take into account the substantial dissimilarities existing between the circumstances covered by the two external dimen-

⁹⁷ See thereto *infra* under C.I.3.

⁹⁸ See also, e.g., OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, p. 29, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011) (“Many of the adverse consequences of corporate activities that affect workers and communities occur further down the supply and production chains. Large multinational corporations are influential players in global supply chains, they can have a significant impact on social and environmental conditions throughout these production and supply chains. It thus seems entirely artificial to expect to be able to promote responsible business behaviour in selected parts of a corporation while excluding other parts of the same supply chain from having to meet internationally defined standards.”).

sions as well as the different implementation challenges resulting from them. Whereas the direct external dimension focuses on a corporation's own activities, its indirect counterpart in particular also concerns a situation in which the enterprise in question has not substantially⁹⁹ contributed to – and thus for example neither aided and abetted nor encouraged – another actor's adverse impact on matters covered by the OECD Guidelines, but is merely linked to this entity on the basis of a business relationship. The implications of this indirect external dimension thus potentially also involve the quite far-reaching expectation that the respective enterprises take to a certain extent recourse to what might be qualified as protective actions aimed at promoting and ensuring the realization of community interests in relations exclusively involving other actors; a position that is – admittedly very broadly – comparable to the legal obligations incumbent upon states in light of the protective dimension of human rights.¹⁰⁰

Against this background, it is hardly surprising that the indirect external dimension of the scope of application has been and remains one of the largely unresolved and most controversially discussed issues surrounding the OECD Guidelines. Already the 2000 review saw the introduction of a recommendation in the former paragraph ten of the General Policies, stipulating that enterprises should “[e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines”.¹⁰¹ Subsequently, considerable controversies among the various stakeholders with regard to the appropriate understanding of this provision and its influence on the OECD Guidelines' scope of application¹⁰² resulted in the former Committee on International Investment and Multinational Enterprises (CIME) issuing a statement addressing these questions with the aim of clarifying them. The respective document of April 2003 states in its rele-

⁹⁹ See thereto with regard to the understanding of the term “contributing to” in the sense of the new paragraphs eleven and twelve of the General Policies the respective Commentary in OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 21, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“For the purpose of this recommendation, ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.”).

¹⁰⁰ See on this protective dimension already *supra* under C.I.1. See also for the respective criticism voiced, *inter alia*, by BIAC in this connection: BIAC, Discussion Paper on Supply Chain Management, June 2002, p. 6, available under: <www.oecd.org/dataoecd/50/2/2089098.pdf> (last visited on 16 June 2011) (“Private entities cannot and must not replace governments with open and transparent rule-making processes.”).

¹⁰¹ Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAF/IME/WPG(2000)15/FINAL of 31 October 2001, p. 11; see also the former Commentary thereto at *ibid.*, p. 13.

¹⁰² See thereto, e.g., the 2002 Roundtable on Corporate Responsibility “Supply Chains and the OECD Guidelines for Multinational Enterprises”, with further information on this meeting being available under: <www.oecd.org/document/30/0,3746,en_2649_34889_2088606_1_1_1_1,00.html>; OECD, Background Paper on the Scope of the Guidelines, reprinted in: OECD, 2003 Annual Meeting of the National Contact Points, Report by the Chair, p. 25 *et seq.*, available under: <www.oecd.org/dataoecd/3/47/15941397.pdf>; as well as OECD Watch, The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility, A Discussion Paper, December 2004, p. 2 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_2997/> (all last visited on 16 June 2011).

vant parts that “the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. [...] These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence.”¹⁰³

In light of the various questions that arose in connection with the subsequent search for a proper interpretation of the newly introduced term “investment nexus” and the well-known implementation challenges resulting from it in the practice of NCPs,¹⁰⁴ the adhering governments were well advised to include the issue of how to “clarify or develop a[n] appropriate further guidance on the application of the Guidelines to supply chains” in the 2010 terms of reference.¹⁰⁵ Thereby, it is worth noticing that they drew attention not only to the previously dominating considerations of a corporation’s influence on the conduct of its business partners based on an investment-like relationship, but also to the in particular more recently intensified discussions on a respective due diligence approach as also adopted for example in connection with the 2006 “OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones”.¹⁰⁶

As a result of the 2011 update, the new or at least considerably rephrased paragraphs ten to thirteen were introduced in part A of the overarching section on “General Policies” of the OECD Guidelines. The all-encompassing approach and thus starting point is laid down in paragraph ten, stipulating that corporations should “[c]arry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential

¹⁰³ The Statement issued by CIME is reprinted in: OECD, 2003 Annual Meeting of the National Contact Points, Report by the Chair, p. 12, available under: <www.oecd.org/dataoecd/3/47/15941397.pdf> (last visited on 16 June 2011).

¹⁰⁴ See thereto for example OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, p. 29 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile>; OECD Watch, The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility, A Discussion Paper, December 2004, p. 3 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_2997/> (all last visited on 16 June 2011).

¹⁰⁵ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 3, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

¹⁰⁶ *Ibid.*, p. 3; on the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones see already *supra* under B.II. On the due diligence approach in the broader context of corporate social responsibility see also for example more recently Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, paras. 17 *et seq.*; as well as the contributions by the UN Special Representative to the 2011 update process like, e.g., Updating the Guidelines for Multinational Enterprises, Discussion Paper of 30 June 2010, available under: <www.oecd.org/dataoecd/17/35/45545887.pdf>; and The Corporate Responsibility to Respect Human Rights in Supply Chains, 30 June 2010, available under: <www.oecd.org/dataoecd/17/50/45535896.pdf> (all last visited on 16 June 2011).

adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed”. Thereby, it is also emphasized that the “nature and extent of due diligence depend on the circumstances of a particular situation”. According to the respective Commentary to this provision, the concept of due diligence is, for the purposes of the OECD Guidelines “understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems”.¹⁰⁷ It is surely one of the most remarkable results of the 2011 update that the due diligence approach – apparently also deeply inspired by the respective conceptual work undertaken by the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises¹⁰⁸ – is now explicitly incorporated into the OECD Guidelines as the overarching guiding concept for business conduct.

The following paragraphs eleven and twelve distinguish between what is qualified here as the direct external and indirect external dimension of the material scope of application. Whereas paragraph eleven states in unqualified terms that companies should “[a]void causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities”,¹⁰⁹ paragraph twelve, employing a more cautious language, proscribes that they also should “[s]eek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship”.¹¹⁰ In addition, paragraph thirteen – addressing a realm beyond the scope of the due diligence-expectations – stipulates that corporations should also in general “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*”.¹¹¹ These provisions are further complemented by paragraph two of part B of the General Policies, stating that enterprises are also encouraged to “[e]ngage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management”.¹¹² Finally, it should be noted that in addition to these modifications, the OECD has recently also developed – in close coopera-

¹⁰⁷ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 21, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁰⁸ See, e.g., recently Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, paras. 13 *et seq.*

¹⁰⁹ Emphasis in the original.

¹¹⁰ See thereto also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 21 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹¹¹ Emphasis in the original.

¹¹² See thereto also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 23, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

tion with, *inter alia*, the eleven member states of the International Conference on the Great Lakes Region¹¹³ – the 2011 “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”, with a related Recommendation having been adopted at the OECD Ministerial Council Meeting on 25 May 2011.¹¹⁴

Despite these at first sight quite substantial amendments and additions, already the final report of the Chair of the Working Party of the Investment Committee on the updating process reveals the continued uncertainties and divergent perceptions surrounding the questions relating to an indirect external dimension of the OECD Guidelines’ material scope of application. It highlights quite openly that the “discussion of all the complex issues surrounding the supply chains and due diligence recommendations had not sufficiently matured. In order to reach a compromise, we ‘carved out’ certain subject areas from the scope of these recommendations. Recognising that thinking in this area is very much in a state of flux, the Working Party has agreed to do further analytical work [...]”¹¹⁵ Consequently, it is even in light of the notable modifications as well as the comparatively long Commentary thereto¹¹⁶ far from predictable, with a decent degree of certainty, how the NCPs are going to understand these new provisions in practice. This applies not only to the substantive and procedural recommendations enshrined therein, but in particular also to the preceding issue of their implications for the material scope of application itself.

Nevertheless, it is at least to be expected – and based on the amendments also clearly indicated – that NCPs are no longer authorized to limit the applicability of the OECD Guidelines to situations characterized by the presence of an “investment nexus” or an “investment like relationship” respectively. Two aspects appear to be particularly noteworthy in this regard. First, the extensive modifications of the text of the OECD Guidelines introduced as a result of the 2011 update visibly demonstrate the considerably amplified relevance attached by the adhering governments to the increasingly important question of responsible corporate conduct in business relations as a whole, including supply and production chains. Second, and at least equally remarkable, attention needs to be drawn to the fact that the previous key phrases “investment nexus” or “investment like relationship” are neither to be found in the text of the updated OECD Guidelines nor in the accompanying Commentaries. Considering the significant influence exercised by these terms on the understanding as well as application of this instrument in practice since 2003, one could have reasonably expected

¹¹³ For further information on this international organization see <www.icglr.org/index.php> (last visited on 16 June 2011).

¹¹⁴ OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, available under: <www.oecd.org/dataoecd/62/30/46740847.pdf> (visited on 16 June 2011); see also OECD, Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 25 May 2011, reprinted in: *ibid.*, p. 7 *et seq.*

¹¹⁵ OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 6 *et seq.*

¹¹⁶ See OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 21-23, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011)

their incorporation in the course of the 2011 update as a precondition for their continued relevance, especially in light of the related substantial amendments already mentioned. It is also precisely these significant modifications aimed at specifying and at the same time extending the respective responsibilities of enterprises in this regard, which largely preclude the – otherwise at least possible – reverse perception that the requirements of an “investment nexus” or “investment like relationship” continue to be applicable in the future simply because they have not been explicitly rejected or abrogated. The fact that these requirements are not even mentioned in the OECD Guidelines and their Commentaries can thus indeed serve as a strong indication for their demise as being one of the significant results of the 2011 update.

