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The History of National Contact Points and the OECD Guidelines for Multinational Enterprises

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Abstract

This article analyses the legal development of the OECD Guidelines for Multinational Enterprises (MNE Guidelines) and their implementation mechanism – National Contact Points (NCPs). Both the MNE Guidelines and NCPs have matured over the past 40 years. While the MNE Guidelines have broadened their scope of application by covering more themes, NCPs have evolved to become legally binding, resulting in the unique combination of soft-law guidelines with a legally binding implementation mechanism. The legal evolution of the MNE Guidelines and NCPs is analysed by extensively consulting their ›legislative‹ history and by referring to various cases that have been submitted to NCPs and courts. More complex questions are also addressed, for instance, regarding the relation between the MNE Guidelines and customary law and the MNE Guidelines' legal status since their increased (partial) integration into hard law. This article aims to offer the first comprehensive overview of these often overlooked guidelines from a legal-historical perspective and discusses their multinormativity.

Keywords: national contact points, OECD, Guidelines for Multinational Enterprises, responsible business conduct, multinormativity

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The History of National Contact Points and the OECD Guidelines for Multinational Enterprises

1 Introduction

1.1 Introduction

In 1976, 16 years after the establishment of the Organisation for Economic Co-operation and Development (OECD), the organisation endeavoured to develop what is said to be one of the world's most authoritative international corporate responsibility instruments,[1] better known as the OECD Guidelines for Multinational Enterprises (MNE Guidelines).[2] The MNE Guidelines[3] were – and are still – regarded as recommendations, addressed by governments to multinational enterprises (MNEs) and contain voluntary[4] principles and standards that stimulate responsible business conduct.[5] Effective implementation of the MNE Guidelines is supported by National Contact Points (NCPs). A total of 47 NCPs help promote the MNE Guidelines and offer their good offices to help resolve disputes that arise within the ambit of the guidelines.[6]

Legality (*i. e.* the legal validity of rules) has been a central issue connected to the MNE Guidelines and NCPs since their inception. From the very outset, some advisory bodies to the OECD have underlined the importance of transforming the MNE Guidelines into legal rules,[7] which has been reiterated more recently by scholars and non-governmental organisations (NGOs),[8] and attempts have been made to move away from guidelines that are merely »morally binding«.[9] By being partly grounded in international law, the MNE Guidelines may transcend their moral boundaries and may have a more compelling (legal) status than anticipated. In a similar vein, the implementation mechanism of the MNE Guidelines, the NCPs, originally did not have any legal status. History shows us how the NCPs have evolved, as their legal status changed drastically.

In the literature, a historical analysis of the MNE Guidelines and NCPs has been lacking. No extant research probes into the legality of the MNE Guidelines and NCPs since their inception. This article aims to address this gap in the literature by comprehensively discussing the history of the MNE Guidelines and the NCPs. It chronologically describes and analyses the evolution of the MNE Guidelines and the NCPs from a legal-historical perspective. Examples will illustrate how the OECD and the courts have grappled with the multinormativity of the MNE Guidelines. The primary objective of this article is to establish the legality of the MNE Guidelines and the NCPs to provide clarity once and for all. The main research question that will be answered in this article is: what is the legal status of the MNE Guidelines and the NCPs?

In order to answer the main research question, I have performed a secondary data analysis[10] of policy documents and conference reports of the OECD.[11] In addition, extensive research into the literature and an analysis of (semi-legal) documents, such as conventions, court decisions and semi-legal decisions were conducted. Research included documents from all stakeholders to add depth to the analysis. The bulk of the analysis concentrated on historical documents.

The remainder of section 1 briefly offers some necessary background information on the institu-

1 Other examples are United Nations Global Compact and ISO 26000, Moratis (2015) 164.
2 OECD (2012a) 147.
3 The origins of the MNE Guidelines can be traced back to the so-called »Rey report« that was drafted in 1972. This report opted for a systematic investigation into multiple themes relating to international investment and MNEs that were later covered by the MNE Declaration and the MNE Guidelines, Eyk (1995) 97–102.
4 The Netherlands and Sweden opted for binding guidelines; however, the majority supported the US in keeping the MNE Guidelines voluntary, Schwamm (1977) 36.
5 OECD (2011a) 3.
6 OECD (2011a) 67–74.
7 TUAC (1978) 103–105; TUAC (1979a) 103–105.
8 Christian Aid (2004) 57, 59; Černič (2008) 99.
9 Eyk (1995) 121–122, 135; Blanpain (2004) 9.
10 Saunders (2012) 304, 307–309.
11 The author thanks the OECD and the Council of Europe for sharing a number of policy documents that were essential for this article.

tional structure of the OECD (section 1.2). The ensuing three sections of this article demarcate a certain period in the (legal) development of the NCPs and the MNE Guidelines: the inception of the guidelines in the mid-1970s (section 2), the dormancy of the NCPs through the 1980s and 1990s (section 3), and their reinvigoration after 2000 (section 4). The final two sections investigate the apparently changing legal status of the MNE Guidelines within the purview of some (recent) legislative developments (section 5) and answer the main research question (section 6).

1.2 The Institutional Structure of the OECD

1.2.1 The Council, Secretariat, Investment Committee and the WPRBC

The OECD's organisational structure comprises three main bodies that can be further broken down into manifold sub-entities. The three main bodies are: (i) the Council, (ii) the Secretariat and (iii) the committees. The Council, which oversees the whole OECD, provides strategic guidance and decides on key policy issues.[12] Orders of the Council are executed by the Secretariat.[13] The OECD also has 250 committees, working groups and expert groups that develop ideas and review the progress that has been made by the Secretariat in specific areas.[14] The Investment Committee is one of the 250 committees and is formally responsible for overseeing the functioning of the MNE Guidelines and clarifying their meaning.[15] Another formal task of the Investment Committee is to report periodically to the Council on issues covered by the MNE Guidelines.[16] Formal tasks of the Investment Committee were delegated to the Working Party on Responsible Business Conduct (WPRBC) in 2013. The WPRBC was established under the Investment Committee as one of its five official subsidiary bodies and is tasked with enhancing the effectiveness of the MNE Guidelines. Ever since its advent, the WPRBC has been the primary OECD body engaged in the development of the NCPs and the MNE Guidelines.[17]

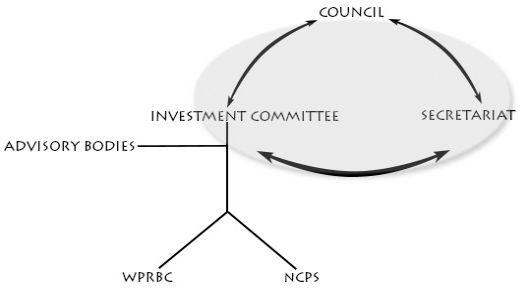

Figure 1: Organisational structure with the NCPs placed within the OECD framework[18]

1.2.2 The NCPs and OECD advisory bodies

The NCPs can be located in the broader institutional structure of the OECD (see Figure 1). They promote the MNE Guidelines, assist MNEs to take appropriate measures to implement the guidelines and provide mediation and conciliation services to resolve any (potential) disputes that may arise in the light of the guidelines.[19] The NCPs are regarded as a pivotal element of the functioning of the MNE Guidelines[20] and are regarded as one of the main contributors to the effectiveness of the guidelines.[21] The NCPs purportedly play an indispensable role in providing justice and remedy for those affected by the actions of MNEs.[22] Currently, an NCP exists (at least on paper) in each OECD member state, including 13 non-member adhering states.[23] NCPs are allowed to work together with the OECD advisory bodies representing the business community, trade unions and NGOs. The three formally recognised advisory bodies are the Business and Industry Advisory Committee to the OECD (BIAC), the Trade Union Advisory Committee to the OECD (TUAC) and OECD Watch.[24]

12 OECD (2006) 4; Article 7 OECD Convention; OECD (2017a).
13 OECD (2006) 4–5.
14 OECD (2017a); OECD (2017b).
15 OECD (2011a) 77; OECD (1979a); OECD (1997) 12, 14; OECD (2011b).
16 OECD (2011b).
17 OECD (2012a) 9, 124.
18 OECD (2009) 300.
19 OECD (2011a) 3.
20 OECD (2011c).
21 Fatouros (1999) 11.
22 Norwegian Ministry Of Foreign Affairs 2.
23 OECD (2017c).
24 The TUAC's origins can be traced back to the Marshall Plan of 1948, TUAC (2007). The BIAC was founded in 1962, OECD (2017d). Cf. OECD (2011a) 71–72, 74.

