
RESEARCH ARTICLE

International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime

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The OECD Guidelines for Multinational Enterprises were viewed at their genesis as political commitments not legally binding on states and only voluntary for corporations. Due to the OECD Council Decision on the Guidelines for Multinational Enterprises in 2000/2011, however, OECD Member States are compelled to implement this regime by the establishment and operation of a National Contact Point (NCP) as a state-based, non-judicial, dispute resolution mechanism to handle complaints concerning corporations operating from or within their respective jurisdictions.

This paper does not analyse weaknesses in the often-troubled NCP system nor does it propose reforms. Rather, it examines the current system from the *legal* perspective of OECD Member States and explores the relatively ignored extent of their obligations under it. This paper posits that on account of the Council Decision, treaty-derived, *international* obligations are in fact imposed on OECD Member States under the NCP system and that NCP maladministration can lead to *state* responsibility at international law. In any event, however, it seems clear that there does not exist any review mechanism—domestically or internationally—capable of attributing internationally wrongful conduct to an OECD Member State on account of its NCP.

Keywords: OECD; Guidelines for Multinational Enterprises; National Contact Point; international obligations; state responsibility; judicial review

I. Introduction

The Organisation for Economic Co-operation and Development (OECD) has undoubtedly emerged as a major player in economic-related global governance. Today, 34 states are active OECD Member States, with several more currently negotiating accession or voluntarily adhering to its direction.¹ One particular area in which the OECD has been viewed as a visionary organisation has been the promotion of corporate social responsibility (CSR) and corporate governance. The OECD considers CSR to be 'the search for an effective 'fit' between businesses and the societies in which they operate.'² In what could be considered the first firm, international step towards locating this 'fit', the OECD proved instrumental in the CSR movement through its 1976 *Declaration on International Investment and Multinational Enterprises* (Declaration),³ which incorporated an Annex containing *Guidelines for Multinational Enterprises* (MNE Guidelines).⁴ The OECD has built upon this foundation to become a leader in promoting CSR.

¹ OECD, 'Members and partners' (OECD) <<http://www.oecd.org/about/membersandpartners/>> The current OECD Member States are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States of America. The OECD also works with, for example, Russia, Brazil, India, Indonesia, Jordan, Costa Rica, and South Africa on various initiatives.

² OECD, 'What is corporate social responsibility?' (OECD) <<http://www.oecd.org/corporate/guidelinesformultinationalenterprises/corporateresponsibilityfrequentlyaskedquestions.htm>>.

³ OECD, 'Declaration on International Investment and Multinational Enterprises C(76)99/FINAL (1976)' <<http://webnet.oecd.org/OECDACTS/Instruments/ShowInstrumentView.aspx?InstrumentID=241&InstrumentPID=270&Lang=en&Book=>>> (Declaration).

⁴ OECD, 'OECD Guidelines for Multinational Enterprises, 2011 Edition' (2011), <<http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>> (MNE Guidelines).

At their genesis, the MNE Guidelines were viewed as political commitments not legally binding on states and certainly only voluntary for corporations operating from or within these states.⁵ Today, however, the relationship between OECD Member States and the MNE Guidelines regime has arguably been fundamentally altered, with perhaps the possible implications of such alterations having gone unnoticed or ignored. Although once viewed as non-binding on states, the implementation of the MNE Guidelines regime can now generally be viewed as binding on all OECD Member States by virtue of the OECD Council's *Decision of the Council on the OECD Guidelines for Multinational Enterprises* (Council Decision).⁶ This is true despite the fact that the actual MNE Guidelines still remain, at least *prima facie*, voluntary for the corporations that they seek to govern.⁷ The core obligation imposed upon OECD Member States by this contemporary MNE Guidelines regime is the establishment and operation of a National Contact Point (NCP) as a dispute resolution mechanism for the handling of complaints submitted to it concerning corporations operating from or within their respective jurisdictions.⁸

Yet, important questions remain unanswered, such as: What exactly has been imposed upon OECD Member States by the Council Decision?; To what extent is it as a state obligated to act accordingly with its NCP and ensure its competence?; What does proper NCP action even entail?; and, Does the state bear legal responsibility if its NCP fails to act accordingly, and if so, does this lead to international responsibility?

The purpose of this paper, therefore, is to examine the contemporary MNE Guidelines and NCP regime from a *state* perspective, that is, OECD Member States. Accordingly, the focus is not so much on the substance of the MNE Guidelines, nor is it on how to improve the NCP system. Rather, it is on the requisite implementation of the MNE Guidelines by OECD Member States and the implications thereof for Member States. In the current frenzy to rein in corporations under the various CSR initiatives, it is overlooked that without the support of states, such efforts are ultimately doomed. States remain the primary subjects of public international law, despite necessary efforts to extend this net to cover other actors, including corporations. It is states that endorse aspirational principles attempting to control the relationship between, *inter alia*, businesses and human rights. It is states that agree to establish and implement corporate monitoring mechanisms. Perhaps, it is states that ought to remain ultimately accountable should such efforts fail. Consequently, states, and more importantly what the international community asks of them, cannot be ignored in this process.

At all times, a state maintains a sovereign right to be aware of its obligations arising under international law, and a failure to inform states of such obligations is surely improper.⁹ With this in mind, the current *per se* binding and presumably 'hard law' character of the MNE Guidelines implementation regime in relation to OECD Member States, although within a traditional CSR context, is therefore somewhat unique. As the OECD states, 'The MNE Guidelines are the only existing multilaterally agreed corporate responsibility instrument that adhering governments have committed to promoting in a global context.'¹⁰ Indeed, the MNE Guidelines regime is the only international CSR regime with a built-in, state-based governance mechanism. Yet these obligations are often simply treated as binding without actually examining the exact nature of the MNE Guidelines and the function of their implementation regime at contemporary international law, as well as the coinciding nature of the obligations imposed upon states by this regime.¹¹ This paper will touch upon this issue that has been neglected in the academic discourse, but it will also examine further why it matters—for without such an examination, the relatively ignored degree of potential *state* responsibility, if any, under the contemporary MNE Guidelines regime, can never be calculated.