4. *Temporal Scope of Application*

A final aspect in connection with the applicability of the OECD Guidelines deals with their temporal dimension. In this regard, it needs to be reiterated that although the substantive and procedural modifications introduced by the 2011 update became in principle effective on 25 May 2011, there is apparently a – quite reasonable – “informal understanding” at the OECD that “when a legal instrument is adopted or revised, a reasonable length of time – approximately six months – is needed in order to implement its provisions”.¹¹⁷ Consequently, the addresses of this instrument are expected to fully comply with all of the amendments only from approximately December 2011 onwards. Furthermore, the changes to the Guidelines – most certainly – do not have retroactive effect.¹¹⁸

In light of these findings, it is therefore, *inter alia*, on the one side not admissible to bring a “specific instance” to the attention of NPCs that is exclusively based on an alleged non-compliance with one or more of the new recommendations of business conduct that took place prior to December 2011. That said, it might on the other side very well be possible and successful to initiate a respective procedure targeting the activities of an addressee that started already prior to that date but were continued unremedied in December 2011 and afterwards. Despite the obvious normative differences between the OECD Guidelines and the European Convention for the Protection of Human Rights and Fundamental Freedoms, the – admittedly not always consistent – case-law of the European Court of Human Rights on its jurisdiction *ratione temporis*¹¹⁹ might nevertheless serve as a useful guidance in the search for an adequate answer to this in some individual cases potentially rather complex question.

¹¹⁷ See in the present context OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 6. See also already *supra* under B.III.

¹¹⁸ See *ibid.*, p. 6.

¹¹⁹ See for example European Court of Human Rights, *Blečić v. Croatia*, Application-No. 59532/00, Judgment of 8 March 2006, paras. 70 *et seq.*; *Vajić*, in: Breitenmoser *et al.* (eds.), *Liber amicorum Luzius Wildhaber*, 483 *et seq.*; *Grabenwarter*, *Europäische Menschenrechtskonvention*, 108 *et seq.*, each with further references.

II. Preface

From a functional perspective, the preface to the OECD Guidelines should not merely be regarded as a more or less informative introductory section. Rather, by outlining the main overarching considerations on which the adoption and continued application of this instrument are based as well as the political and economic environment it is envisioned to function in, it might very well be argued that the preface – in the same way as the preambles of international conventions and declarations – plays a notable role and consequently can be taken recourse to in the interpretation of the subsequent recommendations enshrined in the OECD Guidelines.¹²⁰ Already in light of this finding, it appears justified to take a closer look at the notable amendments introduced in this part of the OECD Guidelines before turning to their substantive recommendations themselves.

Following the deletion of its former paragraph nine addressing the contributions by the OECD to the development of the international policy framework in which business activities are conducted,¹²¹ the preface of the OECD Guidelines now comprises a total number of nine paragraphs. Thereby, already paragraph one has been subjected to a number of notable modifications. Although it still starts off by describing the overall character of the OECD Guidelines as “recommendations addressed by governments to multinational enterprises”, the following sentence of the 2000 version, highlighting that this instrument provides “voluntary principles and standards for responsible business conduct” has been moved closer towards the end of this paragraph. Despite the fact that surely caution is warranted in order not to overstate the importance of this amendment, it might nevertheless serve at least as an indication that the voluntary character of the OECD Guidelines, also most certainly in the eyes of some stakeholders a very important feature, will receive less emphasis in the future.

Aside from the introduction of a new sentence stressing the binding character of this instrument for adhering governments,¹²² another addition worth drawing attention to is the fact that this first paragraph now concludes by stating that “matters covered by the *Guidelines* may also be the subject of national law and international commitments”.¹²³ This statement – also reiterated in paragraph one of the Concepts and Principles – potentially entails a number of implications. At first sight it may give rise to the question why a rule of behavior should be included in this instrument belong-

¹²⁰ See, e.g., on the functions of preambles in the realm of treaty interpretation ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; *Gardiner*, Treaty Interpretation, 186 *et seq.*, with further references. See generally on this issue also for example *Winckel*, Melbourne University Law Review 23 (1999), 184 *et seq.*

¹²¹ The content of this paragraph has been rephrased and added as a final sentence to paragraph eight of the preface stating that “[t]he OECD has contributed in important ways to this process through the development of standards covering such areas as the environment, the fight against corruption, consumer interests, corporate governance and taxation”.

¹²² See thereto already *supra* under C.I.1.

¹²³ Emphasis in the original.

ing to the realm of so-called “soft law”¹²⁴ if it is also stipulated in a “hard law” provision of domestic or international law. However, it needs to be recalled again in this connection that corporations to whom the OECD Guidelines apply also frequently operate in states whose domestic legal frameworks and/or international commitments are at least not uniformly enforced.¹²⁵ In this context, it is precisely non-binding steering instruments like the OECD Guidelines that sometimes provide the only implementable rules of behavior for business enterprises.¹²⁶ In addition, this statement can very well also be understood as a reminder that, first and referring to the legal status quo, not all of the recommendations enshrined in the OECD Guidelines are exclusively voluntary in character, as well as that, second and *de lege ferenda*, the fact that a specific rule of conduct is mentioned in the OECD Guidelines does in no way prevent its future incorporation in – mandatory and legally enforceable – provisions of domestic and international law.

Another notable amendment can be found in paragraph two of the preface, now drawing attention also to “the expansion of the Internet economy” and the resulting “increasingly important role” played by service and technology corporations “in the international marketplace”. Indeed, the improvements in technology and the educational level of populations help the expansion of electronic transactions and business through the Internet. These changes have a macroeconomic effect in the economy that should not be forgotten. In this manner, when a large part of the business transactions are made via Internet, there is a higher consumption and profit as well as a higher labour supply.¹²⁷ Such a situation has, as it is well-known, not only considerable economic consequences and hence its recognition in the OECD Guidelines is fundamental for, *inter alia*, clarifying the scope of application of this mechanism.¹²⁸

Finally, the emergence of multinational enterprises based in developing countries as major international investors – being one of the significant economic developments in recent years – is now explicitly recognised in the final sentence of paragraph three. Far beyond a mere recognition of this substantial change in the composition of actors in the international economic system, this amendment also clearly implies and hints at a more or less novel challenge to the effective implementation of the OECD Guidelines by requiring the OECD and the adhering countries – more than ever – to intensify their efforts to promote compliance with this instrument on a universal scale.¹²⁹

¹²⁴ Generally on the importance and functions of soft law in the international economic system *Nowrot*, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, § 2, paras. 77 *et seq.*, with numerous further references.

¹²⁵ See thereto already *supra* under C.I.2.

¹²⁶ See also *Nowrot*, *The Relationship between National Legal Regulations and CSR Instruments*, 16 *et seq.*, with further references.

¹²⁷ *Dasgupta*, *Managing Internet and Intranet Technologies in Organizations*, 2001.

¹²⁸ Generally on the OECD Guidelines’ scope of application see already *supra* under C.I.

¹²⁹ See thereto also *infra* under D.

III. Substantive Provisions

Following the 2011 update, the main part of the OECD Guidelines, providing for the substantive and procedural recommendations addressed to corporations, comprises of eleven chapters. In addition to two overarching sections on “Concepts and Principles” as well as “General Policies”, the subsequent nine chapters each deal with a specific issue and its implications for business conduct, namely disclosure (III.), human rights (IV.), employment and industrial relations (V.), environment (VI.), combating bribery, bribe solicitation and extortion (VII.), consumer interests (VIII.), science and technology (IX.), competition (X.) as well as taxation (XI.).

1. *Concepts and Principles*

The provisions in the overarching section on Concepts and Principles of the OECD Guidelines have been subjected to two prominent modifications as a result of the 2011 update. While the implications of the explicit recognition, in paragraph four, that multinational enterprises “operate in all sectors of the economy” are already discussed in connection with the personal scope of application of this instrument,¹³⁰ a second major amendment is the introduction of a new paragraph two in this section, addressing the in practice occasionally delicate relationship between the domestic law of the countries in which business enterprises operate on the one side and the content of the recommendations as enshrined in the OECD Guidelines on the other side.¹³¹

The provision starts off by reaffirming that “[o]beying domestic laws is the first obligation of enterprises” with the OECD Guidelines not to be considered as a substitution for national laws. Consequently, the recommendations are also “not intended to place an enterprise in situations where it faces conflicting requirements”. That said, paragraph two nevertheless also explicitly stresses that “in countries where domestic laws and regulations conflict with the principles and standards of the *Guidelines*, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law”.¹³² This phrase appears to be one of the key elements in order to understand the “spirit” of the OECD Guidelines, namely the idea and expectation that companies are not suppose to give up too easily in their attempts to comply with the respective recommendations, even when facing external political and legal challenges. Such challenges are in particular likely to arise for business enterprises operating in countries currently still governed by authoritarian regimes. Thereby, it is important to note that the OECD Guidelines do – in connection with the circumstances just mentioned – not only provide for recommendations

¹³⁰ See *supra* under C.I.1. See also with regard to the modifications introduced in paragraph eleven of the Concepts and Principles already *supra* under C.I.3.

¹³¹ This new provision is partly identical to a previous Commentary on the General Policies in the 2000 version of the OECD Guidelines, see Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL of 31 October 2001, p. 12.