2 The Inception of the MNE Guidelines (1976–1979)

2.1 The MNE Declaration[25]

2.1.1 Contents and Scope

The OECD Declaration on International Investment and Multinational Enterprises of 1976 (MNE Declaration)[26] initially[27] comprised four constituent elements: (i) the MNE Guidelines, (ii) »national treatment«,[28] (iii) international investment incentives and disincentives and (iv) consultation procedures.[29] In the communiqué of the MNE Declaration, the former Secretary-General of the OECD clarified that the aims of the MNE Declaration as well as the MNE Guidelines[30] were twofold: (i) improving the international investment climate and (ii) encouraging the positive contributions of MNEs to economic and social progress.[31]

2.1.2 The Legal Status of the MNE Declaration

The Convention on the Organisation for Economic Co-operation and Development (OECD Convention) enumerates the OECD's repertoire of (non-)legislative instruments. The OECD can take decisions, make recommendations and enter into agreements. All instruments are directed at states and international organisations, but they do not address private actors, such as MNEs.[32] The former chair of the drafting group of the MNE Guidelines, Theo Vogelaar, stumbled on this flaw in the OECD Convention when he tried to draft guidelines for MNEs. In an attempt to address MNEs, Vogelaar decided to use an instrument that had not been included in the OECD's repertoire of instruments: the declaration. Because declarations are not available to the OECD as formal instruments, Vogelaar argued that the MNE Declaration was established by governments representing their own states and not by governments representing the OECD. In other words, the MNE Declaration was not a typical OECD instrument. In order to restore the link to the OECD, the implementation of the MNE Declaration was entrusted to it.[33] As was shown in sections 1.2.1 and 1.2.2, this link was restored through the creation of the Investment Committee, the WPRBC, the three advisory committees and NCPs, which monitor the implementation of the MNE Declaration.

2.2 The MNE Guidelines

2.2.1 Contents and Scope

After the 1976 MNE Guidelines and their slightly amended 1979 version[34] came into force, they were celebrated as a remarkable step forward in the development of a generally accepted code of conduct for MNEs[35] and seen as a solid achievement for »free world diplomacy«.[36] The MNE Guidelines carried great significance, being the first intergovernmental voluntary code of conduct involving developed countries.[37] The spotless reception of the MNE Guidelines was lightly tainted by a number of critical remarks made by the TUAC. The TUAC contended that not much had changed

25 The MNE Declaration was endorsed by all member states of the OECD at that time (Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the UK and the US), except Turkey. Turkey decided to adhere to the MNE Declaration in 1981, OECD (1982) 8.

26 OECD (1976a).

27 »Conflicting requirements imposed on MNEs« were not yet included.

28 »National treatment« prescribes that adhering states treat the enterprises of other adhering states on the same basis as their own domestic enterprises, meaning that foreign enterprises are not burdened with additional laws and regulations, OECD (1976a)Par. II. National treatment seems to be derived from Article 1 of the Convention on the Protection of Foreign Property (drafted in 1967, but not in force). Cf. OECD (1962) 9 (»fair and equitable treatment«); Kauzlarich (1981) 1011.

29 Working Party On The OECD Guidelines For Multinational Enterprises (2001) 2.

30 OECD (1976a) Annex I, Par. 2.

31 Lennep (1976) 5. Environmental progress was added later on.

32 See Article 5 OECD Convention.

33 Vogelaar (1980) 132–133.

34 The MNE Guidelines were amended in 1979, 1984, 1991, 2000 and 2011, OECD (1979b); OECD (1984a); OECD (1991a); OECD (2000a); OECD (2011d).

35 Hägg (1984).

36 Davidow (1977) 455.

37 Grosse (1982) 421, 427–428.

since the introduction of the MNE Guidelines, that workers were still unaware of their existence and that legal rules were necessary.[38] Notwithstanding these critical remarks, the OECD's initiative to develop the MNE Guidelines was considered a milestone in the international regulatory process.[39]

The MNE Guidelines originally centred on the manufacturing industry[40] and comprised seven chapters dealing with general policies, disclosure of information, competition,[41] financing, taxation, employment and industrial relations, and science and technology. The subjects of human rights, consumer interests, the environment and bribery,[42] main themes of future editions of the MNE Guidelines (see section 4), did not receive any or barely any attention in the 1976 edition. The 1979 revision of the MNE Guidelines did not bring about any substantial changes, just a minor textual update of one of the provisions of the employment and industrial relations chapter.[43] Due to the minor progress made, the TUAC concluded that a »virtual stalemate« was reached regarding the contents of the MNE Guidelines.[44]

2.2.2 The Legal Status of the MNE Guidelines

From the outset, the MNE Guidelines were formulated as recommendations from governments jointly given to MNEs operating in their territories.[45] Observance of the MNE Guidelines by MNEs has always been voluntary and not legally enforceable.[46] However, the MNE Guidelines are considered to be morally binding on MNEs as well as on states[47] and represent a »firm expectation of MNE behaviour«.[48] Notwithstanding the morally binding character of the MNE Guidelines, provisions in domestic or international laws may also be legally enforceable under these laws (see section 5.1.1). Nevertheless, it must be noted that, although provisions similar or identical to those of the MNE Guidelines may be found in domestic or international law, this does not alter the status of the guidelines. The MNE Guidelines contain voluntary recommendations and are not domestic or international law.

The status of the MNE Declaration affects the status of the MNE Guidelines. As part of the MNE Declaration (see section 2.1.2), the MNE Guidelines are also regarded as a declaration and consequently as legally non-binding on member states.[49] This may be somewhat confusing. Some scholars hold referring to the MNE Guidelines as »guidelines« to be a misnomer.[50] Indeed, the reference to »guidelines« seems misplaced, since the guidelines are, in fact, a declaration.

2.2.3 The IGCP Decision

Three decisions accompanied the MNE Declaration, one directly relating to the MNE Guidelines.[51] This decision, the Decision on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises (IGCP Decision), set forth unique[52] review and consultation procedures within the framework of the MNE Guidelines[53] and regulated a number of tasks of

38 Vognbjerg (1978) 103–104; TUAC (1979a) 103–105.

39 One of the possible reasons for the success of the MNE Guidelines is that the OECD consisted of like-minded states. In contrast to the UN, the OECD was not hindered by the chasm between developed and less-developed countries, cf. Stanley (1981) 998; Kauzlarich (1981) 1010.

40 The service industry was not yet included, Kauzlarich (1981) 1013. During its 1982 mid-term review, the Investment Committee promised to devote particular attention to the service sector, OECD (1982) 17.

41 For an in-depth analysis of the competition provisions of the 1976 MNE Guidelines, see: Hawk (1977) 241–276; Davidow (1977) 441–458.