⁵ See Nicola Bonucci, 'The legal status of an OECD act and the procedure for its adoption' (OECD Directorate for Legal Affairs, 2004) 2, <<http://www.oecd.org/education/highereducationandadultlearning/31691605.pdf>> (Legal status of an OECD act).

⁶ See OECD, 'Decision of the Council on the OECD Guidelines for Multinational Enterprises', (OECD Decision C(2000)96/FINAL as amended by OECD Decision C/MIN(2011)11/FINAL, 27 June 2000) I(1)-(4) <<http://webnet.oecd.org/OECDACTS/Instruments/ShowInstrumentView.aspx?InstrumentID=233&InstrumentPID=271&Lang=en&Book>> (Decision).

⁷ See MNE Guidelines (n 4) 13.

⁸ See Decision (n 6) arts I(1)-(4).

⁹ See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) UNTS XVI, art 2 (UN Charter).

¹⁰ OECD, 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (2013) 2 <http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf> (Responsible Business Conduct Matters).

¹¹ See eg Ivan Cisar 'OECD Multinational Enterprises Guidelines: Moving from Voluntary Code to the 'Hard' Obligations' (Paper delivered at the 5th International Conference for PhD Students and Young Scholars COFOLA, Faculty of Law, Masaryk University, Brno, Czech Republic, 29 April- 1 May 2011) 2, <<http://www.muni.cz/research/publications/962292>>.

II. The Nature of the MNE Guidelines Regime Today

In short, the MNE Guidelines essentially embody what OECD Member States agree constitute the basic components of responsible corporate conduct. As far as corporations are concerned, however, they remain merely '*recommendations* addressed by governments to multinational enterprises'¹² operating in or from adhering states. They provide *voluntary* principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.¹³

The MNE Guidelines have undergone several revisions over the past few decades. The most recent 2011 edition includes, *inter alia*, an updated chapter on corporate responsibility to respect human rights in an effort to be consistent with the United Nations *Guiding Principles on Business and Human Rights* (Guiding Principles);¹⁴ a more comprehensive approach to corporate due diligence and responsible supply chain management; and reinforced procedural guidance. In the end, however, as indicated, the MNE Guidelines on their own accord remain strictly voluntary in terms of corporate obedience, and by virtue of the Declaration alone, are not binding on OECD Member States.¹⁵

A. National Contact Points and the Legal Effect of the 2000/2011 OECD Council Decisions on the MNE Guidelines

Absent the subscribed to obligations found in OECD treaties, which, though concluded within the OECD framework, remain free-standing agreements legally binding among the parties to the treaty, the OECD Directorate for Legal Affairs has been clear that 'the primary purpose of the OECD is not to produce legal norms'¹⁶ with its instruments. However, the *Convention on the Organisation for Economic Co-operation and Development* (OECD Charter)—the OECD's founding document—provides for a 'back-door' means of imposing obligations upon OECD Member States by way of official 'Acts' by the OECD Council: an entity 'composed of all the Members [that] shall be the body from which all acts of the Organisation derive.'¹⁷ Under Article 5 of the OECD Charter, 'In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be *binding* on all the Members.'¹⁸ According to the OECD Directorate for Legal Affairs, such Decisions are:

[L]egally binding on all those Members countries who do not abstain when the Act is adopted. While they are not treaties they do entail, for Member countries, the *same kind of legal obligations as those subscribed to under international treaties*. Members are obliged to implement Decisions and they must take the measures necessary for such implementation.¹⁹

The nature of this legal regime has certainly altered the relationship between OECD Member States and the MNE Guidelines regime.

The OECD Council issued its Council Decision on the MNE Guidelines, noted above, in 2000; consequently, it is legally binding on all OECD Member States.²⁰ The Council Decision was reinforced by a recent 2011 amendment, but the core obligations remain the same.²¹ In short, the Council Decision established an NCP implementation mechanism that adhering states *must* set up within their domestic system, which is responsible for promoting the MNE Guidelines and helping to resolve issues that arise under the MNE Guidelines.²² With state funding and support, NCPs in different states are to cooperate on matters if need be and are to meet and report regularly.²³

¹² See MNE Guidelines (n 4) 13.

¹³ See *ibid* 13-67.

¹⁴ UNCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (Guiding Principles).

¹⁵ See Legal status of an OECD act, (n 5) 2.

¹⁶ See *ibid* 1.

¹⁷ See OECD 'Convention on the Organisation for Economic Co-operation and Development' (14 December 1960, entered into force 30 September 1961) art 7 <<http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm>> (OECD Charter).

¹⁸ *ibid* art 5(a).

¹⁹ Legal status of an OECD act (n 5) 1.

²⁰ Decision (n 6).

²¹ *ibid*.

²² See *ibid* I(1).

²³ See *ibid* I(2)-(4).

The Council Decision also provides for elements of 'Procedural Guidance' of which OECD Member States must take due account when implementing and operating their NCPs.²⁴ It is this procedural aspect of the MNE Guidelines regime that proves most relevant in determining potential state obligations and potential state responsibility. It holds, *inter alia*, that the role of NCPs is to 'further the effectiveness of the Guidelines' in which they will 'operate in accordance with the core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.'²⁵ NCPs must endeavour to promote the MNE Guidelines by 'appropriate means' and ensure that prospective investors are informed at all times.²⁶ They must respond to inquiries by (1) other NCPs; (2) '[t]he business community, worker organisations, other non-government organisations and the public'; and (3) governments of non-adhering states.²⁷

Furthermore, in what is arguably the most interesting and important duty of NCPs—and perhaps the area in which NCP 'maladministration', as it has been termed,²⁸ proves most apparent—the Procedural Guidance in the Council Decision mandates that NCPs must also handle 'specific instances', discussed more below, which are complaints alleging corporate contravention of the MNE Guidelines based on specific facts submitted to an NCP.²⁹ In this regard, NCPs must 'contribute to the resolution of issues that arise relating to implementation of the Guidelines [and] offer a forum for discussion'.³⁰ This entails at the outset making an initial assessment of whether the issues raised require further examination and then responding to the concerned parties, while providing reasons if further examination is unwarranted.³¹ If the issues raised merit further examination, NCPs must offer 'good offices' to help resolve the issue by, *inter alia*, seeking external advice from relevant stakeholders, consulting other NCPs if need be and facilitating 'consensual and non-adversarial' means of conciliation between parties.³² Following conclusion of proceedings, and only after consultation with the parties, NCPs must release public 'statements' on the success or failure of the conciliation measures and make 'recommendations' for the implementation of the MNE Guidelines.³³