¹³² Emphasis in the original.

to corporations. Rather, the rephrased third sentence of paragraph eight of the Concepts and Principles also stipulates that “[w]hen multinational enterprises are subject to conflicting requirements by adhering countries or third countries, the governments concerned are encouraged to co-operate in good faith with a view to resolving problems that may arise”. Overall, these amendments again evidently indicate the intention of the adhering countries to realize the values enshrined in the OECD Guidelines’ recommendations on the conduct of business enterprises to the greatest extent possible, thus further confirming their normative structure as principles in the sense of optimization requirements.¹³³

2. *General Policies*

The section on “General Policies”, the first one to provide for specific recommendations to corporations,¹³⁴ is, concerning the rules of behavior stipulated therein, now subdivided into two different parts. While part A deals with the recommendations that business enterprises “should” observe, part B proscribes the rules of behavior that these actors are “encouraged” to comply with. This categorization, which is and has already previously been for example also displayed in the subsequent specific section on disclosure, results in the introduction of two different kinds of recommendations, the implications of which in particular for the implementation regime being in the current transitional period difficult to predict.

With the due diligence approach as the new overarching guiding principle stipulated in paragraph ten of part A as well as its implications for the issue of supply chain responsibility mentioned in the following paragraphs twelve and thirteen already been addressed above in connection with the OECD Guidelines’ material scope of application,¹³⁵ another notable amendment concerns paragraph two of part A. The former statement that companies should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitment” has been substituted by the requirement to “respect the internationally recognised human rights”, thus indicating that the respective standards to be observed in this connection are independent of the individual host country’s willingness to enter into treaty obligations. Thereby, it has to be recalled that the practical consequences of this modification are – from a broader legal perspective – rather limited, taking into account that the phrase “internationally recognised human rights” refers primarily to those entitlements that have acquired the status of customary international law and are thus in general binding on all states.¹³⁶ Nevertheless, the symbolic significance of

¹³³ See thereto already *supra* under C.I.1.

¹³⁴ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 19, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹³⁵ See *supra* under C.I.3.

¹³⁶ With regard to the human rights referred to in this connection see also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 30, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“In all cases and irrespective of the country or specific context of enterprises’ operations, reference should be made

this amendment and the underlying intention of the adhering countries mirrored in it are not to be underestimated, not the least when interpreting the recommendations concerned.

Furthermore, it is interesting that the concept of “employee” has been substituted by the term “worker” in paragraphs eight and nine of part A.¹³⁷ According to the Oxford Dictionary the word “worker” has a broader meaning because it is defined as “a person who works”, while the word “employee” is defined as “a person employed for wages or salary, especially at non-executive level”.¹³⁸ Hence, it can be understood that in the new version those who are working for an enterprise are protected in a comprehensive way, no matter in which position or level of the corporation they are.

The issue of engagement with stakeholders is addressed in the new paragraph fourteen of part A. This is an interesting change. Although communication among enterprises and stakeholders depends on the good faith of both parties, the involvement of social agents in the decision-making is very helpful for the satisfactory and responsible economic development of the areas where the enterprises are located. It could be even decisive for the welfare of local communities due to the direct influence upon their own interests.

The “encouragements” as stipulated in the new part B of the General Policies comprise two different recommendations. Paragraph one encourages corporations to “[s]upport, as appropriate to their circumstances, cooperative efforts in the appropriate fora to promote Internet Freedom through respect of freedom of expression, assembly and association online”. This provision thus acknowledges that the concept of “Internet Freedom” is currently an essential component of the communication freedoms.¹³⁹ It hardly needs to be emphasized that it is the largest, fastest and most efficient means of communication worldwide. It is a powerful instrument to improve freedom, human rights and social justice.¹⁴⁰ Accordingly, the inclusion of the Internet freedom as a general principle within the Guidelines is a basic recognition of the current society’s needs in the era of communications. A quite different issue is addressed by the new paragraph two of part B, stating that enterprises are also encouraged to “[e]ngage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management”.¹⁴¹

at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.”).

¹³⁷ The same applies to the subsequent specific sections of the OECD Guidelines.

¹³⁸ See Oxford Dictionaries Online, definition of worker, available under: <<http://oxforddictionaries.com/definition/worker>>; and definition of “employee”, available under: <<http://oxforddictionaries.com/definition/employee>> (both last visited on 16 June 2011).

¹³⁹ For a more comprehensive evaluation of this issue and the legal implications surrounding it see for example *Tietje*, *Global Information Law*, 13 *et seq.*; *Tietje*, in: Hans-Bredow-Institut (ed.), *Internationales Handbuch Medien*, 15 (37 *et seq.*), with further references.

¹⁴⁰ See, e.g., the information on the Global Internet Freedom Consortium, available under: <<http://www.internetfreedom.org/Background>> (visited on 16 June 2011).

¹⁴¹ See thereto already *supra* under C.I.3.

3. *The New Chapter on Human Rights*

Although a broadly phrased recommendation that business enterprises should respect the human rights of those affected by their activities was already previously provided in paragraph two of the General Policies of the 2000 OECD Guidelines, the introduction of a whole new chapter on human rights is undoubtedly among the most significant outcomes of the 2011 update. With regard to the overall approach to this issue, it is important to note that the content of what is now Chapter IV explicitly “draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation”,¹⁴² as recently endorsed by the Human Rights Council on 16 June 2011. In light of this finding, the updated OECD Guidelines happen to be the first major steering regime in the realm of corporate social responsibility that more or less comprehensively incorporates and implements the 2011 Guiding Principles on Business and Human Rights.

In line with the United Nations Framework, the individual provisions of this chapter are phrased in rather general terms. In particular, they wisely abstain from stipulating specific human rights to be respected by corporations, thereby taking into account the large circle of potentially relevant entitlements¹⁴³ as well as – at least equally important – the dynamic, progressive developments in this area of international law. The chapter starts off by emphasizing – again taking recourse to the conceptual approach developed by the UN Special Representative – that while states “have the

¹⁴² See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 29, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011); see also already OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 3, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011). On the “Protect, Respect and Remedy” framework itself see Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/5 of 7 April 2008. For the respective Guiding Principles see Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex.

¹⁴³ See also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 30, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“Enterprises can have an impact on virtually the entire spectrum of international recognised human rights.”). On the core body of human rights to be taken into account see already the reference *supra* in note 136. In addition the Commentary foresees that “[d]epending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments”, see *ibid.*, p. 30.

duty to protect human rights”, corporations are expected to respect these individual entitlements, “which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. This is an expectation that is completely independent of the respective – appropriate or poor – performance displayed by the host or home states in question.¹⁴⁴

While paragraph four envisions that business enterprises express their commitment to respect human rights through a respective policy statement,¹⁴⁵ the paragraphs two, three and five of the chapter basically reflect the new broad due diligence approach as already stipulated in the new paragraphs ten to thirteen of the General Policies.¹⁴⁶ Finally, the recommendation enshrined in paragraph six mirrors the “remedy” element of the United Nations Framework by stipulating that corporations should “[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts” to which they have contributed. This also explicitly draws upon the recent Guiding Principles of the UN Special Representative.¹⁴⁷

Although it remains to be seen how the provisions of this new chapter will be interpreted and applied in the practice of the OECD Guidelines’ implementation procedures,¹⁴⁸ already this substantive addition itself is surely a major improvement of this instrument and, last but not least, highly likely to become an important and interesting practical “testing ground” for the equally novel United Nations Framework and Guiding Principles on Business and Human Rights.

4. Other Notable Amendments to Issue-Specific Chapters

In addition to the introduction of a completely new chapter on the issue of human rights, also most of the other issue-specific sections of the OECD Guidelines have been subject to in part substantial textual modifications. This finding applies for example to Chapter III dealing with the standards for disclosure of information by corporations. Its provisions have been – at least at the surface – considerably revised, taking into account some more recent developments in this field within and outside of

¹⁴⁴ See *ibid.*, p. 30 (“A State’s failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.”).

¹⁴⁵ See thereto also Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 16.

¹⁴⁶ See thereto already *supra* under C.I.3; as well as specifically on the implications in the human rights context also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 31 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁴⁷ Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 22.

¹⁴⁸ On the implementation procedures see *infra* under C.IV.

the OECD realm. The chapter is – in line with its previous version and the approach adopted in the section on General Policies – mainly divided into two sets of disclosure recommendations that business enterprises “should” or “are encouraged” to comply with.¹⁴⁹ Thereby, the first category of recommendations, enshrined in paragraph two, “calls for timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company”.¹⁵⁰ It is virtually identical to the disclosure items listed in the 2004 version of the OECD Principles of Corporate Governance.¹⁵¹ The same applies to the recommendations stipulated in what is now paragraph four of this chapter, calling for an “annual audit” to be “conducted by an independent, competent and qualified auditor”. The second set of recommendations that corporations are at least encouraged to follow concerns the increasingly important and currently controversial issue of non-financial reporting standards.¹⁵² Although the respective paragraph three has also been partly rephrased and enlarged, a sober evaluation of the modifications – in particular, but not exclusively with regard to the realm of non-financial reporting – leads almost inevitably to the conclusion that the amendments to the disclosure chapter are at least not comprehensively reflecting the more recently clearly visible trends and developments in these fields of corporate legal as well as corporate social responsibilities.¹⁵³

¹⁴⁹ On this approach see also already *supra* under C.III.2.

¹⁵⁰ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 27, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁵¹ See OECD Principles of Corporate Governance, 2004, p. 22 *et seq.*, 49 *et seq.*, available under: <www.oecd.org/dataoecd/32/18/31557724.pdf> (last visited on 16 June 2011).

¹⁵² Generally on this issue, e.g., European Union, Communication from the Commission, Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence, COM(2011) 206 final of 13 April 2011, p. 14 *et seq.*; University of Edinburgh, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, October 2010, paras. 199 *et seq.*, available under: <http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf>; European Coalition of Corporate Justice, Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses, May 2008, p. 27 *et seq.*, available under: <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/files/position_papers/fair_law_legal_proposals_to_improve_corporate_accountability_en.pdf> (both last visited on 16 June 2011); as well as on the respective activities of the Global Reporting Initiative *Nowrot*, in: Tietje/Brouder (eds.), Handbook of Transnational Economic Governance Regimes, 117 *et seq.*, with numerous further references.