42 Seymour (1980) 227–228, 235–236. For a critical review, see: Glascock (1977) 459–473.

43 »Nor transfer employees from the enterprises' component entities in other countries« was added to paragraph 8 of the employment and industrial relations chapter. According to the Investment Committee, the text was altered to cover an issue that was not foreseen when the MNE Guidelines were initially drafted, OECD (1979c) Para. 7, 70.

44 TUAC (1979b) 57.

45 Later on, the MNE Guidelines also included MNEs operating *from* one of the adhering countries, thereby broadening the scope of the MNE Guidelines, OECD (2011) 8, 24.

46 OECD (1976a) Par. I, Annex I, Par. 6.

47 Eyk (1995) 121–122, 135; Blanpain (2004) 9. For the moral obligatory nature of codes of conduct in general and the MNE Guidelines specifically, see: Hofstetter/Klubeck (1986) 484–486; Getz (1990) 567–577; N.T. (1978) 255–256; Frederick (1991) 165–177.

48 OECD (1982) 57.

49 OECD (2017e).

50 Baade (1980) 19.

51 The other two decisions are: OECD (1976b) and OECD (1976c).

52 Fatouros (1981) 967.

53 According to H. Steeg, the former Chairman of the Investment Committee, one of the three major achievements was to reach an agreement with regard to the consultation procedures, OECD (1976d) 12.

the Investment Committee (see section 1.2.1). The review and consultation procedures of the IGCP Decision covered issues that fell within the purview of the MNE Guidelines.[54] These procedures were not supposed to function as a built-in grievance mechanism,[55] whereby the Investment Committee would take sides in a dispute[56] or reach a conclusion on the conduct of individual MNEs.[57] The review and consultation procedures would, rather, function as a more neutral »follow-up« mechanism.[58] According to the Investment Committee, the procedures served as a platform to discuss individual cases in the abstract, without reaching any conclusion about individual cases. Individual cases were transformed into »hypothetical problems« that needed clarification in the light of the provisions of the MNE Guidelines.[59]

The review and consultation procedures were of practical importance, because they induced the settlements of individual cases by clarifying whether actions of MNEs in general complied with the MNE Guidelines.[60] Based on these generalisations, MNEs involved in a specific clarification procedure could still ascertain whether their actions were in accordance with the MNE Guidelines. As such, the review and consultation procedures, as laid down in the IGCP Decision, converted the MNE Guidelines into a more compelling instrument[61] and seemed to function *de facto* as a platform that stimulated dispute resolution.

2.3 The MNE Guidelines as Clarified by the Investment Committee and Applied by Domestic Courts

2.3.1 The Badger Case

The 1977 Badger case is a »historic landmark case«[62] that garnered extensive attention in the literature,[63] as it set an important precedent for future cases and was the first case in which the MNE Guidelines were (successfully) invoked.[64]

In January 1977, the individual labour contracts of approximately 250 Badger employees were terminated. After being declared bankrupt by the Antwerp Commercial Tribunal,[65] Badger was unable to indemnify its employees for the termination of their contracts, and its US-based parent company, Badger Inc., refused to pay the debts of its Belgian subsidiary.[66] In Belgium, indemnification rates were the highest in the world, and Belgian regulations allowed for indemnification of the outstanding amounts by a social insurance fund. On the instigation of the trade unions, it was decided not to claim indemnification via the social insurance fund, but to bring the case before the Antwerp District Court and the Investment Committee. After consultation with the Investment Committee, the parties reached an agreement, whereupon the case before the court was terminated.[67] Badger Inc., which most likely could not be held liable for any indemnification according to the prevailing laws in this case,[68] agreed to indemnify all 198 of the approximately 250 staff members of its Belgian subsidiary for the closure. It also agreed to pay a maximum of 120 million Belgian francs.[69] Two years later, the Investment Commit-

54 OECD (1976) Annex I, Par. 11.
55 Vogelaar (1977) 7; Kauzlarich (1981) 1015–1016, 1027–1028.
56 Vogelaar (1980) 137; cf. Blanpain (1985) 181.
57 OECD (1976e) Par. 3. In practice, the consultation procedures did not foreclose the possibility of reaching conclusions on the conduct of individual enterprises, Blanpain (1980a) 148–149.
58 Rojot (1985) 380–381. This view was supported by the USA, Rubin et al. (1976) 23. In the early 1980s, the TUAC shifted its focus from the binding nature of the MNE Guidelines to the follow-up procedures of the MNE Guidelines, Tapiola (1999) 2.
59 Fatouros (1981) 965, 969–970.
60 Horn (1981) 930–931, 937.
61 Rubin (1981) 1286.
62 Grosse (1982) 429.
63 Fatouros (1981) 965–966; Smith (1983) 125–136; Grosse (1982) 428–429; Horn (1981) 931–932; Stanley (1981) 1003; Kauzlarich (1981) 1014–1015; Blanpain (1980b) 125–146; Wakkie (1979) 83–85; Blanpain (1986) 257–258; Carr Jr. / Kolkey (1984) 9–10; Blanpain (1982) 918–919; Blanpain (1977) 57–132; Robinson (1983) 125–128.
64 Blanpain (1983) 107.
65 Antwerp Commercial Tribunal (1977) 133–135.
66 Blanpain (1977) 51.
67 Maanen (1979) 330–332. For more information on the Belgian labour system of the late 1970s: Blanpain (1977) 50–51, 85.
68 Cf. Comments on the prevailing Belgian laws and the concept of limited responsibility: Blanpain (1980b) 144; Blanpain (1977) 115.
69 Badger et al. (1977) 138–141.

tee formalised its clarification of the Badger case.[70] It stated that »observance of the [MNE] Guidelines should, in some instances, lead parent companies to assume certain financial obligations of their subsidiaries« and considered these obligations as »good management practice«.[71]

The lessons that can be learnt from this »test case« of the MNE Guidelines[72] are, firstly, that in certain exceptional instances parent companies have to assume financial responsibilities for their subsidiaries even when not obliged by law and, secondly, that the consultation procedures of the Investment Committee can yield positive results by providing effective remedy without any (further) court involvement. The Badger case demonstrates that the MNE Guidelines can morally compel MNEs to act responsibly, even if their responsibilities transcend national legal obligations.[73] In this case, Badger Inc. was only legally liable to the extent of its assets in the USA (limited liability) and not for indemnification of staff members of a subsidiary. Nonetheless, Badger Inc. was morally compelled to accept responsibility for indemnifying the employees of its Belgian subsidiary.[74] This »transnational piercing«, as it is called, *i. e.* piercing the corporate veil that separates the parent company from its subsidiary, was deemed spectacular, since the MNE Guidelines set a lower threshold than prevailing laws for the responsibility of Badger Inc. regarding the indemnification of the staff of its Belgian subsidiary.[75]

2.3.2 The BATCO Case

The MNE Guidelines may play a role in establishing liability on the basis of tort law, which is illustrated by the British-American Tobacco Company (BATCO) case.[76] In the BATCO case,[77] BATCO decided to concentrate the production of cigarettes in its manufacturing facility in Belgium instead of the Netherlands, leading to the collective dismissal of more than 200 employees in the Netherlands. A Dutch trade union, *Christelijke Bond van Werknemers in de Voedings-*, *Agrarische-*, *Recreatie-*, *Genotmiddelen- en Tabakverwerkende Bedrijven*, challenged BATCO's decision before the Dutch courts. The case was brought before the Amsterdam District Court,[78] the Amsterdam Court of Appeal[79] (for an interlocutory injunction), and the Enterprise Division of the Amsterdam Court of Appeal.[80] The Enterprise Division of the Amsterdam Court of Appeal rendered the final ruling. It decided that BATCO's termination of negotiations with the Dutch trade union and works council was premature, in breach of Dutch law and contravened a stipulation of a collective labour agreement agreed to by BATCO.[81] Breaking off consultations with unions and the works coun-

70 Cf. OECD (1977) 4; OECD (1978) Para. 18–22. In these reports, the working group of the Investment Committee stated that the MNE Guidelines may obligate parent companies to assume certain responsibilities complementary to legal obligations, but that responsibilities derived from those guidelines are in no way legal responsibilities.