Moreover, in addition to the MNE Guidelines and the Council Decision with its Procedural Guidance, the Investment Committee, another creature of the Council Decision, has taken on a role with regard to MNE Guidelines implementation.³⁴ It has adopted an official *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises* (Commentaries).³⁵ Although not part of the Council Decision, and therefore not *per se* binding on OECD Member States, these Commentaries are supposed to constitute the official interpretation of the instruments by the parties and add further clarification to the NCP process, and therefore are potentially relevant in determining whether an NCP administered its role correctly when resolving a specific instance.

Ultimately, despite the fact that NCPs appear to implement a non-binding remedial mechanism for use between what is usually a corporation and a party adverse to that corporation, NCPs constitute state-based non-judicial grievance mechanisms, and notionally therefore states have the responsibility to implement and administer them effectively.³⁶ The NCP implementation process, however, has not been the picture of success.

B. Establishing and Operating National Contact Points—Easier Said Than Done

Since mandatory implementation is *required* of OECD Member States, the NCP dispute resolution mechanism can be viewed as a unique method for addressing corporate misconduct. Whether it is a competent method, however, remains another issue entirely. This is not to say that there are not optimists out there: for example, Professor Larry Catá Backer considers it to be the case that NCPs have begun to assume an increasingly important role as *de facto* institutional bodies where violations of international norms may be

²⁴ See *ibid* Procedural Guidance.

²⁵ *ibid* Procedural Guidance I.

²⁶ See *ibid* Procedural Guidance I(B)(1), (2).

²⁷ See *ibid* Procedural Guidance I(B)(3)(a)-(c).

²⁸ See eg OECD Watch, 'Model National Contact Point' (2007) 11 <http://oecdwatch.org/publications-en/Publication_2531> (MNCP).

²⁹ See Decision (n 6) Procedural Guidance I(C).

³⁰ *ibid*.

³¹ See *ibid* (1). See also *ibid* (3)(a).

³² See *ibid* (2)(a)-(d).

³³ See *ibid* (3)(b)-(c).

³⁴ See generally Decision (n 6) 'II' and 'Procedural Guidance' II.

³⁵ OECD, 'Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises' (2011) <<http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>>.

³⁶ See Decision (n 6) I and Procedural Guidance I; see also Guiding Principles (n 14) Principle 27.

remedied, and that they offer a substantial potential for the global regulation of corporate conduct.³⁷ Other academics have also debated the role of NCPs and other grievance mechanisms in this regard.³⁸ On a very basic level, it could be said that the *existence* of an NCP is at least a positive existence—this paper would go so far as to say that an NCP is better than no NCP at all. In theory, an NCP can perhaps serve as a forum in which CSR norms can develop as Professor Catá Backer proposes (and perhaps rightfully so). But is this the current reality? If NCP maladministration is the norm, are the objectives of an NCP merely words on paper? And can we even calibrate the damage being done by NCP maladministration and inconsistencies to the emergence and fostering of potential state-based and non-state-based norms in the CSR context?

Although it is beyond the scope of this paper to conduct a case-by-case, issue-by-issue analysis of the problems associated with the NCP system, simply put, the current reality is that the NCP system is in poor shape. Among many other issues, there exists no uniform structure for NCPs. The Council Decision itself asserts that states 'have *flexibility* in organising their NCPs, seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations and other interested parties.'³⁹ As a result, some NCPs are government entities or ministries, while some remain a single person; some are housed in one government office, while others have taken on a multi-partite structure, representing various stakeholders, such as businesses, unions and NGOs.⁴⁰ According to OECD Watch—a respected commentator noted in the Council Decision itself⁴¹—this disarray perpetuates the 'obvious risk that NCPs make different initial assessments.'⁴² While this lack of a prescribed structure is a clear and perhaps necessary deferral to state sovereignty by the OECD, it no doubt detracts from the organisation, consistency and capabilities of the NCP system as a whole.

Furthermore, the handling of specific instances is particularly problematic, and the majority of NCPs have weak records in this regard.⁴³ There are no set, uniform procedures that NCPs must follow when receiving and considering a specific instance complaint.⁴⁴ Consequently, the procedures that NCPs have established to handle complaints vary from NCP to NCP.⁴⁵ Therefore, a complainant must first decipher the rules that a particular NCP has adopted before drafting and filing a complaint.⁴⁶ Complainants, however, are often groups of private citizens or NGOs that may not have the resources to comprehend the different rules before filing, and their having to do so is contrary to the requirement that states should facilitate access to effective and appropriate non-judicial grievance mechanisms in accordance with Principles 27 and 28 of the Guiding Principles.⁴⁷

Outright rejection of specific instance complaints and the erroneous reasons for doing so also present a major dilemma within the NCP system. Rejection is by far the most likely outcome of an NGO-filed complaint,⁴⁸ and seeing as how the majority of NPC cases are filed by NGOs,⁴⁹ this clearly has undesirable results. Many specific instances are left 'closed', which signals a failure in mediation and a failure of the NCP to fulfil its role, where it essentially relinquishes its role and closes the case without resolution.⁵⁰ The OECD

³⁷ See Larry Catá Backer, 'Rights and Accountability in Development (RAID) v Das Air and Global Witness v Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations' (2009) 10 Melbourne J Int'l L 258.

³⁸ See eg Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3 Hanse LR 1; Jernej Letnar Cernic, 'Global Witness V. Afrimex LTD.: Decision Applying OECD Guidelines on Corporate Responsibility for Human Rights' (2009) 13 ASIL Insight 1.

