Legal Aspects of Contemporary International Problems: How Should Multinational Enterprises be Treated under International Law?

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This essay examines why multinational enterprises (MNEs)[1] are a considerable challenge for international law and how effectively international law has responded to this challenge so far. It takes stock of successful and failed attempts to create hard and soft law instruments under international law for the purpose of regulating MNEs and briefly explores the efficiency of these initiatives and their potential for future development. Against the current fragmented regulatory framework for MNEs, a case study into the inroads made by the US-based retailer Wal-Mart into the South African market provides compelling evidence of the claim that there is a gap between legality and reality. Based on the 2012 South African Competition Appeal Court decision[2] approving Wal-Mart's merger with the South African retailer Massmart, subject to certain conditions, it is argued that under the present state-centric international law system, MNEs can hardly be said to be regulated effectively—either as a matter of international law or as a matter of national law.

What are the main concerns about MNEs?

During recent decades, the number of MNEs worldwide has grown exponentially worldwide.[3] Their individual economic performance dwarfs the individual gross domestic product (GDP) of the majority of United Nations Member States,[4] particularly

[1] In this essay the term "multinational enterprises" refers to a large and complex cluster of companies of various nationalities, established in more than one country, with at least one parent company exercising a significant degree of influence or control over the activities of a multitude of affiliates retaining a degree of autonomy, sharing a common pool of human and financial resources, pursuing a common strategy and being interlinked by shareholdings, managerial control or contract. This definition draws on elements compiled by Kuschnik from various other definitions. Kuschnik, Bernhard, "On the Difficulties of Legally Regulating Multinational Enterprises", *European Business Law Review* 19, No. 5 (2008), p. 898. While the term "multinational enterprises" has traditionally been used by the OECD, other terms abound which designate corporate structures with the same features like the UN term "transnational corporations" (TNCs). Muchlinski, Peter, *Multinational Enterprises and the Law*, Oxford 2007, p. 6.

[2] *Minister of Economic Development and others v. Wal-Mart Stores Inc. and others*, Competition Appeal Court of the Republic of South Africa, 3 March 2012, at: http://www.saflii.org/za/cases/ZACAC/2012/2.pdf.

[3] According to the United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, there are 82 000 parent companies active worldwide with 810 000 foreign affiliates. United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, 2009, Geneva, United Nations Publications, XXI, at: http://unctad.org/en/docs/wir2009_en.pdf. In 14 OECD countries their number increased from 7,000 in the late 60s to 24,000 as of 1990. UNCTAD report *Transnational Corporations*, Vol. 12, No. 3, December 2003, p. 8, at: http://unctad.org/en/Docs/iteiit35v12n3_en.pdf.

[4] Tullberg cites Sir John Brown, in 1999 CEO of BP Amoco, saying that "the 10 largest companies in the world including BP Amoco, each have an annual turnover in excess of the gross national product of more than 150 of the 185

of those in the developing world.[5] Spurred by privatisation and deregulation at the national level and by globalisation in the wake of global trade liberalisation,[6] a notable shift in power[7] has taken place—from states to MNEs—with a consequent loss of what may be termed "equality of arms".[8] The economic rise of MNEs has been largely associated with their specific global corporate structures that enable them to exploit differences in national regulations and legal regimes as well as weak systems of governance.[9] This allows them to trade efficiently within their global corporate network and to effectively avoid taxes, through transfer pricing.[10] It also makes it easier for them than for companies operating in a single state to flexibly relocate all or part of their production sites abroad.[11] Hence, MNEs can use these competitive advantages over local companies, as well as their job creating power and technological superiority,[12] as a bargaining chip to obtain additional investment incentives from both home and host governments, such as tax concessions and financial assistance.[13] As host states tend to fiercely compete against each other for foreign direct investments (FDIs), they may also make concessions on national labour and environment standards, in an effective race to the bottom.[14]

Globalised markets offer MNEs large opportunities to abuse their dominant position with detrimental impacts on lawmaking, law enforcement and the administration of justice, particularly in host states in the developing world. The willingness and/or capability of host states to control MNEs risks being undermined by their need to attract

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members of the United Nations". Tullberg, J. "Illusions of Corporate Power: Revisiting the Relative Powers of Corporations and Governments", *Journal of Business Ethics* 52 (2004), pp. 326-7.

[5] In 1999, ExxonMobil recorded revenues of $ 185 billion, while Chad's and Nigeria's GDP, two countries in which the MNE operated at that time, stood at $ 1.6 billion and $ 43.3 billion respectively. Williams, Cynthia A. "Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry", *Journal of International Law and Politics* 36 (2004), p. 458.