71 OECD (1979c) Par. 42.

72 TUAC (1977); Eyskens (1977) 97, 106.

73 According to the former Belgian representative to the OECD who was involved in the Badger case, Blanpain, the logic of placing obligations on MNEs that transcend national regulations is self-evident, because if the MNE Guidelines simply repeated national obligations, the former would be useless by themselves. The regulation of the transnational character of MNEs is the very *raison d'être* of the MNE Guidelines according to Blanpain (1980b) 269. Blanpain's view is supported by the architect of the MNE Guidelines, Vogelaar. Vogelaar asserts that the MNE Guidelines are independent of, and complementary to, existing laws and invite MNEs to go further than obligations stipulated by these positive laws. The MNE Guidelines were intended to fill lacunae in (inter)national law, Vogelaar (1980) 135. For a dissenting view, see: Campbell / Rowan (1983) 240.

74 N.T. (1978) 256; Blanpain (1980b) 142–146, 268; OECD (1979) Para. 39–42; Wakkie (1979) 85.

75 Requirements for piercing the corporate veil stipulated by prevailing laws were: (i) the size and stake of Badger Inc. in the share capital of its subsidiary, (ii) to which extent Badger Inc. (in)directly influenced the daily operations of its subsidiary, and (iii) the quality of this influence (*i. e.* whether the parent company can be blamed for unduly negatively influencing its subsidiary's activities). The third requirement was deemed decisive by prevailing laws. Still, the Badger case was decided on the basis of the first two requirements, demonstrating that the third requirement was not decisive for the MNE Guidelines, Maanen (1979) 333–338. Cf. Vandekerckhove (2005) 460–462; Horn (1980) 67–69.

76 Vytopil (2015) 159–160; Pres. Rb. Amsterdam (1978) 165.

77 For an elaboration on this case, see: Blanpain (1980b) 150–173.

78 Amsterdam District Court (1978).

79 Amsterdam Court Of Appeal (1978).

80 Enterprise Division Of The Amsterdam Court Of Appeal (1979).

81 Article 25 Works Councils Act and article 2(7) of the Collective Labour Agreement.

cil was qualified as grave negligence on the side of BATCO and a violation of the principle of good governance. The court concluded that closing one of its manufacturing facilities constituted mismanagement of BATCO.[82]

What makes the BATCO case exceptional is that it is the first case recorded in which the MNE Guidelines were applied in court. At an annual general meeting of shareholders, the chairman of BATCO's UK-based parent company, BATCO Industries, publicly announced that the MNE Guidelines »are very much in line with our own established policies in these matters and we certainly support their efforts to have them widely applied«.[83] The Enterprise Division of the Amsterdam Court of Appeal implicitly bound BATCO to the MNE Guidelines through this unilateral declaration of BATCO Industries' chairman.[84] It ruled that it is not without meaning that BATCO endorsed the MNE Guidelines,[85] which prescribe cooperation with stakeholders during collective lay-offs.[86]

The Dutch courts were reluctant to reach any conclusions on the legal status of the MNE Guidelines[87] or to pass any judgement on the clarifications of the Investment Committee regarding the BATCO case that had been discussed at a Council meeting only a few days earlier.[88] The President of the Amsterdam District Court purportedly declined to address the allegation of the plaintiff that the MNE Guidelines had been violated, presumably because he considered the MNE Guidelines to be voluntary and not binding on companies.[89]

3 The Dormant Period of the NCPs (1980–1999)

3.1 The NCPs Become Legally Binding

3.1.1 The 1984 Review

After the next review in 1984, the 1979 MNE Guidelines maintained their legally non-binding status and remained almost untouched. Just one minor text insertion took place in the chapter on general policies.[90] The revised IGCP Decision of 1979 was replaced by the »Second Revised Decision of the Council on the Guidelines for Multinational Enterprises« (MNE Decision).[91] The 1984 MNE Decision introduced approximately twice as many provisions as the preceding Revised IGCP Decision. The new MNE Decision included ground-breaking provisions on NCPs. Bereft of any formal powers, NCPs started out as »contact points« with a non-binding status in 1979.[92] In 1984, for the first time in history, member states were legally bound to set up NCPs for »promotional activities, handling enquiries and for discussions with the parties concerned on all matters related to the [MNE] Guidelines so that they can contribute to the solution of problems in this

82 Enterprise Division Of The Amsterdam Court Of Appeal (1979).
83 Enterprise Division Of The Amsterdam Court Of Appeal (1979).
84 Boukema (1979) 244; Eyk (1995) 71–72.
85 OECD (1976) Annex I, Employment and Industrial Relations, Par. 6.
86 Enterprise Division Of The Amsterdam Court Of Appeal (1979).
87 In a case before the Dutch Supreme Court a few years later, Attorney General Van Soest concluded in his advisory opinion to the Dutch Supreme Court that the MNE Guidelines do not constitute hard law. Referring to the BATCO case, Van Soest acknowledged that the MNE Guidelines may help establish good governance, Dutch Supreme Court (1984) Advisory Opinion Attorney General Van Soest, Par. 5.
88 The clarifications of the BATCO case included in the 1979 Review Report of the MNE Guidelines were discussed on 13 June 1979. The discussion was preceded by another discussion that had already taken place a year earlier about the BATCO case, OECD (1979) Par. 5; OECD (2001) 23.
89 Reference to the MNE Guidelines was found neither in the Amsterdam District Court's verdict, nor in the plaintiff's allegation. Scholars argue that the plaintiffs did base their allegations on the MNE Guidelines, Pres. Rb. Amsterdam (1978) 164–165; Wakkie (1979) 87.
90 The updated MNE Guidelines of 1984 only inserted »and consumer interests« in paragraph 2 of the general policies chapter, OECD (1984a) Annex I, General Policies, Par. 2.
91 According to the Directorate for Legal Affairs, the IGCP Decision of 1979 was »replaced in May 1984 by the Second Revised Decision of the Council on the Guidelines for Multinational Enterprises, which was replaced by the Decision of the Council on the OECD Guidelines for Multinational Enterprises« (consulted by the author in 2014).
92 OECD (1979) Par. 79.

connection«.[93] From now on, member states could be held legally accountable by other member states for setting up an NCP.[94] It was agreed that, as a general procedure, NCPs were expected to initiate discussions on a national level, before cooperating with NCPs of other countries.[95] Essentially, the MNE Decision laid the groundwork for the development of the NCPs.