³⁹ See Decision (n 6) Procedural Guidance I(A).

⁴⁰ For a discussion of the various formats and functions of the various NCPs, see eg TUAC OECD, 'National Contact Points' <<http://www.tuacoeedmnguidelines.org/contact-points.asp>> (TUAC on NCP Structures). The Trade Union Advisory Committee to the OECD is another authoritative advisory body noted in the Council Decision itself. See Decision (n 6) II(2).

⁴¹ See Decision (n 6) II(2).

⁴² OECD Watch, 'NCP' <<http://oecdwatch.org/oecd-guidelines/ncp>>.

⁴³ See eg OECD Watch, 'The OECD Guidelines for MNEs: Are they "fit for the job"?' (2009) 5-6 <http://oecdwatch.org/publications-en/Publication_3201/> (Fit for the job?).

⁴⁴ See eg OECD Watch, 'Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints' (2006) 19 <http://oecdwatch.org/publications-en/Publication_1664/at_download/fullfile> (Guide to the OECD Guidelines).

⁴⁵ See OECD Watch, 'The OECD Guidelines for Multinational Enterprises: A tool for responsible business conduct' (2012) 6 <http://oecdwatch.org/publications-en/Publication_3816/> (Tool for responsible business conduct).

⁴⁶ *ibid.*

⁴⁷ See Guiding Principles (n 14) Principles 27, 28.

⁴⁸ See OECD Watch, '10 Years On: Assessing the contribution of the OECD Guidelines of Multinational Enterprises to responsible business conduct' (2010) 11 <http://oecdwatch.org/publications-en/Publication_3550/> (10 Years On).

⁴⁹ See *ibid* 9-10.

⁵⁰ OECD Watch, 'NCP: National Contact Point Canada' <<http://oecdwatch.org/cases/advanced-search/ncps/casesearchview?type=NCP&search=National%20Contact%20Point%20Canada>>.

itself, however, only classifies specific instances as either 'concluded' or 'in progress', thereby ignoring the lack of meaningful resolution in many cases.⁵¹ Even if a complaint is not rejected and is ultimately deemed successful in terms of some resolution being made, NCPs merely release a 'statement' to that effect, which can indicate violations of the MNE Guidelines, but in no way is binding on the corporation in question, nor does it impose a penalty.⁵² Accordingly, 'almost invariably the NCPs' final statements [are] skewed to protect companies rather than draw a clear distinction between acceptable and unacceptable corporate conduct.'⁵³

Furthermore, at all times while specific instances are being considered, confidentiality of the proceedings is of utmost concern and little information is made public—only after the conclusion of proceedings, whether successful or not, and with agreement between the parties, are details of the proceedings made public. This significantly calls into question the transparency of the entire process.⁵⁴ Most NCPs have not registered for voluntary peer review by other NCPs; most lack a partite structure and involvement from other stakeholders, such as NGOs; and most lack a multi-stakeholder or oversight body. As a result, *inter alia*, guidance is not provided for the protection of complainants, no further assessment or statements are made if mediation fails, and no right of appeal is provided.

At best, the NCP complaint process appears to be 'complicated and uncertain'.⁵⁵ For years, civil society actors have advocated for its reform. For example, OECD Watch has even published a 'Model National Contact Point' upon which states should structure their NCPs.⁵⁶ Very few complaints have been satisfactorily resolved through mediation, and in any event, NCPs are unable to compel companies found to have breached the MNE Guidelines to change their corporate practices.⁵⁷ NCPs lack official instructions on how to handle parallel proceedings across several NCPs,⁵⁸ a common feature, which results in confusion, disordered interpretations, and NCPs rejecting many cases that involve parallel proceedings.⁵⁹ Ultimately, the system has been repeatedly criticised for its weak investigatory powers, inequitable treatment of parties, and inconsistencies in interpreting the scope of the MNE Guidelines across different NCPs. As indicated by Professor John Ruggie, the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises:

The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short ...⁶⁰

With the different debates considered as to why the NCP system has largely proven futile, the unfortunate reality to date is that it has. The 2011 update to the MNE Guidelines and its coinciding amendment to the Council Decision does not seem to have had laid any more of a foundation for more cohesive and competent NCP activity in the future, nor for a general decrease in maladministration. It did attempt to reinforce the NCP system by, *inter alia*, stressing NCP impartiality, predictability, and equitability in handling complaints, and stressing that NCPs should remain transparent with set timelines and procedures easily available to all stakeholders.⁶¹ These assurances aside, however, on the NCP implementation procedure itself, which 'should be the cornerstone of the Guidelines',⁶² the 2011 update falls 'far short of what is needed to ensure that they are an effective and credible instrument.'⁶³ As stated by OECD Watch:

⁵¹ OECD, 'Database of specific instances' <<http://mneguidelines.oecd.org/database/>>.

⁵² See Tool for responsible business conduct (n 45) 7.

⁵³ MNCP (n 28) 5.

⁵⁴ See Decision (n 6) Procedural Guidance, I(C)(4).

⁵⁵ Guide to the OECD Guidelines (n 44) 17.

⁵⁶ MNCP (n 28).

⁵⁷ See Fit for the job? (n 43) 5-6.

⁵⁸ See 10 Years On (n 48) 46.

⁵⁹ See *ibid* 11.

⁶⁰ See eg UNHRC, 8th Session 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5 para 98 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>>.

⁶¹ Decision (n 6) Procedural Guidance.

⁶² OECD Watch, '2011 Update of the Guidelines' (2011) <<http://oecdwatch.org/oecd-guidelines/2010-update-of-the-guidelines>>.

⁶³ *ibid*.