¹⁵³ See also for example the respective criticism brought forward by OECD Watch, OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011) (“Given the legislation on this issue in the United States and an on-going process in Europe concerning country-by-country reporting for EU-based companies, it appears that the OECD Guidelines will fall short of corporate transparency and disclosure developments, before they leave the printing press. Similarly, the update fails to include social and environmental disclosure requirements in line with international best practice.”). However, in this connection attention should also be drawn to the fact that a number of additional and more specific recommendations relating to reporting and disclosure of information can be found in other chapters of the OECD Guidelines, among them chapter VI on “Environment” and chapter VIII on “Consumer Interests”.

Chapter V on “Employment and Industrial Relations” also bears witness to a considerable number of amendments, most of them aimed at bringing its recommendations in conformity with recent developments in the work of the International Labour Organisation (ILO)¹⁵⁴ as – most certainly also from the perspective of the OECD Guidelines – “the competent body to set and deal with international labour standards, and to promote fundamental rights at work”.¹⁵⁵ Two substantive modifications as a result of the 2011 update appear to be particularly worth highlighting in this regard. First, the chapeau of this chapter – being of significant importance for the understanding and interpretation of the subsequent specific provisions – explicitly refers now not only to the “framework of applicable law, regulations and prevailing labour relations and employment practices”, but also to “applicable international labour standards”. This addition rightly reflects on the one side the overall increasing emphasis of the OECD Guidelines on the effective realization of internationally recognized principles and standards, independent of the respective home and host states legal regimes and implementation performances. On the other side it also takes into account the progressive and evolutionary character of the international regime on labour and social standards, thus introducing another dynamic reference element into this instrument in order to provide for a more flexible and timely adaption to changing normative circumstances and expectations. Second, a new paragraph four lit. b stipulates that “[w]hen multinational enterprises operate in developing countries, where comparable employers [to the ones in their home countries] may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies”, another clear indication for the normative structure of the recommendations as principles in the sense of optimization requirements.¹⁵⁶ Although the provision continues by also stressing – again in line with the general nature of principles – the relativeness of this recommendation in relation to “the economic position of the enterprise”, it explicitly proscribes that the respective wages, benefits and working conditions “should be at least adequate to satisfy the basic needs of the workers and their families”, thereby effectively establishing a notable kind of “minimum standard” that corporations are expected to adhere to wherever they operate, the importance of which hardly needs to be elaborated on.

Concerning potential amendments to the following chapter VI on “Environment”, already the 2010 terms of reference envisioned that “[w]ith growing concerns over climate change and increased attention given to green growth, ecoinnovation, bio-diversity and sustainability issues, the update should consider whether there is a need to clarify or provide additional guidance on the application of the Guidelines to

¹⁵⁴ See on this aim also already OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 4, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

¹⁵⁵ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 35, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁵⁶ See thereto already *supra* under C.I.1.

these issues”.¹⁵⁷ And indeed, the introduction of provisions asking corporations to actively reduce, take into account and report on, *inter alia*, greenhouse gas emissions, biodiversity, as well as efficient resource utilization and recycling is apparently the most important modification agreed upon the course of the recent review process. Respective examples are the additions to the recommendations enshrined in paragraph six lit. b, c and d. Furthermore, it is noteworthy that the Commentary to this chapter now lists “voluntary labelling or certification schemes” as being among the options available to corporations when providing information on their products, and – in the realm of reporting recommendations – explicitly refers to the reporting standards developed by the Global Reporting Initiative (GRI) as “useful references”.¹⁵⁸ A final notable amendment can be found in the chapeau of paragraph six, stipulating that enterprises should continually “seek to improve corporate environmental performance” not only “at the level of the enterprise” itself, but “where appropriate [also in] its supply chain”, thus further confirming the OECD Guidelines’ enlarged material scope of application as already discussed above.¹⁵⁹

The substantial revisions in the subsequent chapter VI, formerly named “Combating Bribery” and now – mirroring its broader scope already in its title – labelled “Combating Bribery, Bribe Solicitation and Extortion”, are primarily the result of and take into account the numerous initiatives and guiding instruments initiated and developed in the OECD context in the course of the previous decade. Whereas the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force already on 15 February 1999¹⁶⁰ and thus found its manifestation already in the 2000 version of the OECD Guidelines,¹⁶¹ more recent instruments include the 2009 OECD Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the 2009 OECD Recommendations of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions and the 2006 Recommendation on Bribery and Officially Supported Export Credits.¹⁶² Aside from the increased emphasis on corporations being expected

¹⁵⁷ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

¹⁵⁸ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 43, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011). Generally on the work of the GRI see also, e.g., *Nowrot*, in: Tietje/Brouder (eds.), Handbook of Transnational Economic Governance Regimes, 117 *et seq.*, with further references.

¹⁵⁹ See thereto *supra* under C.I.3.

¹⁶⁰ See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, available under: <www.oecd.org/dataoecd/4/18/38028044.pdf> (last visited on 16 June 2011); see thereto also, e.g., *Tarullo*, Virginia Journal of International Law 44 (2004), 665 *et seq.*

¹⁶¹ See the respective Commentary, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL of 31 October 2001, p. 32 *et seq.*

¹⁶² On these and other important guiding instruments in this regard see the information on “Key OECD Anti-Corruption Documents” under: <www.oecd.org/document/42/0,3746,en_2649_

to also “resist the solicitation of bribes and extortion”, as now for example more prominently and unequivocally stipulated in the chapeau of this chapter, other notable amendments include the introduction of the new paragraphs two and three. While paragraph two concerns the, from the perspective of corporations, internal institutional and proactive dimensions surrounding this issue,¹⁶³ paragraph three – in line with the ideas envisioned in the 2010 terms of reference¹⁶⁴ – deals with the in practice quite “thorny” and ambivalent topic of so-called “small facilitation payments” by recommending that business enterprises should “[p]rohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records”. Overall, the modifications introduced have, if appropriately and comprehensively implemented by corporations, surely a notable potential to positively contribute to the on-going global task of eliminating all forms of bribery and corruption.

With regard to chapter VIII on “Consumer Interests”, it is from a broader perspective in particular three developments that appear to be worth drawing attention to. First, many of the provisions in this chapter reflect now more clearly and specifically than before the ever-growing importance of enabling consumers to have access to information on the product and services offered by enterprises, including the economic, environmental and social circumstances of the respective chains of production. In this connection, the considerably rephrased paragraph two stipulates that corporations should “[p]rovide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions, including information on the prices and, where appropriate, content, safe use, environmental attributes, maintenance, storage and disposal of goods and services. Where feasible this information should be provided in a manner that facilitates consumers’ ability to compare products”. Furthermore, the new paragraph five enshrines the expectation that they should “[s]upport efforts to promote consumer education in areas that relate to their business activities, with the

37447_41799402_1_1_1_37447,00.html> (last visited on 16 June 2011). On the importance of these instruments for the understanding of the respective recommendations enshrined in the OECD Guidelines see also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 47 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁶³ Paragraph two comprises the following recommendations that enterprises should comply with: “Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise’s internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.”

¹⁶⁴ See OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 4, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

aim of, inter alia, improving the ability of consumers to: i) make informed decisions involving complex goods, services and markets, ii) better understand the economic, environmental and social impact of their decisions and iii) support sustainable consumption”.¹⁶⁵ Second, the revised paragraph three of this chapter further strengthens the belief that corporations need to provide consumers with “access to fair, easy to use, timely and effective non-judicial dispute resolution and redress mechanisms, without unnecessary cost or burden”, thereby mirroring language that can be found already in the 2007 OECD Recommendation on Consumer Dispute Resolution and Redress.¹⁶⁶ Third, it is noteworthy that the updated version of this chapter – in particular in its paragraphs six and eight – is now for valid reasons also more explicitly than ever¹⁶⁷ concerned with respect for consumer privacy and the security of personal data, especially in light of the “increasing collection and use of personal data by enterprises, fuelled in part by the Internet and technological advances, [that] has highlighted the importance of protecting personal data against consumer privacy violations, including security breaches”.¹⁶⁸

Finally, in connection with notable amendments introduced as a result of the 2011 update, one further issue-specific chapter, namely the one dealing with taxation, also deserve to be at least briefly mentioned. The revised paragraph one of this chapter XI more explicitly and specifically stresses as well as elaborates on the expectation that enterprises comply not only with the letter but also the spirit of tax laws and regulations. As further explained in the Commentary attached to this chapter, this recommendation also entails that business “[t]ransactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction”.¹⁶⁹ In addition, an entirely new paragraph two – reflecting an institutional and proactive approach also adopted by the OECD Guidelines for example in connection with combating bribery – stipulates that corporations “should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated”.¹⁷⁰

¹⁶⁵ On the underlying motives for and understanding of these provisions see also the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 50 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁶⁶ See *ibid.*, p. 51. On the document itself see OECD Recommendation on Consumer Dispute Resolution and Redress of 12 July 2007, available under: <www.oecd.org/dataoecd/43/50/38960101.pdf> (last visited on 16 June 2011).

¹⁶⁷ See in general also already paragraph five of the previous chapter VII on consumer interests, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAF/IME/WPG (2000)15/FINAL of 31 October 2001, p. 34.

¹⁶⁸ See the respective Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 52, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁶⁹ *Ibid.*, p. 58.