By including the NCPs in the 1984 MNE Decision, setting up an NCP became legally binding. The OECD Convention stipulates that the Council[96] can take decisions that bind all member states.[97] Since the MNE Decision was taken by the Council in accordance with the OECD Convention, its contents became binding on member states. The imperative nature of the 1984 MNE Decision is also reflected in its first paragraph, stating that »member governments *shall* set up National Contact Points«.[98]

3.2 Clarifications of the Investment Committee and Opinions of the NCPs

3.2.1 The Philips III Case

What makes the Philips III case extraordinary is that it is the first case that was actively dealt with by an NCP. Just a year after the Investment Committee *recommended* the instalment of NCPs by states, thus before installing NCPs became mandatory, the Finnish NCP had already given its first opinion. In 1980, the case was submitted by the TUAC at the national level (*i. e.* the Finnish NCP) and at the international level (*i. e.* the Investment Committee). The case involved the closure of a subsidiary of Philips in Finland, Oy Philips Ab. Philips allegedly had not properly informed its employees or the local management of Oy Philips Ab. Employees of Oy Philips Ab were notified that production would be terminated and, during the same meeting, which lasted less than two hours, employees had to sign minutes that stated that negotiations had taken place.[99]

The Finnish NCP acknowledged that the employees had been confronted with a fait accompli. According to the Finnish NCP, notice of the plant closure was given well in advance, and steps were taken to mitigate adverse effects, but the decision had been taken before any notification. Because the decision regarding the closure had already taken place before any notification, the Finnish NCP argued that negotiations with employees were effectively superfluous. In its opinion, the Finnish NCP criticised the Dutch headquarters of Philips with respect to their communications towards employees and the local management. The Finnish NCP concluded that it »is not convinced that the parent company has fulfilled the recommendation set up by the OECD Guidelines«.[100] In stark contrast to the opinion of the Finnish NCP, the Investment Committee decided that no clarification of the MNE Guidelines was necessary in this case.[101]

Another reason why the Phillips III case is extraordinary is that, for the first time in NCP history, the fundamental question arose as to whether NCPs could reach a conclusion on the conduct of an individual enterprise. Reaching conclusions on the conduct of individual enterprises is now succinctly termed as »making determinations« and is still subject to intense debate.[102] In the Phillips III case, the Finnish NCP reached a conclusion on the conduct of Phillips, hence being the first NCP to make a determination.

3.3 The 1991 Revision

The 1990s were characterised by an increased role of (information) technology, unprecedented globalisation, the prospect of an ageing population[103] and an upsurge of foreign investments.[104] Corporate supply chains became a new

93 OECD (1984b) Par. 1.
94 Van Eyk argues that the obligations are between adhering states and cannot be invoked by inhabitants of an adhering state, Eyk (1995) 162. Cf. Robinson (2014) 77–79.
95 OECD (1984b) Par. 2.
96 Article 5 OECD Convention in conjunction with Article 7 OECD Convention.
97 Article 5 OECD Convention. See for exceptions Article 6 OECD Convention.
98 OECD (1984b) Par. 1.
99 TUAC (1980) 136–137.
100 Finnish Contact Group On Multinational Enterprises (1980) 144–146.
101 Blanpain (1983) 147.
102 Cf. OECD Watch (2015) 44.
103 Blanpain (1998) 337–344.
104 Canner (1998) 658–660; Murray (1998) 4–6. Cf. Salzman (1999) 771; OECD (1997) 4. For developments in the field of international investment before the 1991 review, see OECD (1991b) Chapter I, Para. 1–43.

focal point,[105] and many services were being outsourced.[106] When the OECD embarked on the third update of the MNE Guidelines in 1991,[107] a number of these developments were already incorporated. Whereas the 1984 review was dominated by the »stability argument«, meaning that only a few minor changes were permitted in order to maintain the stability of the MNE Guidelines,[108] the 1991 review slightly deviated from this view and incorporated some changes. Most salient was the introduction of a completely new chapter on the environment.[109]

3.4 NCPs Out of the Limelight

An emerging issue already signalled in the early 1980s and deemed »gigantic« by the former diplomat and representative of the Belgian government Roger Blanpain was the »promotional problem«. Efforts to promote the NCPs and the MNE Guidelines needed to be augmented, or else obscurity could pose a serious threat to their existence.[110] This promotional problem was compounded by the infrequent use of the NCPs during the 1990s.[111] Debates and disputes on the application of the MNE Guidelines, a necessary prerequisite to keep the guidelines active,[112] rarely took place at the NCP level.[113] The interest of, especially, the trade unions in NCPs, the prominence of the MNE Guidelines and the clarification procedures of the Investment Committee declined during the 1990s. In the 1980s, a flurry of cases had been presented to the Investment Committee by trade unions; some accounts estimate more than 40, whilst only four cases were brought before the Investment Committee a decade later.[114] The voluntary character of the MNE Guidelines probably played a role in trade unions' declining interests.[115] In 1999, the TUAC concluded that the MNE Guidelines were »no longer used and little known«.[116] The MNE Guidelines »slumped into disuse«.[117]

4 The Revival of NCPs and the MNE Guidelines (2000–2011)

4.1 The 2000 Revolution

4.1.1 Contents and Scope

In multiple ways, the 2000 update of the MNE Guidelines can be considered revolutionary.[118] In 2000, the world was a different place, marked by a growing service and knowledge economy as well as an increase of small- and medium-sized enterprises in international markets.[119] A significant overhaul of the MNE Guidelines[120] was necessary to match the changing global environment and to maintain their relevance and effectiveness.[121]

The 2000 update of the MNE Guidelines brought about far-reaching changes.[122] The entire preface of the guidelines was rearranged, modified and divided into a preface and a chapter on »concepts and principles«, now mentioning NCPs

105 Tapiola (1999) 3.
106 Blanpain (1998) 342–343.
107 The 1991 review followed a year after negotiations on the review had failed in 1990. In 1990, the review failed mainly because of disagreements with respect to national treatment, Eyk (1995) 129–130.
108 OECD (1997) 4; Blanpain (1985) 6. Cf. Campbell / Rowan (1983) 241.
109 Other changes that were incorporated following the 1991 review: (i) a new section in the annex to the MNE Declaration on conflicting requirements and (ii) the specification of »geographical area« in the disclosure of information section, OECD (1991b) 107 (footnote 1), 111, 117–120.
110 Blanpain (1983) 245.
111 Zia-Zarifi et al. (1999) 362.
112 Vogelaar (1980) 137.
113 Zia-Zarifi et al. (1999) 362.
114 No indication is given in the literature that this decline of case submissions was compensated by an increase of case submissions to the NCPs.
115 Eyk (1995) 186, 232.
116 OECD (1999) Par. 6.
117 Murray (2001) 255.
118 Amendments were also made to the MNE declaration, in particular to the preamble. A subtle change was that the declaration now spoke of »adhering« and not member countries, signifying the endorsement of the MNE Declaration by non-OECD member states. See: OECD (2000b) Appendix 1.
119 OECD (2000b) Par. 1.
120 OECD (2000) Para. 5 and 6.
121 Scholars have defined four »pillars« for successful private regulation. The MNE Guidelines, as a form of private regulation, must take the following four pillars into account: (i) quality, (ii) enforcement, (iii) legitimacy and (iv) effectiveness, Lambooy (2010) 250.
122 Murphy (2005) 24–25.

explicitly.[123] A new stipulation on the respect of human rights by MNEs[124] was presented as well as provisions on sustainable development;[125] local capacity building;[126] training opportunities;[127] whistle-blower protection;[128] corporate governance;[129] child labour, forced labour and compulsory labour issues;[130] occupational health and safety;[131] environmental performance;[132] disclosure and transparency;[133] and new chapters on consumer protection[134] and bribery.[135] This non-exhaustive list of amendments illustrates that the once-cherished idea of leaving the MNE Guidelines unaltered in order to maintain their stability, which had dominated the previous revisions, was abruptly set aside in 2000.[136]

The scope of the 2000 MNE Guidelines was broadened, calling upon MNEs to encourage business partners »to apply principles of corporate conduct compatible with the Guidelines«.[137] This extension of the MNE Guidelines was confined to business partners that have an investment connection with the company. This requirement was better known as the »investment nexus«.[138] The investment nexus seriously challenged the effectiveness of the NCPs.[139] OECD Watch stated that, throughout the next ten years, the investment nexus would be the primary ground for rejecting cases by the NCPs, accounting for approximately 64 per cent of all cases rejected.[140] Be this as it may, the new amendment regarding business partners was a first stepping-stone towards broader inclusion of suppliers and subcontractors and consequently widened the sphere of influence of NCPs.