The update missed a once-in-a-decade opportunity to provide for a system capable of ensuring observance through investigative powers and the ability to impose some kind of sanction when the Guidelines are breached. In the absence of minimum standards to ensure that the Guidelines are consistently applied, it will be up to National Contact Points to step up to the plate and demonstrate their commitment and ability to resolve disputes and help provide remedies for those adversely affected by corporate misconduct.⁶⁴

Other international commentators echo these sentiments. Amnesty International, for example, expressed its disappointment by stating:

Apart from the substantive aspects of the human rights chapter, Amnesty International believes that the greatest shortcomings by far relate to the feeble progress made on the institutional arrangements and implementation procedures of the Guidelines. After 10 years in operation, much has been learnt about what works and what does not work with regards to the functioning of National Contact Points (NCPs). These lessons should have informed the review process with a view to strengthening and providing clearer parameters for NCP performance. The role of NCPs is key to ensuring effective adherence by enterprises to the Guidelines, and therefore for the success of the Guidelines as an instrument. However, the reality is that many NCPs grossly under-perform. Although this may be due to the capacity and will of individual NCPs, much is due to the defects and shortcomings of the institutional architecture within which NCPs operate. Measures were required to ensure that those NCPs that lag behind are brought up to at least as high a level as the best performing NCPs. However, the update did not meet expectations in this regard. Despite strong encouragement by NGOs, neither mandatory oversight nor peer review mechanisms are expressly required. There is no clarification about the role of NCPs in making recommendations on observance of the Guidelines or on monitoring and following up on agreements and recommendations. No consequences for companies who fail to comply with the Guidelines or refuse to engage in mediation are specified. The absence of minimum standards to ensure the effectiveness of the implementation procedures and their coherent application across adhering States, risk undermining the value and meaning of the substantive improvements made elsewhere in the Guidelines and with it, the effectiveness and credibility of the instrument as a whole.⁶⁵

EarthRights International followed suit with its discontent, stating:

NCPs have been consistently hobbled by structural and procedural weaknesses. They're often located in government agencies responsible for promoting trade and investment, imbuing them with a pro-corporate bias. They're rarely overseen in any sort of systematic or impartial way. They often operate in great secrecy and are not required to abide by any timelines for the processing of complaints and requests. And – particularly in the US – they have resisted taking on any sort of fact-finding function or making determinations as to whether any of the Guidelines have in fact been breached in a specific instance. As a result, companies have little incentive to cooperate with the NCP, change their behavior, or even comply with the Guidelines in the first place. And individuals and communities find the NCP an unwelcoming place to resolve their grievances. [...] Unfortunately, the updated Guidelines include none of these improvements, except for some vague wording about the importance of impartiality for the NCP.⁶⁶

This organisation, for example, has repeatedly called for NCPs to avoid conflicts of interest; to develop and recommend timelines; and to be given the ability to properly make non-binding findings of fact and issue when gauging a specific instance. These concerns and others like them still largely remain unresolved.

⁶⁴ *ibid.*

⁶⁵ Amnesty International, 'The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must not turn into effective implementation' (Press Release, 23 May 2011) 2 <http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior_300012011en.pdf>.

⁶⁶ EarthRights International 'OECD Guidelines Update: Substantive Improvements, Procedural Disappointments' (Press Release, 25 May 2011) <<http://www.earthrights.org/campaigns/oecd-guidelines-update-substantive-improvements-procedural-disappointments>>.

Indeed, the current general state of the NCP system seems to fail to meet the requirements identified in the Guiding Principles for effective non-judicial grievance mechanisms: legitimate, accessible, predictable, equitable, rights-compatible and transparent.⁶⁷ Despite the intentionally loose structure of the NCP system, NCP maladministration in how they administer specific instances remains prevalent and undesirable. And since this NCP maladministration is occurring under the auspices of the state, it provides all the more reason why it is necessary to precisely determine the nature of state obligations under this MNE Guidelines regime. Specific ways in which to mend the NCP system lie beyond the scope of this paper. This paper is meant to survey and evaluate potential *state* responsibility under the NCP system that is in place today, and given the current state of that system, such responsibility is not difficult to envision *legally*.

C. What is the Nature of State Obligations Under the OECD Council Decisions on the MNE Guidelines?

As noted above, the OECD Directorate for Legal Affairs considers the 2000 Council Decision and its 2011 amendment to impose obligations on states equal to those of treaty obligations despite its open dismissal of the notion that a Council Decision is a treaty.⁶⁸ This directly calls into question the contemporary status of the MNE Guidelines regime as regards states at public international law.

The first logical observation is the fact that it is the Council Decision—not the MNE Guidelines—that imposes state obligations under the MNE Guidelines regime. At first glance, the MNE Guidelines document may appear to be a treaty, which would certainly give rise to international obligations; and public international law does indeed permit the presumably equal existence of treaties and ‘other international agreements’.⁶⁹ Ultimately, however, the MNE Guidelines as its own document is not a treaty because it lacks the requisite characteristics for such a status. In short, in contemporary public international law, the law of treaties, while rooted in custom and the work of the International Law Commission (ILC), is largely controlled by the *Vienna Convention on the Law of Treaties* (VCLT).⁷⁰ Under the VCLT, a treaty is ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’⁷¹ In very basic terms, treaties are subject to ratification, acceptance, approval, or accession, based on the consent of a state to be bound by that particular instrument.⁷² *Inter alia*, once authenticated, the text of a treaty is not subject to changes on a whim; amendments are normally necessary for such changes to be made,⁷³ which bind only those states that choose to be bound by them.⁷⁴ Once ratified by a state, a treaty is to be deposited with the designated entity,⁷⁵ and only upon entry into force of the treaty,⁷⁶ which is usually based on a certain number of deposits, are its parties actually legally *bound* to honour its tenets in good faith.⁷⁷

As regards the MNE Guidelines, however, there is no evidence that the OECD ever intended for the document itself to constitute a binding treaty between states. As indicated, the MNE Guidelines still remain only an annex to the Declaration, which the OECD Directorate for Legal Affairs considers to be merely ‘policy commitments subscribed to by the governments of Member countries [...] not intended to be legally binding.’⁷⁸ Treaties as freestanding, binding agreements among states are conducted within the OECD framework,⁷⁹ a fact that again serves to distinguish the MNE Guidelines from any of these documents. Although states do in fact sign the MNE Guidelines when they agree to support its objectives,⁸⁰ such acts can more or less be seen as good faith gestures by states. There is no ratification, accession, approval, or acceptance mechanism in place for the MNE Guidelines, nor was there ever any means for depositing the document or timeframe for entry into force. If anything, the MNE Guidelines essentially ‘entered in force’ immediately in 1976 upon

⁶⁷ See Guiding Principles (n 14) Principle 31.