¹⁷⁰ See thereto as well as for further details also *ibid.*, p. 59 *et seq.*

IV. Implementation Procedures and Institutional Framework

A final aspect deserving closer attention in connection with the 2011 update concerns the amendments introduced with regard to the respective implementation procedures which find their legal basis in the Decision of the Council on the OECD Guidelines for Multinational Enterprises of 25 May 2011 and the so-called “Procedural Guidance” attached thereto.¹⁷¹ Although the OECD Guidelines have always been and most certainly continue to be recommendations addressed by the adhering governments to corporations and thus constitute in accordance with their Preface “voluntary principles and standards for responsible business conduct”, they nevertheless have – already prior to the recent review – also provided for a number of in part comparatively sophisticated implementation elements.¹⁷² The existence of these institutional and procedural features aimed at an optimal realization of the underlying values as explicitly or implicitly enshrined in the OECD Guidelines’ recommendations thereby not only reflects the increasing emphasis on and attention devoted to the development of “soft” regulatory implementation techniques including grievance mechanisms in the realm of non-mandatory steering regimes in order to foster the necessary effectiveness and credibility of these approaches;¹⁷³ a trend which already some times ago gave rise to the observation that, on the domestic level as well as in particular with regard to the international system as a whole, the distinction between so-called “hard law” and non-binding regulatory instruments is from a functional perspective becoming increasingly blurred.¹⁷⁴ From a broader perspective and in line with the last mentioned finding, it also confirms the perception that both legal regulations and mechanisms belonging to the non-legal field of corporate social responsibility¹⁷⁵

¹⁷¹ OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 65 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁷² For an evaluation of the implementation procedures of the OECD Guidelines prior to the 2011 update see, e.g., *Tully*, *International and Comparative Law Quarterly* 50 (2001), 394 (400 *et seq.*); *Utz*, *Die OECD-Leitsätze für multinationale Unternehmen*, 41 *et seq.*; *Vendzules*, *Colorado Journal of International Environmental Law and Policy* 21 (2010), 451 (461 *et seq.*); *Nowrot*, *Normative Ordnungsstruktur*, 287 *et seq.*

¹⁷³ Generally on the effectiveness and credibility as two of the key criteria in particular also for the evaluation of corporate social responsibility instruments see, e.g., Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/4/35 of 19 February 2007, paras. 56 *et seq.*; specifically on the important role played by grievance mechanisms and respective effectiveness criteria in this regard see more recently Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, paras. 27 *et seq.*

¹⁷⁴ See for example *Shelton*, in: *Shelton* (ed.), *Commitment and Compliance*, 1 (10); *Tietje*, *Internationalisiertes Verwaltungshandeln*, 255 *et seq.*; *Koh*, *Yale Law Journal* 106 (1997), 2599 (2630 *et seq.*); as well as for a more comprehensive analysis of this phenomenon *Abbott/Snidal*, *International Organization* 54 (2000), 421 *et seq.*

¹⁷⁵ On the legally non-binding character of the respective rules of behavior as a constitutive element of the concept of corporate social responsibility see *Nowrot*, in: *Raupp/Jarolimek/Schultz* (eds.), *Handbuch CSR*, 419 *et seq.*, with further references.

like the OECD Guidelines have despite their obvious differences in common that they congruently stipulate rules of behavior; both are steering instruments intended to influence the conduct of the actors to which they are addressed and in this regard, both types of rules are adopted based on the claim to be in general effective concerning the achievement of their respective goals.¹⁷⁶

That said, it is nevertheless quite obvious that the concrete shape and specific elements of the implementation procedures always remain one of the most controversial aspects surrounding the design of non-binding instruments in particular also in the realm of corporate social responsibility. This issue has, like no other, important implications for the overarching core question of how “voluntary” the respective recommendations should be and really are in practice, the possible and plausible answers to which being inevitably also influenced by one’s respective preunderstanding (*Vorverständnis*)¹⁷⁷ and thus not completely devoid of subjective points of view. Any discussions and negotiations on this subject are therefore most likely to reveal quite divergent perceptions and expectations of the different stakeholders involved and any – necessarily compromisal – arrangement reached in this regard almost certainly results in partial disappointments and disapproval on one side or/and the other. It is thus hardly surprising that also in the wake of the 2011 update of the OECD Guidelines, it happened to be the sufficiency or insufficiency respectively of the amendments to the implementation procedures that drew, specifically among NGOs, the lion’s share of criticism voiced against the review process as a whole.¹⁷⁸

In light of these findings and bearing in mind that the present contribution is first and foremost aimed at providing a scientific assessment of the results of the 2011 update as they are, it appears also in the present context ever more appropriate to approach the quite sensitive issue of implementation procedures by not primarily elaborating on the question of what could potentially have been achieved in this regard. Rather, taking into account that the outcome of the recent review process is likely to be definitive and thus determinative for at least the present decade, the following analysis will largely confine itself to concentrate on the modifications that have actually been agreed upon by the adhering countries, with a view to evaluate their implications for the respective institutional framework and its functioning in the years to come. Thereby, taking the institutional perspective as a suitable overarching starting and focal point, the main entities entrusted with the implementation of the OECD Guidelines are the National Contact Points, the OECD Investment Committee and – on the basis of the 2011 update – the OECD Secretariat.

¹⁷⁶ Generally on the numerous conceptual similarities between legal regulations and non-binding steering instruments see *Nowrot*, *The Relationship between National Legal Regulations and CSR Instruments*, 6 *et seq.*, with further references.

¹⁷⁷ See thereto in the legal context already the quite comprehensive assessment by *Esser*, *Vorverständnis und Methodenwahl*, 21 *et seq.* and *passim*.

¹⁷⁸ See OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile>; see also, e.g., Amnesty International, *Public Statement: The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has Come to an End*, AI Index: IOR 30/001/2011 of 23 May 2011, available under: <www.amnesty.org/en/library/asset/IO30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (both last visited on 16 June 2011).

1. National Contact Points

The decentralized and in practice most important institutional level in the implementation framework is constituted by the National Contact Points (NCPs), established in all adhering countries in accordance with paragraph eleven of the Concepts and Principles and paragraph I.1 of the respective OECD Council Decision. From a broader perspective, as a result of the 2011 update, the principle purpose of these bodies is now explicitly described as “to further the effectiveness of the *Guidelines*”.¹⁷⁹ This addition not only clearly indicates the intention of the adhering countries – as already stipulated in the 2010 terms of reference¹⁸⁰ – to “enhance awareness, visibility and a more widespread and effective use” of this steering instrument and its implementation procedures. It also might consequently, among the relevant stakeholders, being legitimately taken recourse to as an overarching interpretative guideline when concretizing the – subsequently outlined – requirements and expectations concerning the range of appropriate organizational structures of NCPs as well as with regard to the fulfillment of their responsibilities.

a) Composition and Institutional Arrangements

A main and – at least from the perspective of some stakeholders and other interested parties¹⁸¹ – particularly controversial question concerns the composition of and institutional arrangements surrounding the establishment of NCPs in the various adhering countries. Since the states had, in accordance with the previous Council Decision and the Procedural Guidance attached thereto, always enjoyed a wide margin of appreciation in organizing their individual NCPs, the institutional structure of these entities had displayed a considerable variety of different forms. As of June 2010, nineteen NCPs were established in single government departments, eight of them in multiple government departments, one comprised of government and business representatives, ten displayed a tripartite structure involving public officials and representatives from business as well as trade unions, one was composed of representatives from the government sector, business, trade unions and NGOs, and two displayed a mixed structure of independent experts and government representatives.¹⁸² Thereby, it happened to be in particular the substantial number of single-department NCPs, fre-

¹⁷⁹ Emphasis in the original.

¹⁸⁰ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

¹⁸¹ See thereto, e.g., OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, p. 43 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011); Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/5 of 7 April 2008, paras. 98 *et seq.*

¹⁸² See OECD, Report by the Chair of the 2010 Annual Meeting of the National Contact Points, OECD Doc. DAF/INV/NCP(2010)1 of 28 June 2010, para. 14 and Annex 1.

quently situated at the respective ministry of economic affairs, finance, trade or/and investment, that were quite suspiciously eyed by many trade unions and NGOs. In individual cases, this suspicion may have been right or wrong, but overall surely not completely devoid of any reasons. In addition, no lesser person than the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises himself had already in 2008 expressed his concerns that “[t]he housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest”.¹⁸³

Against this background, many stakeholders had apparently expected – or at least hoped for – the possibility of significant amendments to be agreed upon in the course of the recent review process. However, already based on the terms of reference approved by the adhering countries on 30 April 2010, their respective expectations should have realistically been reduced. While envisioning a discussion on how “to give greater guidance to the institutional structure and functioning of NCPs”, the document also rather unequivocally stated that “the rights of adhering countries to adopt the NCP structure that best fits their individual circumstances” will be maintained.¹⁸⁴ And indeed, compared to the changes made in other sections of the OECD Guidelines and their accompanying documents as a result of the 2011 update, it requires a more careful look to note and assess the amendments agreed upon concerning the requirements to be observed in order to provide for a suitable institutional arrangement. The principle objective of functional equivalence between the different organizational forms of NCPs, including the respective “core criteria of visibility, accessibility, transparency and accountability” in accordance with the introduction to paragraph I of the Procedural Guidance as well as the commentaries thereto, have remained virtually unchanged. The same applies to the explicit recognition of adhering countries’ “flexibility in organising their NCPs” under paragraph I.A. of that document.

However, a notable addition is the entirely new paragraph I.A.1 of the Procedural Guidance as an overarching guideline for the composition and institutional structure, stipulating that the NCPs “[w]ill be composed and organized such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines* and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government”.¹⁸⁵ This provision can be regarded as another clear indication for the intention of all parties concerned to foster the goal of enhancing the overall effectiveness of the OECD Guidelines in general and the important role played by the NCPs in this connection in particular, as already expressed in paragraph I.1 of the Council Decision itself. It is especially the criterion of

¹⁸³ Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/5 of 7 April 2008, para. 98.