4.1.2 NCPs

NCPs were also subject to the 2000 review. Annual meetings between NCPs were to become a new custom,[141] NCPs were obliged by the Council to write annual reports to the Investment Committee,[142] and the NCPs acquired clearer responsibilities that were all laid down in the 2000 MNE Decision.[143] In future, the NCPs' role was to further the effectiveness of the MNE Guidelines and, in order to ensure commensurability with other NCPs,[144] each NCP was to act in accordance

123 Cf. OECD (2000) Appendix 2, Preface and Chapter I with OECD (1991b) Annex I, Preface MNE Guidelines. It is not clear why NCPs were also included in the MNE Guidelines, since they were sufficiently covered by the MNE Decision.

124 Paragraph 2 of Chapter II. OECD (2000b) Par. 6 and Appendix 2. By introducing new human-rights provisions, the OECD responded to the request to include more precepts regarding MNE behaviour for instance regarding basic human rights, Getz (1990) 575; Frederick (1991) 168–169.

125 Paragraph 1 of Chapter II. Cf. Preface Chapter V. OECD (2000) Appendix 2.

126 Paragraph 3 of Chapter II. OECD (2000) Appendix 2.

127 Paragraph 4 of Chapter II. OECD (2000) Appendix 2.

128 Paragraph 9 of Chapter II. OECD (2000) Appendix 2.

129 Paragraph 6 of Chapter II. OECD (2000) Appendix 2.

130 Paragraph 1b and 1c of Chapter IV. OECD (2000) Par. 6 and Appendix 2.

131 Paragraph 4b of Chapter IV. OECD (2000) Appendix 2.

132 Chapter V. OECD (2000) Par. 6 and Appendix 2. In 2005, the OECD published a guide with tools and approaches for MNEs with respect to the environmental chapter of the guidelines. The OECD environmental guide explicates that the environmental chapter of the MNE Guidelines builds upon various international environmental declarations and conventions, such as the Rio Declaration on Environment and Development and the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, OECD (2005). The environmental chapter also has a strong relationship to other international instruments, such as the Johannesburg Plan of Implementation, Agenda 21, the Convention on Biological Diversity, the Espoo Convention on Environmental Impact Assessment in a Trans-boundary Context and the Declaration of the United Nations Conference on the Human Environment, Gordon/Mitidieri (2005) 7–8.

133 Chapter III. OECD (2000) Par. 6 and Appendix 2.

134 Chapter VII. OECD (2000) Par. 6 and Appendix 2.

135 Chapter VI. OECD (2000) Par. 6 and Appendix 2.

136 The stability argument was often propagated by the BIAC. The BIAC agreed to accept the »imperfect« revision of the MNE Guidelines, because rejection would have been more damaging. In the BIAC's view, rejection could have led to anti-business publicity and to »real dangers that individual governments or the UN would decide to develop codes of their own«, Batco International (2000) Par. 5.

137 Paragraph 10 of Chapter II. OECD (2000) Appendix 2.

138 According to OECD Watch, the »investment nexus refers to an existing investment connection between the MNE and the company that allegedly did not observe the MNE Guidelines, such as a supplier or subsidiary«, OECD Watch (2010) 11.

139 Ruggie (2010) Par. 99–100.

140 OECD Watch (2010) 11.

141 OECD (2000) Annex 3, Par. 3.

142 OECD (2000) Annex 3, Annex to the Council Decision, Section D.

143 OECD (2000) Para. 7, 8 and 11.

144 In OECD jargon: »functional equivalence«.

with the criteria of visibility, accessibility, transparency and accountability.[145] Furthermore, the terms »specific instance« became fashionable and were henceforth used to specify the (mediation or conciliation) procedure used to resolve any disputes pertaining to the implementation of the MNE Guidelines. With the introduction of specific instances, the role of the NCPs in dealing with individual cases was further formalised.[146]

4.2 The Post-Revolution Period

4.2.1 Reception of the Revised MNE Guidelines

After the 2000 revolution, the MNE Guidelines and their implementation mechanism blossomed. A ground-swell of cases was brought for consideration before the NCPs. By 2004, 64 specific instances were filed in 21 different countries, and only one specific instance was forwarded to the Investment Committee. In contrast to the period before the 2000 review, parties initiating a specific instance now found starting a procedure »worth the expense«, and incidentally the MNE Guidelines were lauded as being »extremely successful«.[147] Johnston, former Secretary-General of the OECD, emphasised the naming and shaming possibilities of the MNE Guidelines and the NCPs, dubbed »the court of public opinion«. Via shareholder meetings or consumer action the »court of public opinion« could wield great power over parties that did not respect the MNE Guidelines. Without undermining the role of the court of public opinion, Johnston, however, conceded that »it would be naïve to think that a meaningful system of global norms could exist without binding regulation and formal deterrence«.[148]

4.3 The 2011 Review

4.3.1 Contents and Scope

By 2011, the Internet economy had expanded, the service and knowledge-intensive sectors were playing an increasingly important role in international markets, and MNEs domiciled in developing countries emerged as key international investors.[149] The time had come to update the MNE Guidelines once again in order to keep pace with the changing world.[150] During this latest update, the MNE Guidelines and MNE Decision reinforced the position of the NCPs, presented a new chapter and incorporated a number of minute but sometimes substantial changes.[151]

One of the most significant amendments of the MNE Guidelines was the introduction of a human-rights chapter and the strengthening of human-rights provisions throughout the guidelines. Risk-based due diligence on matters covered by the MNE Guidelines in order to address potential adverse impacts was another novelty.[152] The scope of the risk-based due diligence was not confined to the activities of the MNE itself, but was extended to its supply chain.[153] Finally, by incorporating a new provision in the MNE Guidelines, the investment-nexus problem was overcome.[154] In the 2000 edition of the MNE Guidelines, MNEs were supposed to merely *encourage* business partners to act responsibly in compliance with them. Since the 2011 revision, MNEs are recommended to *prevent and mitigate* potential adverse impacts that are directly linked to their operations, products and services by their business relationships.[155] It was this new stipulation that laid a direct link between the operations, products and services of a company and its business relationships, for which an MNE is now supposed to assume responsibility. Ever since the latest update of the MNE Guidelines, MNEs

145 OECD (2000) Annex 3, Annex to the Council Decision, Preface.
146 OECD (2000) Annex 3, Annex to the Council Decision, Section C.
147 Salzman (2005) 215.
148 Johnston (2004) 183, 187, 188.
149 OECD (2011e) Preface, Para. 2–3.
150 Cf. OECD (2011e) Chapter II, Section B, Par. 1.
151 Amendments were also made to the chapters on disclosure, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition and taxation.
152 For an elaboration on the due-diligence requirements of the MNE Guidelines and the OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, see: Kryczka et al. (2012) 126–127.
153 Ruggie/Nelson (2015) 5–6.
154 Melgar et al. (2011) 29–30.
155 The investment nexus decision was based on Recommendation II.10 (now: Recommendation II.13). Since the updated version of the MNE Guidelines came into force Recommendation II.13 became a fall-back clause. Hitherto, Recommendation II.12 is the chief supply chain clause. OECD (2011e) Chapter II, Para. 12–13.

must not only assume responsibility for their business partners, but also for other business relations as long as there is an »operational link«.