⁶⁸ See Legal status of an OECD act (n 5) 1.

⁶⁹ See eg UN Charter (n 9) art 102.

⁷⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

⁷¹ See *ibid* art 2(1)(a).

⁷² See *ibid* arts 2(1)(b), 12.

⁷³ See *ibid* arts 2(1)(c), 10, 24.

⁷⁴ See *ibid* art 40(4).

⁷⁵ See eg *ibid* arts 16, 76-80.

⁷⁶ See eg *ibid* art 24.

⁷⁷ See *ibid* art 26.

⁷⁸ Legal status of an OECD act (n 5) 2.

⁷⁹ See eg *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997 <<http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>>.

⁸⁰ See eg TUAC OECD, *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context: Trade Union Guide* (2012) 5 <<http://www.tuacoecdmeneguidelines.org/Docs/TradeUnionGuide.pdf>>.

the Declaration being made, therefore eliminating the notion of consent that would be required in the case of a treaty.⁸¹ Lastly, as demonstrated as recently as 2011, the text of the MNE Guidelines has not been static like that of a treaty; substantive changes are made through working groups and consultation, without input strictly by states or the need for re-ratification of an amendment or protocol.⁸² Ultimately, the text of the MNE Guidelines is directed towards governing corporate conduct—very little addresses state duties. Accordingly, the MNE Guidelines as a document is not a treaty in and of itself.

The nature of state obligations under the Council Decision on the MNE Guidelines therefore becomes the issue. As discussed, the one formal obligation imposed upon OECD Member States on account of the Council Decision is to establish an NCP and ensure its operation, its proper administration and its competence.⁸³ The question remains, however, whether this is a hard, international obligation. The obligation to implement the MNE Guidelines by way of an NCP is found only in the Council Decision, but strict adherence to such Council Decisions is in fact a treaty-derived obligation stemming from the OECD Charter.⁸⁴ A fundamental principle of the international order is the fact that a treaty is only binding on its parties.⁸⁵ Accordingly, only OECD Member States, which in order to become a Member would have had to have ratified the founding OECD Charter, are in fact legally bound by Council Decision.⁸⁶

As regards the most current 2011 version of the MNE Guidelines, a total of 45 states—both OECD Member States and non-OECD states—and the European Union as an observer, have endorsed the update and adhere by the 2011 Council Decision and the current MNE Guidelines.⁸⁷ In addition to the OECD Member States that are bound by the Council Decision to implement the NCP system, several other non-members have also voluntarily established NCPs.⁸⁸ It could perhaps be argued that these non-OECD states may still be obligated to implement the MNE Guidelines by way of an NCP on some customary basis given their wilful adherence to the MNE Guidelines both in the past and currently, yet such issues are beyond the scope of this paper. Non-OECD states, however willing they may be to honour the MNE Guidelines with an NCP, are not actually *bound* to do so by virtue of the Council Decision—this status is reserved for OECD Member States only.

Since OECD Member States are legally bound to implement the NCP system on account of a treaty-derived obligation, a strong argument can be made that this is in fact an *international* obligation imposed on these states—not only because of its treaty foundation, but also because the OECD Council is entrusted as the authoritative body under the OECD Charter.⁸⁹ A suitable comparison can perhaps be made to Article 25 of the *Charter of the United Nations* (UN Charter), under which ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’⁹⁰ Article 25 is generally viewed as empowering the Security Council, as an authoritative body, with the ability to impose binding, international obligations on UN Member States;⁹¹ obligations clearly derived from the UN Charter as a treaty by which UN Member States are consensually bound. The same can be said for the OECD Council, charged by the OECD Charter—a treaty that all OECD Member States must choose to be bound by—as an authoritative body capable of imposing binding obligations on OECD Member States; obligations both treaty-derived and bestowed by a treaty-created authoritative body, and therefore presumably international in character.

Therefore, the NCP implementation system for the MNE Guidelines most likely gives rise to international obligations for OECD Member States due to the Council Decision and its 2011 amendment. This legal regime has no doubt altered the relationship between OECD Member States and the MNE Guidelines, in that it has altered what is expected of states in this CSR initiative. Failure of a state to set up an NCP, or failure of its NCP to administer its role accordingly, would most likely be considered an internationally wrongful act. One must ask whether this is what OECD Member States signed on for, but in any event, if this is the case, where does this leave states in terms of accountability?

⁸¹ Declaration (n 3).

⁸² Decision (n 6).

⁸³ *ibid* I, Procedural Guidance, I.

⁸⁴ See OECD Charter (n 17) art 5(a).

⁸⁵ See VCLT (n 70) art 26.

⁸⁶ See OECD Charter (n 17) arts 4, 5.

⁸⁷ For a list of adhering states, see Responsible Business Conduct Matters (n 10) 10.

⁸⁸ For example, Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania have done so. OECD, ‘National Contact Points’ <<http://mneguidelines.oecd.org/ncps/>>.

⁸⁹ See OECD Charter (n 17) arts 5, 7-12.

⁹⁰ UN Charter (n 9) art 25.

⁹¹ See eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South Western Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) 1971 ICJ Rep 16 paras 87-116.