¹⁸⁴ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

¹⁸⁵ Emphasis in the original.

impartiality which is not only subsequently emphasized with regard to the exercise of the NCPs' functions,¹⁸⁶ but also already directly connected to their composition and institutional structure itself, that surely deserves attention and might entail important implications for the respective organizational decisions of adhering countries. Furthermore, it should not be left unmentioned in this connection that the new version of the commentaries explicitly states – as a kind of encouragement – that “[r]egardless of the structure Governments have chosen for their NCP, they can also establish multi-stakeholder advisory or oversight bodies to assist NCPs in their tasks”.¹⁸⁷

That said, it appears nevertheless difficult to convincingly argue that in light of these new provisions “single-department NCPs housed at the finance, economics, or investment departments of governments without any oversight body do not have the perceived credibility and impartiality that is now required from NCPs”.¹⁸⁸ It would surely be desirable for all adhering countries to seriously consider the possibility of a more inclusive institutional structure taking into account the concerns mentioned above. In addition, it might very well be that the activities of NCPs, including their handling of specific instances, that are established in a single ministry or other government department are in the future subjected to a heightened degree of scrutiny as a result of the amendments introduced in the course of the 2011 update, not the least with regard to the admissibility and the success of submissions to the OECD Investment Committee under paragraph II.2 lit. b of the Procedural Guidance¹⁸⁹. However, it needs to be emphasized that the respective amendments have to be read in conjunction with and are thus to be interpreted also in light of paragraph I.A.2 of the Procedural Guidance, explicitly stipulating that the objective of effectiveness, including impartiality, can also be met if the NCPs exclusively “consist of senior representatives from one or more Ministries” or a single “senior government official”. The only valid conclusion that one can draw from the content of this provision is that the adhering countries are currently still of the opinion that – at least under ideal circumstances and thus arguably rather theoretically – it is possible, and thus admissible, to retain an NCP in a single government department and nevertheless adequately fulfill the responsibilities assigned to this entity under the respective OECD Council Decision and its accompanying documents.

b) Status and Functions in the Implementation Regime

At the decentralized level of the adhering countries, the NCPs are the main institutional element entrusted with the task of realizing and implementing the substantive and procedural recommendations enshrined in the OECD Guidelines. Their respon-

¹⁸⁶ See thereto *infra* under C.IV.1.b).

¹⁸⁷ OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 76, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

¹⁸⁸ See OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011).

¹⁸⁹ See thereto also *infra* under C.IV.2.

sibilities in this regard are mirrored in a number of activities, all of them aimed at – and thus also to be understood as well as interpreted in light of – fulfilling the overarching goal “to further the effectiveness of the *Guidelines*”¹⁹⁰ as now stipulated in paragraph I.1 of the 2011 Decision of the Council on the OECD Guidelines for Multinational Enterprises.

The considerable range of individual functions assigned to them can be broadly categorized and systemized as comprising five different classes of activities, among them three main competences as well as two of what might be qualified as subsidiary tasks. These two subsidiary functions, aimed at effectuating the exercise of the three principles responsibilities, are on the one side the obligation to cooperate with other NCPs as, *inter alia*, provided for in paragraph I.2 of the Council Decision and paragraph I.C.2 lit. b of the Procedural Guidance,¹⁹¹ and on the other side the duty of every NCP to report annually to the OECD Investment Committee on its respective activities in accordance with I.3 of the Council Decision and I.D. of the Procedural Guidance. The three core functions of NCPs themselves are listed in paragraph I.1 of the Council Decision. They concern, first, the undertaking of informational and promotional activities; second, the handling of and response to enquires about the OECD Guidelines from – as stipulated in paragraph I.B.3 of the Procedural Guidance – other NCPs, the “business community, worker organisations, other non-governmental organisations and the public” as well as from governments of non-adhering countries; and third, the task of “contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances”.¹⁹²

In the same way as with regard to the two subsidiary functions, also the provisions dealing with promotional activities as well as the handling of enquiries by NCPs have not been subjected to any major amendments in the course of the 2011 update. However, three modifications appear to be noteworthy in this connection. First, as also already indicated by the new paragraph II.8 of the Council Decision, the Commentary on the Implementation Procedures now explicitly integrate the NCPs in the so-called “proactive agenda” aimed at promoting the effective observance of the Guidelines¹⁹³ by asking these entities to “maintain regular contact, including meetings, with social partners and other stakeholders”.¹⁹⁴ This further contributes to the perception of a more inclusive approach as one of the guiding principles that has emerged or at least strengthened as a result of the recent review process. Second, the Commentary also unambiguously envisions now that the NCPs increasingly engage in “joint peer learning activities”, among them in particular “horizontal, thematic peer reviews and vol-

¹⁹⁰ Emphasis in the original.

¹⁹¹ See also for example the Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 78, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“Coordination between NCPs in Specific Instances”).

¹⁹² See paragraph I.1 (emphasis in the original).

¹⁹³ See thereto also *infra* under C.IV.2.

¹⁹⁴ See the respective commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 77, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

untary NCP peer evaluations”.¹⁹⁵ Finally, it is worth drawing attention to the fact that the responsibility of NCPs to raise public awareness of the OECD Guidelines explicitly includes, in accordance with the reformulated paragraph I.B.2 of the Procedural Guidance, awareness of and information on the implementation procedures itself. As specified in the amended Commentary thereto, this task applies in particular also to the possibility of bringing so-called “specific instances” to the attention of individual NCPs,¹⁹⁶ a clear indication of the growing importance of this remedy in the overall implementation framework of the OECD Guidelines.

The last mentioned modification already introduces one of the most important NCPs’ function, namely their central role in the resolution of issues that arise relating to the implementation of the OECD Guidelines in specific instances in accordance with paragraph I.1 of the Council Decision. This is simultaneously one of the most complex and controversially perceived functions that NCPs are entrusted with. This kind of complaint procedure or non-judicial grievance mechanism¹⁹⁷ has gained increasing recognition in recent years. As of March 2011, 110 complaints had been filed against one or more individual companies by NGOs alone.¹⁹⁸ Furthermore, no less than 117 “specific instances”-procedures were initiated by trade unions until June 2010.¹⁹⁹ Considering on the one side the eminent practical importance and implications of this possibility, granted to all stakeholders concerned, to file a formal complaint to a government-backed NCP against a corporation based on an alleged non-conformity with the recommendations enshrined in the OECD Guidelines, and – on the other side – the material as well as procedural challenges most certainly connected with this approach not the least in light of the voluntary character of this instrument, it is hardly surprising that this procedure and the functions exercised by NCPs in this connection are among the most disputed issues in the implementation regime of the OECD Guidelines.

Against this background, any other decision than an incorporation of this topic in the list of items to be discussed in the course of the review process would have been

¹⁹⁵ *Ibid.*, p. 77; see thereto also *infra* under C.IV.3.

¹⁹⁶ See the Commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 76, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“NCPs should provide information on the procedures that parties should follow when raising or responding to a specific instance. It should include advice on the information that is necessary to raise a specific instance, the requirements for parties participating in specific instances, including confidentiality, and the processes and indicative timeframes that will be followed by the NCP.”).

¹⁹⁷ On this classification see, e.g., Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, paras. 27 *et seq.*

¹⁹⁸ See OECD Watch, Quarterly Case Update, March 2011, available under: <http://oecdwatch.org/publications-en/Publication_3641/at_download/fullfile> (last visited on 16 June 2011).

¹⁹⁹ Thereto as well as for more statistical information covering the period from 2001 to June 2010 see OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, p. 9 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011).

more than a surprise. Consequently, the 2010 terms of reference explicitly stated in this regard, *inter alia*, that “[w]ith a view to enhancing the credibility and efficiency of the specific instance facility, the update should discuss the role and tasks of NCPs in considering specific instances”. In particular, it is added in the document that the update “could develop, in light of emerging practices, more detailed guidance on the various steps and timeframes for considering a specific instance, and clarify the standards of transparency and confidentiality to be applied”.²⁰⁰

And indeed, the amendments agreed upon in the course of the 2011 update to the provisions of the Procedural Guidance dealing with this complaint procedure and the Commentary thereto are quite substantial. This applies first and in particular to the introduction of a new overarching standard on how NCPs are required to approach and exercise their functions in this regard. The introductory section of paragraph I.C of the Procedural Guidance now explicitly stipulates that these entities have to contribute to the resolution of respective disputes “in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*”.²⁰¹ It surely remains to be seen whether and how the unequivocal stipulation of this standard of conduct, being obviously also inspired by the respective work of the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises on “effectiveness criteria for non-judicial grievance mechanisms”,²⁰² will result in certain changes in the practice of NCPs. However, it is already at this stage worth highlighting that these new guiding principles are most certainly among the class of standards, the observance of which by individual NCPs may be subject of a submission to the OECD Investment Committee under paragraph II.2 lit. b of the Procedural Guidance.²⁰³

Whereas the dispute resolution proceedings in the sense of paragraph I.C.2 of the Procedural Guidance itself remain confidential in accordance with paragraph I.C.4 of that document, another notable modification and/or specification concerns the publication of concluding statements by the NCP. Paragraph I.C.3 of the Procedural Guidance now explicitly proscribes that the NCP is in general always required to make the results of individual procedures publicly available, with the content on the respective statement depending on the respective outcome.²⁰⁴ While this is in line with

²⁰⁰ OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 6, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

²⁰¹ Emphasis in the original. See thereto also the respective commentaries, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 77 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

²⁰² See thereto most recently Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 31.

²⁰³ See thereto also *infra* under C.IV.2.

²⁰⁴ See also the respective commentaries, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 80 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

a practice already previously adopted by some NCPs, the explicit stipulation of this requirement is surely to be applauded in order to facilitate the uniformity and thus also the “functional equivalence” in this connection, in particular since paragraph I.C.3 of the Procedural Guidance also quite comprehensively indicates the expected scope and content of the statements. The same applies to the considerably more detailed guidance – the adherence to which by individual NCPs being again potentially subject to a submission under paragraph II.2 lit. b of the Procedural Guidance – provided for in particular on the basis of the revised Commentary on, *inter alia*, the initial assessments to be undertaken by NCPs with regard to every complaint,²⁰⁵ the necessary “balance between transparency and confidentiality” in the course of and subsequently to the proceedings,²⁰⁶ as well as on a – necessarily flexible, but nevertheless quite detailed – indicative timeframe for the specific instances procedure.²⁰⁷

In sum, the clarifications and amendments to this complaint mechanism, as already indicated by OECD Watch and other stakeholders, still leave certain room for improvements and could had surely been even more ambitious by, for example, providing for certain consequences for corporations whose conduct is found to be not in conformity with the OECD Guidelines.²⁰⁸ Nevertheless, the modifications agreed upon in the course of the 2011 update are – realistically perceived and taking into account the important effectiveness criterion of acceptance among all stakeholders concerned – at least a clearly notable and laudable step forward towards the further effectuation of this grievance procedure.