[6] Mujih, Edwin C., *Regulating Multinationals in Developing Countries. A Conceptual and Legal Framework for Corporate Social Responsibility*, Farnham 2012, p. 85; Buhmann, Karin, "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?", *Nordic Journal of International Law* 78, No. 1 (2009), p. 8.

[7] Mujih, p. 7.

[8] Kuschnik, p. 907.

[9] Muchlinski, p. 120.

[10] Kuschnik, p. 901.

[11] Muchlinski, p. 8; Zerk refers to this advantage as the "mobility argument" which next to the "development" and "morality" argument is advanced as grounds for requiring a stronger global regulation for MNEs, Zerk, Jennifer A., *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge 2006, pp. 46-47.

[12] Muchlinski, p. 104.

[13] Zerk, p. 47.

[14] Vasquez, Carlos M. "Direct vs. Indirect Obligations of Corporations Under International Law." *Columbia Journal of Transnational Law* 43 (2004-2005), p. 959; Bantekas, Ilias, Corporate Social Responsibility in International Law, *Boston University International Law Journal* 22, (2004), p. 314.

FDIs,[15] resulting in the further deepening of an existing "domestic enforcement gap".[16] In some instances, MNEs' operations in host states have thus led to considerable social and/or environmental harm and human rights violations.[17] The widespread perception that MNEs frequently manage to escape jurisdiction[18] has given rise to claims for a stronger regulation of MNEs under international law,[19] commensurate with their economic weight and political clout.

The "negative externalities" associated with MNEs' operations have not only been the subject of high-profile lawsuits brought against a number of MNEs, such as Unocal Corporation,[20] ExxonMobil[21] or Royal Dutch Shell,[22] but have also fuelled the theoretical debate among legal scholars about how the present *ex ante* and *ex post* regulatory framework for MNEs should be adapted to the new realities of a globalised world, in order to close the widening gap between legality and reality and the ways in which MNEs' socially responsible conduct could be enhanced while better preventing undesirable side effects.[23]

What are the main legal arguments advanced by proponents of an international hard law regulation of MNEs?

In a state-centric system, where states have the exclusive right of defining international law and are the only bearers of direct obligations,[24] regulating MNEs by means of international hard law poses considerable conceptual challenges by attributing legal personality and imposing direct obligations under international law.[25] If MNEs were to

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[15] Chesterman, Simon, "Oil and Water: regulating the behavior of Multinational Corporations through law", *New York University Journal of International Law and Politics* 36, (2004), p. 308; De Schutter, Olivier, "The Accountability of Multinationals for Human Rights Violations in European Law", Center for Human Rights and Global Justice Working Paper No. 1, New York University School of Law 2004, p. 74.
[16] Herik, Larissa van den, and Cernic, Jernej Letnar, "Regulating Corporations under International Law. From Human Rights to International Criminal Law and Back Again", *Journal of International Criminal Justice* 8 (2010), p. 728.
[17] Gatto, Alexandra, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*. Cheltenham 2011, p. 9.
[18] Buhmann, pp. 7 and 11.
[19] Weschka, Marion, "Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 66 (2006), p. 659, at: http://www.zaoerv.de/66_2006/66_2006_3_a_625_662.pdf.
[20] *Doe v Unocal Corporation*, 963 F. Supp. 880, 883, 884 (C.D. Cal. 1997); Mujih, p. 70, for other incidences see Buhmann, p. 23.
[21] *Doe VII et al v Exon Mobil Corp et al*, D.C. Circuit Court of Appeals, No. 09-7125.
[22] Hornby, Catherine, "Dutch court to take on Shell Nigeria cases", Reuters, 30 December 2009 at: http://www.reuters.com/article/2009/12/30/us-shell-nigeria-idUSTRE5BT1WL20091230; Wiwa v Royal Dutch Shell Petroleum Co., 226 F.3d 88 (2d Cir 2000), cert. denied, 532 U.S. 941 (2001).
[23] Wouters, Jan, and Chanet, Leen, "Corporate Human Rights Responsibility: A European Perspective", *Northwestern Journal of International Human Rights* 6, No. 2 (2008), p. 262.
[24] Brownlie, Ian, *Principles of Public International Law*, Oxford 1998, pp. 57-58.
[25] Vasquez, pp. 927-959.