III. State Responsibility—Why Determining the Nature of State Obligations Under the MNE Guidelines Regime Matters

Determining the true legal character of the MNE Guidelines and the Council Decision, as well as the scope of their ensuing obligations presumably imposed on states, is a necessary exercise because without the examination as conducted above, it is impossible to determine if and how states can be held responsible for a possible breach of an international obligation on account of its NCP. Indeed, this is an issue often overlooked, despite the logical presumption that the point of ensuring that hard obligations are imposed upon states under the MNE Guidelines regime is in order to seek recourse against a state if said obligations are breached. Furthermore, states have a right to know the extent of their responsibility. It could be said that the OECD itself has overlooked this issue, in that it appears content to proclaim the binding international obligations imposed upon its Member States pursuant to the Council Decision, yet does so without any consideration as to the extent of such obligations, responsibility of states found contravening these obligations, repercussions for such contraventions and the forum in which such a review and pronouncement could even be made.⁹²

A. State Responsibility for NCP Maladministration?

The basics of state responsibility are called into question when considering state obligations under the MNE Guidelines regime. According to the ILC in Article 1 of its *Articles on Responsibility of States for Internationally Wrongful Acts* (ASR), 'Every internationally wrongful act of a State entails the international responsibility of that State.'⁹³ The International Court of Justice (ICJ) has, *inter alia*, held that 'refusal to fulfil a treaty obligation involves international responsibility',⁹⁴ whereas other tribunals have even gone so far as to declare that 'any violation by a State of any obligation, of whatever origin, gives rise to State responsibility.'⁹⁵ This foundational principle applies whether the wrongful act involves only the wrongdoing state and the injured state, or if the wrongdoing extends to other subjects of international law.⁹⁶

Under Article 2 of the ASR, however, '[a]n internationally wrongful act of a state only exists when an act or omission is attributable to the state at international law and constitutes a breach of an international obligation.'⁹⁷ Such obligations entail both treaty and non-treaty obligations, yet must be governed by international law.⁹⁸ Furthermore, as held as far back as 1923 by the Permanent Court of International Justice, '[s]tates can act only by and through their agents and representatives',⁹⁹ and therefore it is imperative as a matter of state responsibility to distinguish acts or omissions that are attributable to a state from those that are not.

Although several other ASR articles could potentially give rise to attribution,¹⁰⁰ for the purpose of gauging potential state responsibility for NCP maladministration, the core Articles 4 and 5 seem to suffice. Under Article 4(1):

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises *legislative, executive, judicial or any other functions*, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.¹⁰¹

Article 4(2) qualifies 4(1), in that 'An organ includes any person or entity which has that status in accordance with the internal law of the State.'¹⁰² In any event, under Article 5:

The conduct of a person or entity which is not an organ of the State under article 4 which is empowered by the law of that State to exercise elements of the governmental authority shall be considered

⁹² See eg Legal Status of an OECD act (n 5) 1.

⁹³ UNGA 'Articles on Responsibility of States for Internationally Wrongful Acts with commentaries', UN GAOR, 56th Session Supp No 10 UN Doc A/56/10 (2001) art 1 (ASR).

⁹⁴ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase* (Advisory Opinion) (1950) ICJ Rep 221, 228.

⁹⁵ See *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair* (1990) XX RIAA 215 para 75.

⁹⁶ See ASR (n 93) art 1, commentary para 5.

⁹⁷ See ASR (n 93) art 2.

⁹⁸ See ASR (n 93) arts 2, commentary para 7, 3.

⁹⁹ See *German Settlers in Poland* (Advisory Opinion) (1923) PCIJ Ser B No 6, 22.

¹⁰⁰ See eg ASR (n 93) arts 8, 16.

¹⁰¹ See ASR (n 93) art 4(1).

¹⁰² See ASR (n 93) art 4(2).

an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.¹⁰³

Recall that there is no settled format and function for NCPs; states have liberty in determining NCP structure.¹⁰⁴ The question therefore becomes the extent to which NCPs can be considered organs of an OECD Member State. A strong argument can be made that maladministration by any NCP is attributable to its OECD Member State under Article 4, whatever the mode, since every NCP seems to be tied to the central government in some fashion;¹⁰⁵ this is despite the fact that they do not fulfil a legislative or judicial role. As a quasi-organ of the state, therefore, a state's NCP would most likely fall under the 'any other functions' category in Article 4(1).¹⁰⁶ If for some reason Article 4 failed to capture a state's responsibility for its NCP's maladministration, its NCP would be considered an entity empowered to exercise governmental authority for the purposes of Article 5, under which responsibility could still be maintained.¹⁰⁷

Ultimately, attributing NCP maladministration to an OECD Member State does not present a difficult task once it is established that the state's duty to establish an NCP and ensure its proper administration is in fact an international obligation. The problem, however, remains whether there exists a body capable of making this attribution determination.

B. Judicial Review of NCP Maladministration?

Assuming an OECD Member State could be held internationally responsible for its NCP's maladministration, basic due process would still necessarily require a ruling to that effect by a body competent to make such a determination. Given the current international order, this presumably would need to be a judicial or quasi-judicial body. In fact, it is likely the case that such a ruling would have to be issued by a court that has jurisdiction to pronounce that a *state* is in breach of its legal obligations on account of its NCP. This raises the issue of whether judicial or quasi-judicial review of an NCP's activity is legitimate or even possible in general, aside from whether a particular court is competent to rule on a state's situation in international law.

Commentators have been quite adamant that NCP oversight is crucial for the system to operate effectively. OECD Watch, for example, believes the NCPs that perform best are comprised of independent experts or are those that maintain an external 'steering board' to provide oversight.¹⁰⁸ The United Kingdom NCP, for example, has such a steering board, and its NCP is arguably revered by some as the gold standard in the field.¹⁰⁹ However, even the competence of this generally proactive NCP in this regard has been questioned.¹¹⁰ Its steering board only considers appeals 'purely on procedural grounds',¹¹¹ and in no way reviews the decisions of the NCP, nor could it be said that oversight by a steering board is even legitimate judicial or quasi-judicial review for the purpose of law in any event.

The Investment Committee noted above is also not an appropriate forum for such review. Although its mandate according to the Council Decision may appear to grant it broad powers of NCP review,¹¹² as other scholars such as Erika de Wet have indicated, it can 'merely issue abstract clarifications on the Guidelines in instances where it is of the view that the National Contact Points did not interpret the Guidelines correctly. It cannot make determinations pertaining to specific enterprises, nor can it overrule a decision of the National Contact Points.'¹¹³ Furthermore, commentators have been critical of the Investment Committee even as regards this limited mandate, declaring, *inter alia*, that it 'has not shown itself to be well equipped to carry out the responsibilities assigned to it under the procedural guidance: overseeing the way NCPs function

¹⁰³ See ASR (n 93) art 5.