2. OECD Investment Committee

Considering the at the first structural level – aside from the respective mutual obligations to cooperate²⁰⁹ – largely decentralized character of the implementation processes on the basis of the numerous NCPs involved, the necessity or at least the desirability arises for an overarching centralized institutional component in order to promote and facilitate the coordinated, uniform and thus predictable as well as effective²¹⁰

²⁰⁵ See especially *ibid.*, p. 79 (“When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.”).

²⁰⁶ *Ibid.*, 81. See also the only slightly modified paragraph I.C.4 of the Procedural Guidance.

²⁰⁷ For details see the respective commentaries, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 82 *et seq.*, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

²⁰⁸ See, e.g., OECD Watch Statement on the Update of the OECD Guidelines for MNEs, 25 May 2011, available under: <http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile> (last visited on 16 June 2011), with a number of additional suggestions.

²⁰⁹ See thereto already *supra* under C.IV.1.b).

²¹⁰ On the predictability as one of the effectiveness criteria for non-judicial grievance mechanisms see, e.g., more recently Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational

application of the OECD Guidelines. This important role is primarily²¹¹ assigned to the OECD Investment Committee, established in April 2004 as the successor of the previously responsible Committee on International Investment and Multinational Enterprises (CIME).²¹²

Assisted by the OECD Secretariat,²¹³ the responsibilities entrusted to the Investment Committee in this connection can, from the perspective of the OECD, its member states and other adhering countries, be broadly divided into two categories, namely external functions on the one side and more inward-oriented competences on the other side. Corresponding to the growing global importance of corporations from developing countries and other non-adhering states in the international economic system as also highlighted in the amended Preface to the OECD Guidelines,²¹⁴ the respective external competences of the Investment Committee are now receiving considerably increased attention as a result of the 2011 update. Whereas the previous paragraph II.3 of the Council Decision only foresaw that this body “may decide to hold exchanges of views on matters covered by the Guidelines with representatives of non-adhering countries”, the new version of this provision unequivocally stipulates that it “shall engage with non-adhering countries on matters covered by the *Guidelines* in order to promote responsible business conduct worldwide in accordance with the *Guidelines* and to create a level playing field. It shall also strive to co-operate with non-adhering countries that have a special interest in the *Guidelines* and in promoting their principles and standards.”²¹⁵ In addition, also the newly introduced paragraph II.2 lit. e) and f) of the Procedural Guidance stress the need for cooperation “with international partners” and the engagement “with interested non-adhering countries” as notable responsibilities of the Investment Committee in order to enhance the effectiveness of this instrument, thereby further reaffirming the amplified importance rightly attached to all meaningful undertakings aimed at enlarging the OECD Guidelines’ personal and territorial scope of application.

In an attempt to systemize the at least equally important inward-oriented competences of the Investment Committee, the respective activities can again be subdivided into three categories. These could be adequately labeled as coordinator responsibilities, substantive supervisory functions or clarification competences as well as, finally, institutional supervisory functions. The status of this body as the central coordination institution for the regime of the OECD Guidelines with the aim to foster their effective implementation finds its expression in various more or less specific responsibilities, among them the task of serving as a forum for “exchanges of views” by adhering countries, BIAC, TUAC, OECD Watch and other international partners in accordance

Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 31.

²¹¹ On the recently introduced status and functions of the OECD Secretariat in this regard see *infra* under C.IV.3.

²¹² See thereto as well as generally on the composition and activities of the OECD Investment Committee the respective information provided under: <www.oecd.org/document/24/0,2340,en_2649_34863_2373464_1_1_1_1,00.html> (last visited on 16 June 2011).

²¹³ See thereto *infra* under C.IV.3.

²¹⁴ See already *supra* under C.II.

²¹⁵ Emphases in the original.

with paragraph II.1 and II.2 of the Council Decision. While these provisions have – with the exception of the inclusion of OECD Watch founded in March 2003 – not been subjected to any major amendments in the course of the 2011 update, two notable additions are provided in this connection. First, the new paragraph II.8 of the Council Decision explicitly calls also for the pursuit of a “proactive agenda that promotes the effective observance by enterprises of the principles and standards” enshrined in the OECD Guidelines.²¹⁶ Second, “fostering functional equivalence of National Contact Points” is explicitly mentioned in what is now paragraph II.5 of the Council Decision as one of the central subjects on which a continuing exchange of views among all stakeholders concerned is perceived to be beneficial, thereby further demonstrating the increasing importance attached to the search for effective and acceptable solutions on this rather controversial issue.²¹⁷

The substantive supervisory functions exercised by the Investment Committee in connection with the implementation of the OECD Guidelines are first and foremost mirrored in this body’s principle responsibility for ensuring the uniform interpretation and application of the recommendations enshrined in this code of conduct. The principle means to achieve this goal is the Committee’s competence to issue clarifications on the OECD Guidelines. In this regard, it considers on the one side in accordance with paragraph II.1 of the Procedural Guidance “requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the *Guidelines* in particular circumstances”.²¹⁸ Furthermore and independently of an initiative by a NCP, the Investment Committee has on the other side also the competence to issue a general clarification on issues concerning the interpretation and application of the OECD Guidelines under paragraph II.2 lit. b of the Procedural Guidance, in case “an adhering country, an advisory body or OECD Watch makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances”.²¹⁹ Although it is prominently stressed in paragraph II.4 of the Council Decision itself that the Investment Committee, in this connection, “shall not reach conclusions on the conduct of individual enterprises” and is, more generally, precluded “from acting as a judicial or quasi-judicial body”,²²⁰ it is nevertheless arguable that it occupies in light of its competences a status that is at least to a certain extent comparable to a dispute settlement appellate institution. While these substantive supervisory functions of the Investment Committee already existed prior to the 2011

²¹⁶ See also in this connection already *supra* under C.IV.1.b).

²¹⁷ See thereto also already *supra* under C.IV.1.a).

²¹⁸ Emphasis in the original.

²¹⁹ See thereto also the respective commentary, reprinted in: OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, p. 84, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011) (“Clarifications of the meaning of the *Guidelines* at the multilateral level would remain a key responsibility of the Committee to ensure that the meaning of the *Guidelines* would not vary from country to country.”).

²²⁰ See the respective commentary, reprinted in: *ibid.*, p. 83. See in this connection also on the apparent inadmissibility of submissions dealing with the findings and statements made by an NPCs that do not relate to the interpretation of the OECD Guidelines, *ibid.*, p. 83 *et seq.* This probably applies for example to factual findings made by individual NCPs in connection with specific instances.

update, two recent amendments are worth drawing attention to that may have considerable implications for the future practice. First, paragraph II.4 of the Council Decision now stipulates that in case of a request for clarification, not only the corporation concerned²²¹ but all “[p]arties involved in a specific instance [...] will be given the opportunity to express their views either orally or in writing”, thus further adjusting this procedure to the requirements of the equitability principle, rightly considered as one of the important effectiveness criteria for non-judicial grievance mechanisms.²²² Second, it is noteworthy – albeit not surprising – that OECD Watch has been added to the circle of actors being entitled to make a submission for clarification under II.2 lit. c of the Procedural Guidance. Taking into account that this network and its member organizations have been – together with trade unions – particularly active in filing cases to NCPs,²²³ it is to be presumed that this procedure will be more frequently taken recourse to and thus increasingly occupy the Investment Committee in the years to come.

The same is very likely to apply to the exercise of this body’s institutional supervisory competences aimed at further improving the functioning of NCPs. In addition to, for example, the task of considering the annual reports of NCPs under paragraph II.2 lit. a of the Procedural Guidance, the respective responsibilities of the Investment Committee find their most prominent recognition in paragraph II.2 lit. b of the Procedural Guidance, stating that it considers substantiated submissions “on whether an NCP is fulfilling its [procedural²²⁴] responsibilities with regard to its handling of specific instances”, thus providing the entitled actors with a potentially quite powerful remedy to address respective shortcomings in the performance of individual NCPs. Although it most certainly remains to be seen whether and how this procedure is going to be applied in practice,²²⁵ as noted above, it is the addition of OECD Watch to

²²¹ On the previous version see paragraph II.4 of the 2000 Council Decision, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL of 31 October 2001, p. 45.

²²² See thereto recently Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para. 31.

²²³ For more statistical information covering the period from 2001 to June 2010 see OECD Watch, *10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct*, June 2010, p. 9 *et seq.*, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011). For more recent information see, e.g., OECD Watch, *Quarterly Case Update*, March 2011, available under: <http://oecdwatch.org/publications-en/Publication_3641/at_download/fullfile> (last visited on 16 June 2011).

²²⁴ On this specification see the respective commentary, reprinted in: *OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context*, 25 May 2011, p. 84, available under: <www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited on 16 June 2011).

²²⁵ The provision itself is not new. See paragraph II.3 lit. b of the 2000 Procedural Guidance, reprinted in: Committee on International Investment and Multinational Enterprises / Working Party on the OECD Guidelines for Multinational Enterprises, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG(2000)15/

the list of entities entitled to raise a respective complaint as a result of the 2011 update which considerably increases the likelihood that this provision will gain more prominence in the future.