4.3.2 NCPs

The procedural guidance for the NCPs was also updated in 2011. The overarching purpose of *governments* when setting up the NCPs was and remains to further the effectiveness of the MNE Guidelines.[156] Within the boundaries of this overarching purpose, the Council bolstered the dispute-resolution mechanism of the MNE Guidelines by introducing a number of guiding principles.[157] When resolving issues through specific instances, NCPs will have to take into account the following principles: impartiality, predictability, equitability and compatibility with the principles and standards of the MNE Guidelines.[158] The four principles aim to ensure that issues are resolved impartially, that NCPs provide »clear and publicly available information on their role«, including timeframes of the specific instance procedure, that parties can engage in the specific instance procedure on an equal footing without one party dominating it, and that NCPs act within the ambit of the MNE Guidelines.[159]

4.4 Specific Instances

4.4.1 The PSA Peugeot Citroen Case

Exemplary for how decisions of NCPs can be interwoven with those of the courts is the PSA Peugeot Citroen case. The issuers in this specific instance, Amicus and T&G, referred to as the »unions« by the UK NCP, alleged that PSA Peugeot Citroen failed to engage in meaningful consultations with the unions when they closed down a manufacturing factory in the UK. The NCP concluded that PSA Peugeot Citroen had given reasonable notice before the factory was closed, but »failed to fulfil all the requirements under the [MNE] Guidelines«.[160]PSA Peugeot Citroen should have consulted the unions when the closure decision was still at a »formative stage« and was supposed to have furnished the unions with sufficient information in order to enable them to engage in the consultations appropriately.[161]

In order to interpret the MNE Guidelines' recommendation on the consultation of, and co-operation with, workers and worker representatives by an employer,[162] the UK NCP applied UK case law about fair consultations. UK case law established a number of elements of fair consultations and defined it as »giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects«.[163] Based on this definition and its elements, the UK NCP applied UK case law in its own decision and decided that PSA Peugeot Citroen had failed to meet the requirements on fair consultations.[164] Literally copying from UK case law, the UK NCP concluded its decision by recommending the MNE meet the legally defined requirements on fair consultations.[165]

5 On the Road to Hard Law (2011 and Beyond)

5.1 The Road to Hard Law

5.1.1 The Hybrid Nature of the MNE Guidelines and Their Relation to Domestic Laws

In the preface of the guidelines, it is stressed that »matters covered by the [MNE] Guidelines may also be the subject of national law and international commitments«.[166] This provision points to the professedly voluntary character of the MNE Guidelines that may, in fact, be somewhat hybrid,

156 OECD (2011b) Section I, Par. 1.
157 More substantial amendments were made in the latest MNE Decision covering, *inter alia*, the proactive agenda, institutional arrangements and the introduction of OECD Watch.
158 OECD (2011b) Procedural Guidance, Section C, Preface.
159 OECD (2011f) Par. 22.
160 UK NCP (2008) 1.
161 UK NCP (2008) Para. 60–62.
162 According to the MNE Guidelines, employers should »promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern«, OECD (2011a) 36.
163 UK Administrative Court (1994) Par. 25.
164 UK NCP (2008) Par. 63.
165 UK NCP (2008) Par. 64.
166 OECD (2011e) Preface, Par. 1.

since they reflect both soft law and hard law.[167] In other words, the provisions of the MNE Guidelines are considered as soft law, but these soft-law provisions sometimes also reflect matters that are covered by (inter)national rules of hard law.[168] The latest update clearly demarcates these boundaries between the MNE Guidelines as soft law on the one hand and hard law on the other. The MNE Guidelines reiterate that »some matters covered by the [MNE] Guidelines may also be regulated by national law or international commitments«[169] and state that, in case national legislation already exists, »the [MNE] Guidelines are not a substitute for nor should they be considered to override domestic law and regulation«.[170] Whenever domestic laws and the MNE Guidelines conflict with each other, the MNE Guidelines stipulate that »enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law«.[171] In other words, MNEs are expected to respect domestic laws, but at the same time they must do their best to respect the MNE Guidelines – even in cases of conflict between domestic laws and the guidelines' provisions. Adhering governments are encouraged to aid MNEs confronted with conflicting requirements by cooperating »in good faith with a view to resolving problems that may arise«.[172]

5.1.2 The MNE Guidelines and Legislation on Corporate Disclosure

In some instances, references to the MNE Guidelines are included in legislation about corporate disclosure.[173] An example is Directive 2014/95/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups (Directive on non-financial information).[174] The Directive on non-financial information stipulates that »large undertakings which are public-interest entities exceeding […] 500 employees […] shall include in the management report a non-financial statement containing information […] relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters«.[175] In addition, large enterprises are obliged to disclose their diversity policy in relation to administrative, management and supervisory bodies in their corporate governance statement.[176] When preparing their non-financial statement, large enterprises can make use of various international frameworks. The Directive on non-financial information specifically mentions the MNE Guidelines as one of the frameworks that can be used.[177]

5.1.3 The MNE Guidelines and Due-Diligence Guidance in Legislation

The due-diligence provisions of the MNE Guidelines (see section 4.3.1) have inspired multiple sectoral due-diligence initiatives, as in the agricultural sector,[178] apparel and footwear industries[179] and the financial sector.[180] The due-diligence guidance provided for companies operating in supply chains of conflict minerals, the »OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas« (OECD due-diligence guidance), is somewhat older.[181] The OECD due-diligence guidance is drafted in such a manner that it builds on and is consistent with the MNE Guidelines.[182] Adhering states to the MNE Declaration were recommended by the Council to support, dissem-

167 Cf. Calliess / Renner (2009) 276.
168 For example, some matters covered by the MNE Guidelines can also be found in legally binding ILO conventions.
169 OECD (2011e) Chapter I, Par. 1.
170 OECD (2011e) Chapter I, Par. 2.
171 OECD (2011e) Chapter I, Par. 2.
172 OECD (2011a) 18; Melgar et al. (2011) 33–34.
173 See for related legislative trends indicating a transition from soft law to hard law: Nieuwenkamp (2015).
174 European Parliament / Council (2014).
175 Article 1 Directive on non-financial information.
176 Par. 19 Chapeau and Article 1 Directive on non-financial information.
177 Par. 9 Chapeau Directive on non-financial information.
178 OECD / FAO (2016) Foreword. Cf. OECD (2014); OECD (2015); Love (2015).
179 OECD (2017f).
180 OECD (2017g).
181 Arimatsu / Mistry (2012) 14–15, 20–22.
182 OECD (2016) 16.

inate and actively promote observance of the OECD due-diligence guidance.[183]

The OECD due-diligence guidance may be effectively transformed into hard law, since the Council of the European Union's approval of the European Commission's proposal for a regulation for »setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas« (EU conflict minerals regulation).[184] What is most striking, without going into the details, is that the requirements for responsible importers set forth by the proposed EU conflict-minerals regulation are frequently based on the OECD due-diligence guidance. By requiring responsible importers to establish supply-chain policy standards and risk-management systems consistent with the OECD due-diligence guidance, among other requirements, the EU conflict-minerals regulation confers a hybrid status on the OECD due-diligence guidance and indirectly on the due-diligence provisions of the MNE Guidelines on which the OECD due-diligence guidance is based.[185] Still, the MNE Guidelines and OECD due-diligence guidance remain legally non-binding, but the references to them in hard law draw them more into the legal realm.