¹⁰⁴ Decision (n 6) Procedural Guidance, I(A).

¹⁰⁵ See TUAC on NCP Structures (n 40).

¹⁰⁶ See ASR (n 93) art 4(1).

¹⁰⁷ See ASR (n 93) art 5.

¹⁰⁸ See Tool for responsible business conduct (n 43) 5.

¹⁰⁹ See eg International Bar Association, 'Response to the UK Consultation on the terms of reference for an update of the OECD Guidelines for Multinational Enterprises' (2009) para 72.

¹¹⁰ OECD Watch, 'Rights and Accountability in Development (RAID), "Fit for Purpose?: A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises"' (2008) <<http://oecdwatch.org/files/raid-fit-for-purpose-report/view>>.

¹¹¹ See Department for International Development, 'UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises' (2011) 14 <<http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>>.

¹¹² See Decision (n 6) Procedural Guidance, II(1)-(5).

¹¹³ See Erika de Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' (2008) 9 German LJ 1987, 1994.

and interpreting the provisions of the Guidelines.¹¹⁴ In any event, even if the Investment Committee had the power to review NCP decisions for the purpose of determining maladministration, it again still would lack any power to judicially or even quasi-judicially review an NCP's acts for the purpose of attributing state responsibility under public international law, nor would it have any power to rule that a *state* is in breach of an international obligation.

However, judicial review of NCP action has at least been called for in the past, yet only for 'serious cases of maladministration' and only in common law systems.¹¹⁵ Aside from the obvious difficulties in determining what constitutes 'serious' maladministration, only one quarter of the current OECD Member States are common law,¹¹⁶ and so one must wonder how practical such a call even is.

Judicial review on the international stage may present a last resort for attributing state responsibility for NCP maladministration, yet such an analysis at this point is quite hypothetical. It seems as though the ICJ serves as the only possible forum in which such a review could occur. Theoretically, it would maintain jurisdiction over such a claim,¹¹⁷ and it certainly possesses the ability to attribute internationally wrongful conduct to a state.¹¹⁸ Standing to bring such a claim, however, would only be met if one OECD Member State brought a claim against another OECD Member State on account of its NCP's maladministration—an unlikely scenario. In any event, aside from the hurdle presented by the fact that ICJ jurisdiction is generally derived from consensus,¹¹⁹ before any treaty or other international agreement—such as the Council Decision—could be invoked before the ICJ, it would have to be registered with the UN Secretariat.¹²⁰ There has been no such registration of any OECD documents or instruments. Accordingly, any potential judicial review of NCP maladministration and coinciding attribution of state responsibility by the ICJ remains both improbable and strictly hypothetical at this point.

As such, a fundamental shortcoming that remains within the NCP system is the complete lack of an enforcement mechanism, especially as regards NCP oversight.¹²¹ The lack of judicial or even quasi-judicial review of NCP action in general seems to present a major problem, and indeed there is no evidence to date of an NCP's actions or decisions being judicially reviewed. Further, when *state* responsibility is at issue, until some sort of judicial review by a body competent to attribute internationally wrongful conduct to a state is possible, OECD Member States will continue to dodge responsibility for their NCP's maladministration, despite the fact that, as demonstrated, it can be argued that such maladministration is in breach of their international obligations.

IV. Conclusion

In conclusion, it appears that hard, international obligations are imposed upon OECD Member States as regards the formation and operation of NCPs on account of the 2000 OECD Council Decision on MNE Guidelines and its 2011 amendment. NCP maladministration when handling specific instances, which remains persistent, can likely be attributed to OECD Member States under the international law of state responsibility.

In any event, however, it seems clear that there does not exist any review mechanism, neither domestically nor internationally, capable of attributing internationally wrongful conduct to an OECD Member State on account of its NCP. This reality calls into question the effectiveness of the international obligations levied upon OECD Member States to establish NCPs and administer them effectively.

The NCP regime has not proven particularly effective in its decade-long lifespan thus far, and it appears that states by way of their NCPs are largely responsible for this current state of affairs. While respect for state sovereignty as regards the NCP system is both necessary and appreciated, sovereignty is not necessarily always an absolute concept.¹²² The OECD can and must do more to mandate a more cohesive, competent, and

¹¹⁴ See MNCP (n 28) 10.

¹¹⁵ See MNCP (n 28) 11.

¹¹⁶ See OECD Members (n 1).

¹¹⁷ See *Statute of the International Court of Justice* (26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 36(2).

¹¹⁸ See *ibid* arts 34-35.

¹¹⁹ See generally *Statute of the International Court of Justice* art 36.

¹²⁰ See UN Charter (n 9) arts 92, 102(1), (2). As to whether the Council Decision can even be considered an 'international agreement', is an issue beyond this paper. The scope of this term has been examined as far back as the early days of the UN Charter. See eg Michael Brandon, 'Analysis of the Terms 'Treaty' and 'International Agreement' for the Purposes of Registration Under Article 102 of the United Nations Charter' (1953) 47 Am J Int'l L 49. But it can be said that the ICJ has affirmed the registration requirement in the past. See eg *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, (Preliminary Objections) (1994) ICJ Rep 112, 122. However, the case also makes clear that a lack of registration does not determine the *legal status* of a treaty or international agreement. Indeed, Article 102 often seems to be honoured in the breach and its role in contemporary international law is at least debatable.

¹²¹ See eg Tool for responsible business conduct (n 43) 4.

¹²² See eg UN Charter (n 9) chaps VI, VII.

proactive effort by states and their NCPs when handling specific instances. As a start, uniformity across NCPs should be required, as should some sort of stable review mechanism, even if it is domestically entrenched. Further, it needs to be stressed to OECD Member States that they are indeed subject to *international* obligations under the Council Decision on the MNE Guidelines; any lingering notions that proper NCP administration is merely aspirational or can be 'progressively realised' must be corrected. If this relationship is not clarified, the ability of the OECD to command respect as an international organisation attempting to direct the behaviour of states will remain weakened, while corporate misconduct will continue unchecked.

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