3. *OECD Secretariat*

Whereas the NCPs and the Investment Committee played already prior to the 2011 update an important role in the implementation framework of the OECD Guidelines, a new institutional and operational element introduced as a result of the recent review process is the role and functions explicitly assigned to the OECD Secretariat in this regard. In accordance with paragraph II.5 of the Procedural Guidance attached to the respective Council Decision, the Secretariat is entrusted with the task of assisting the Investment Committee in discharging its responsibilities. Among the activities envisioned in this connection under lit. a) to e) of this provision are on the one side broader and more general assignments such as the promotion of the OECD Guidelines in other international fora and meetings, the overall facilitation of cooperation between NCPs and the Secretariat's status as a central point of information for interested entities of this kind.

However, this provision addresses on the other side also a number of more challenging administrative tasks with potentially controversial implications. This applies first to the development of "unified reporting formats" in order to facilitate the idea of establishing "an up-to-date database" on specific instances as well as in particular to the undertaking of providing "regular analysis of these specific instances". In addition, it is certainly true with regard to the – in light of previous experience and discussions thereto – rather delicate assignment of facilitating "peer learning activities, including voluntary peer evaluations" among NCPs, with the last mentioned approach being already for quite some times strongly supported by, *inter alia*, OECD Watch.²²⁶ So far in practice, the approach has only been adopted by the Dutch NCPs in the fall of 2009.²²⁷ Especially in light of this second class of activities assigned to the Secretariat, this OECD body has at least the potential to occupy a considerably more prominent position in the future application of the OECD Guidelines' implementation procedures than its officially merely assisting role might initially suggest.

FINAL of 31 October 2001, p. 48. See also, however, on the perception that the issues of "oversight of NCP performance and right of appeal on procedural grounds" are among the "areas deserving special attention" in the course of the review process: OECD, Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises, 4 May 2010, p. 5 *et seq.*, available under: <www.oecd.org/dataoecd/61/41/45124171.pdf> (last visited on 16 June 2011).

²²⁶ See, e.g., more recently OECD Watch, 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct, June 2010, p. 43, available under: <http://oecdwatch.org/publications-en/Publication_3550/at_download/fullfile> (last visited on 16 June 2011) ("OECD Watch has argued for many years that one of the most effective ways of ensuring functional equivalence would be through a peer review mechanism.").

²²⁷ See thereto already OECD, 2008 Annual Meeting of the National Contact Points, Report by the Chair, p. 16, available under: <www.oecd.org/dataoecd/48/38/41721195.pdf> (last visited on 16 June 2011); as well as subsequently OECD, Report by the Chair of the 2010 Annual Meeting of the National Contact Points, OECD Doc. DAF/INV/NCP(2010)1 of 28 June 2010, paras. 20 *et seq.*

D. Overall Assessment and Outlook

When the NCPs first expressed their opinion at their annual meeting on 16/17 June 2009 that the time has come to “consider the merits of updating the Guidelines”, they voiced the perception that “[a]s a living instrument, the Guidelines need to be kept up-to-date”.²²⁸ This characterization as a “living instrument”²²⁹ – well-known in the legal context from the domestic realm of constitutional law,²³⁰ but already for quite some time also taken recourse to on the international plane²³¹ – appears to be particularly fitting. It rightly conveys the notion that the effective functioning of the OECD Guidelines is inherently dependent upon a dynamic understanding, necessary to adjust this steering instrument to changing social, economic and legal circumstances and conditions as well as to the correspondingly shifting societal expectations on the conduct of business enterprises. These indispensable adjustments of the OECD Guidelines are – or at least should be – on the one side continuously realized through

²²⁸ OECD, 2009 Annual Meeting of the National Contact Points, Report by the Chair, 16-17 June 2009, at VI (“Considerations for Future Actions”), available under: <www.oecd.org/dataoecd/41/25/43753441.pdf> (last visited on 16 June 2011).

²²⁹ See in this connection also already, e.g., European Union Meeting on CSR and the OECD Guidelines for Multinational Enterprises, Brussels, 10-11 May 2001, Concluding Plenary Session Intervention by *John Evans*, General Secretary of TUAC, p. 2, available under: <http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111139.pdf> (last visited on 16 June 2011) (“The key issue for TUAC is now how to ensure that the Guidelines become a living instrument through effective implementation.”).

²³⁰ See, e.g., Supreme Court of the United States, *Gompers v. United States*, Judgment of 11 May 1914, 233 U.S. 604, 610 (1914) („But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”); Judicial Committee of the Privy Council, *Edwards v. Canada*, Judgment of 29 October 1929, [1930] A.C. 124, 136 („The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.”); *Re Same-Sex Marriage*, Judgment of 9 December 2004, [2004] 3 SCR 698, para. 22 („The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”); as well as thereto for example *Strauss*, *The Living Constitution*, 7 *et seq.*; *Ackerman*, *Harvard Law Review* 120 (2007), 1737 *et seq.*; *Hogg*, in: Goldsworthy (Hrsg.), *Interpreting Constitutions*, 55 (84 *et seq.*); *Jackson*, *Fordham Law Review* 75 (2006), 921 *et seq.*, each with further references.

²³¹ See in particular with regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms already the European Court of Human Rights, *Tyrer v. United Kingdom*, Appl.-No. 5856/72, Judgment of 25 April 1978, para. 31 („The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.”); as well as subsequently for example *Demir and Baykara v. Turkey*, Appl.-No. 34503/97, Judgment of 12 November 2008, para. 68; *Rantsev v. Cyprus and Russia*, Appl.-No. 25965/04, Judgment of 7 January 2010, para. 277; and thereto, e.g., *Wildhaber*, in: Arsanjani *et al.* (eds.), *Essays in Honor of W. Michael Reisman*, 569 (571 *et seq.*); *Letsas*, in: Fitzmaurice/Elias/Merkouris (eds.), *Treaty Interpretation*, 257 (263 *et seq.*). For a related perception with regard to the Treaty on European Union and the Treaty on the Functioning of the European Union see, e.g., *Lenaerts/Gutiérrez-Fons*, *Common Market Law Review* 47 (2010), 1629 (1669) (“EU’s living constitution”). Finally, see also for example on the understanding of the UN Charter as a „flexible, living constitution“ or a „living instrument“ *Delbrück*, in: *Ackerman et al.* (eds.), *Liber Amicorum Bert V.A. Röling*, 73 (79); *Fassbender*, *The United Nations Charter*, 130 *et seq.*

the adaptive interpretation of its recommendations by NCPs and the Investment Committee. On the other side, however, this approach also requires from time to time certain textual updates on the basis of comprehensive and inclusive review processes.

The conclusion of the most recent review process of this kind on 25 May 2011 almost naturally gives, again, rise to the in general age-old question – which also has been at least implicitly addressed in literally all initial comments on the 2011 update²³² – how the results achieved with regard to the numerous and not infrequently controversial issues should be assessed and perceived at large: As a balanced outcome or rather as an opportunity missed? There seems to be – as it is frequently the case – no straightforward and simple answer to this question, not least because this undertaking is partly also dependent upon the individual respondent’s subjective points of view. With all due caution, it can be submitted that the truth lies somewhere in between on a spectrum that extends from clearly missed opportunities to obviously balanced outcomes. Some issues, for example in connection with the chapter on disclosure and the implementation procedures, could surely have been more progressively addressed. Consequently, it might very well be argued that a number of opportunities have indeed been missed in the course of the recent review process. However, realizing these shortcomings should not divert one’s view from the substantial number of improvements agreed upon as a result of the 2011 update, among them the introduction of the due diligence approach as an overarching guiding principle, the considerably more explicit incorporation of supply chain responsibility, the addition of a new separate chapter on human rights, the clarifications and specifications with regard to the implementation procedures and the respective institutional framework as well as numerous other laudable modifications. Against this background and taking into account the important effectiveness criterion of acceptance among all stakeholders concerned, it appears from a broader perspective not unjustified to position the results of the 2011 update overall – on the above mentioned spectrum – considerably closer to the side of balanced outcomes.

This finding surely does not imply that the various different kinds of governmental and nongovernmental stakeholders involved in and concerned with the OECD Guidelines are not continuously facing new challenges. Already the above mentioned perception of this steering regime as a living instrument strongly indicates that it belongs to the category of projects that are never complete, but in constant need of adjustments and improvements. And indeed, even prior to the formal conclusion of the recent review process, the Report of the Chair of the Working Party of the Investment Committee on the Update of the Guidelines for Multinational Enterprises published on 3 May 2011 identified a non-exhaustive list of “new issues” and the “need for further work in several areas”, among them the complex questions concerning supply chains and due diligence recommendations, a potential cooperation with respective national human rights institutes, the application of the OECD Guidelines to the financial sector, and the issues surrounding “extractive industry transparency” and “responsible investment in agriculture”.²³³

²³² On some of the respective comments and statements see already *supra* under A.

²³³ OECD, Council, OECD Guidelines for Multinational Enterprises: Update 2011, Note by the Secretary-General, OECD Doc. C(2011)59 of 3 May 2011, Appendix I, p. 6 *et seq.*

In addition to these and numerous other individual topics in need of further evaluation, two overarching issues are particularly worth highlighting in this regard. On the one side, the continued success of the OECD Guidelines has always been and is currently ever more so dependent upon a further effectuation of the implementation procedures, an undertaking that requires first and foremost adherence to the letter and spirit of their provisions as well as constructive and open-minded efforts by all actors concerned. On the other side, it appears in light of the changing structure, actors and environment of the international economic system – not least the rise of transnational corporations based in developing and transition countries – of crucial importance that no reasonable efforts are spared to directly and indirectly enlarge the OECD Guidelines' personal scope of application. However, also in face of these challenges, it is submitted that the perception and guiding vision of the OECD Guidelines as a living instrument provides a suitable overall approach to secure the continued relevance of this steering regime in the increasingly important realm of corporate social responsibility far beyond the 2011 update.

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