5.2 The Road Ahead: The Customary Law Conundrum

5.2.1 The MNE Guidelines as Customary Law

An attempt has been made to bestow legal power on the MNE Guidelines through the cultivation of customary law. The classic theory of customary law was developed by the International Court of Justice (ICJ). In the seminal »North Sea Continental Shelf cases«, the ICJ articulated two imperative criteria[186] to be fulfilled:[187] (i) the existence of an »extensive and virtually uniform« general practice amongst states and (ii) states feeling legally compelled to act in accordance with an obligatory rule of customary law (*opinio juris*).[188]

In the first few years after the promulgation of the MNE Declaration, scholars opined that the MNE Guidelines could impossibly create international customary law instantly, but they might transform into customary law over time.[189] It was argued that, when applied frequently, the provisions of the MNE Guidelines could »pass into the general corpus of customary law« and could even apply to MNEs that had never accepted them.[190] This prophecy of a gradual evolution of customary law was maintained through the 1990s and into the new millennium.[191] By the mid-1980s, the MNE Guidelines were already considered a general practice, given the length of time that they had been operative,[192] but they did not obtain the status of customary law and were instead expected to remain »in the limbo of not quite binding« for years to come.[193]

The evolution of the MNE Guidelines into customary law has both been supported as well as opposed. Supporters of legally binding MNE Guidelines advance the view that the MNE Guidelines meet the requirements of customary law, because national governments enact legislation (general practice) and national courts decide (*opinio juris*) on matters they cover.[194] NCPs may play a critical role in creating international customary law as »the royal courts of this developing common law«.[195] Specific instances and their end products, NCP decisions, can develop a general practice and can serve as pathfinders for future, binding treaty rules, if necessary.[196] The follow-up procedures of the Investment Committee represent state practice by definition due to the inter-state discourse that takes place before a clarification, and it may also lead to the development of customary law.[197] Some supporters are more reticent, however. They

183 OECD (2012b).
184 European Commission (2014). See for the status of the regulation: http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52014SC0052.
185 Article 4(b) and Article 5(1)(b)(ii) EU due diligence regulation.
186 Article 38 (1)(b) Statute of the ICJ.
187 ICJ (1969) Para. 74, 78.
188 Shaw (2014) 51–63; Nollkaemper (2009) 180–190; Eyk (1995) 55–56.
189 Horn (1981) 936–937; Plaine (1977) 344; cf. Kohona (1983) 214; Blanpain (1980b) 268; Vogelaar (1980) 135–136.
190 Vogelaar (1977) 8; Schwamm (1977) 38.
191 Leary (1997) 260–261; Bijsterveld / Genugten (1997) 503; Queinnec (2007) 23–29.
192 Clarke (1987) 238.
193 Reynolds (1985) 352.
194 Queinnec (2007) 23–29.
195 Backer (2009) 32.
196 Backer (2009) 32, 42.
197 Baade (1980) 13, 28.

argue that soft-law instruments, such as the MNE Guidelines, may influence state practice and »*may* result in the creation of an international customary law rule«.[198]

Opponents purport that these types of claims of soft-law principles transforming into customary law could be problematic and have to be treated with caution. Some of them conclude that the MNE Guidelines have not yet developed into customary law.[199] In line with the reservations of Baade,[200] one of the first scholars to unveil the hidden difficulties underlying the development of customary law, opponents argue that the presence of state practice and *opinio juris* is not easily determined. The mere facts that the MNE Guidelines stipulate that they are voluntary, or that they were drafted as guidelines and not as articles to a legal convention, can indicate that no *opinio juris* and thus no rule of customary law has been established.[201] A further obstacle to accepting the MNE Guidelines as customary law is the dominant view that MNEs cannot be considered as subjects of international law. The dominant view was,[202] and still is, »state-centric«.[203] At best, MNEs could be considered as limited subjects of international law, for instance when such legal personality is conferred on MNEs in an international treaty.[204]

Based on the aforementioned views of proponents and opponents on the development of the MNE Guidelines as customary law, no definitive answer can be given as to whether they have passed into the general corpus of customary law. No indication was found that these opposing views will reconcile in the near future, and no court decision was found that put an end to the discussion by establishing that the MNE Guidelines have transformed into customary law. In other words, the customary-law conundrum remains unresolved. Taking into account the voluntary nature of the MNE Guidelines and the state-centric view of international law, it is most likely that they cannot yet be considered customary law and that this will not change in the near future.

6 Conclusions

The preceding sections have elucidated how governments became legally obliged to set up NCPs. One can conclude that, from a legal perspective, 1984 was the most important year for NCPs. Ever since 1984, there have been no legality issues pertaining to NCPs, because NCPs received their legal status in the 1984 MNE Decision. From this moment onwards, adhering states have been legally obliged to set up NCPs in their country. Ensuing revisions of the 1984 MNE Decision have maintained this legal status of NCPs and further strengthened its procedures by providing procedural guidance. Changes made to the MNE Guidelines have broadened the scope of NCPs, allowing NCPs to deal with new themes such as the environment, human rights and consumer interests. Since the investment nexus was discarded, the scope of NCPs has been further broadened, as NCPs could seize opportunities to deal with cases deeper in the supply chains of MNEs.

While reaching a conclusion on the legal nature of NCPs is not very difficult because of their incorporation in the legally binding MNE Decision, reaching any tentative conclusion on the legal nature of the MNE Guidelines is very difficult indeed. The MNE Guidelines have always been kept in the limbo of »not quite binding«, and transformation of the MNE Guidelines into customary law seems unlikely for now. Proponents and opponents of this transformation have been unable to reconcile their views, and no court has decided this matter yet, leading to the conclusion that the customary-law conundrum is unresolved for now.

In conclusion, the MNE Guidelines contain voluntary recommendations and are not part of domestic or international law. As illustrated in the BATCO and Badger cases, the MNE Guidelines have fulfilled an auxiliary function when applied before a court of law and have also imposed obligations that transcend national laws. Matters covered by (inter)national rules and that are considered hard law are sometimes reflected in the MNE Guidelines, conferring a hybrid status on

198 Černič (2008) 82.
199 Schliemann (2012) 55.
200 Baade (1980) 6–15.
201 Chinkin (1989) 856–858.
202 Eyk (1995) 141.
203 Baxi (2016) 24–25; Nollkaemper (2009) 55–57. According to Shaw the question about the international legal personality of MNEs remains unanswered, Shaw (2014) 181–183.
204 Chetail (2014) 111–112.

them. This hybrid status is exactly where the MNE Guidelines stand now: the guidelines do not constitute legal rules, but reflect matters that are covered by legal rules. On the one hand, some guidelines may be mere expressions of morality, which may impose moral obligations. On the other hand, developments, such as the incorporation of (parts of), or references to, the MNE Guidelines in EU Directive 2014/95 and the proposed EU conflict-minerals regulation indicate that the MNE Guidelines are possibly on the road to becoming hard law. However, multinormativity remains prevalent, and there may still be a long road ahead before they attain their legal status.

■

List of abbreviations

BATCO – British-American Tobacco Company
BIAC – Business and Industry Advisory Committee to the OECD
Directive on non-financial information – Directive 2014/95/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups
ICJ – International Court of Justice
IGCP Decision – Decision on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises
MNE – multinational enterprise
MNE Decision – Second Revised Decision of the Council on the Guidelines for Multinational Enterprises of 1984 and its revisions in 1991, 2000 and 2011
MNE Declaration – OECD Declaration on International Investment and Multinational Enterprises (1976, 1979, 1991, 2000, 2011)
MNE Guidelines – OECD Guidelines for Multinational Enterprises (1976, 1979, 1991, 2000, 2011)
NCP – National Contact Point
NGO – non-governmental organisation
OECD – Organisation for Economic Co-operation and Development
EU conflict minerals regulation – European Commission's proposal for a regulation for setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas
OECD Convention – Convention on the Organisation for Economic Co-operation and Development of 1960
OECD due diligence guidance – OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
TUAC – Trade Union Advisory Committee to the OECD
WPRBC – Working Party on Responsible Business Conduct

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