be granted legal personality under international law—if they were to be considered bearers of direct obligation, subject to monitoring and sanctioning mechanisms under international law—this would amount to disempowerment for states,[26] which they are unlikely to accept. Voluntary soft law regulation, by contrast, which is directly applied by states to MNEs, upholds the current distribution of duties and responsibilities between state and non-state actors under international law and has therefore been more likely to be accepted by states and businesses alike.[27] Notwithstanding these challenges, several legal scholars have advanced arguments for the need and potential of international law to evolve in this direction (which direction? Hard law or soft law?). Their main argument is that international law needs to adapt to the new realities of globalisation[28] by building on several developments in international law following the Second World War.[29]

As for the possibility of international law to admit new subjects, in its 1949 Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* case, the International Court of Justice (ICJ) established the United Nations as a new subject of international law, based on a functional approach. The ICJ can thus be said to have paved the way for adding more non-state actors to the system.[30] As a result of the atrocious human rights violations against individuals during the Second World War, human rights law emerged to protect individuals against human rights violations by states. As a consequence, individuals have acquired a limited legal personality under international human rights law.[31] Since companies are capable of violating individuals' human rights in the same way as states, it has been claimed that they should also be held liable under international criminal law. While individuals are liable under international criminal law for the crimes falling into the jurisdiction of the International Criminal Court (ICC), companies are not. When in 1998 the ICC's statute was defined, the French delegation proposed to give the ICC jurisdiction over legal persons.[32] This proposal was dismissed but could be revisited.[33]

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[26] Vasquez, p. 932.
[27] Gatto, p. 15.
[28] Weschka, p. 659.
[29] Wouters, p. 264, Jägers, Nicola, *Corporate Human Rights Obligations: In Search of Accountability*, Intersentia 2002; Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford 2006, pp. 195-270.
[30] Bantekas, p. 316; Gatto, pp. 49 and 52; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174, 180, at: http://www.icj-cij.org/docket/files/4/1835.pdf.
[31] Gatto, p. 49.
[32] Chesterman, p. 308.
[33] Gatto, pp. 23 and 92-93.

Another line of argument for stronger global regulation of MNEs is rooted in the alleged normative imbalance between MNEs' rights and obligations under international law.[34] It has been argued that since MNEs have gained several direct rights, such as the right of diplomatic protection from the home state, access to the complaint procedure of the European Court of Human Rights (ECtHR),[35] and investor protection through dispute settlement bodies specified in Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) such as NAFTA[36]—primarily the International Centre for the Settlement of Investment Disputes (ICSID), created by the World Bank in 1965[37]—they should also have direct obligations.[38]

Finally, the considerable difficulties[39] sometimes faced by victims of MNE activities when they are seeking legal redress in host or home state jurisdictions, or under the US Alien Tort Claims Act,[40] are reasonable grounds for claiming a stronger regulation of MNEs. According to the doctrine of separate corporate personality, MNEs are not considered as a whole legal entity when it comes to the attribution of legal liability, but, as a rule, their constituent legal entities (parent company and subsidiaries) are individually subject to the jurisdiction of the home state or host state respectively, regardless of the ownership or control relationship between them.[41] If legal remedies are not available in the host state, and the home state (particularly in common law countries) invokes the doctrine of *forum non conveniens* to decline jurisdiction,[42] then MNEs are unlikely to be regulated at all *ex post*.

While far-reaching conceptual changes in international law have been envisaged by legal scholars[43] in an effort to fill this perceived legal vacuum,[44] parallel efforts to put novel and ground-breaking ideas into practice in the form of binding hard law instruments—

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[34] Gatto, pp. 60-61.
[35] Gatto mentions fair trial, privacy and freedom of religion, p. 58. Emberland, M., *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford 2006.
[36] Investor protection in the NAFTA is regulated under Chapter Eleven, Muchlinski, pp. 241 and 712.
[37] Muchlinski, pp. 716-746.
[38] Weschka, p. 627.
[39] In situations where the respective jurisdiction is unable or unwilling to regulate or the MNE is complicit in breaches of law committed by the state itself, Chesterman, p. 315.
[40] Civil lawsuits against MNEs can be filed by aliens with US District Courts under the 1789 ATCA for torts committed "in violation of the law of nations or a treaty of the United States", 28 U.S.C. § 1350 (2001). A comprehensive discussion of ATCA cases can be found in Zerk, pp. 207-215, and Chesterman, pp. 318-323.
[41] Zerk, p. 54.
[42] Zerk, p. 120; Chesterman, 315; Wouters, p. 297; Bantekas, pp. 342-343; Weschka, p. 628.
[43] Alston, Philip (ed.), Non-State Actors and Human Rights, Academy of European Law, Oxford 2005, at: http://www.univie.ac.at/intlaw/reinisch/non_state_actors_alston_ar.pdf; Clapham, Andrew, *Human Rights Obligations of Non-state Actors*, Oxford 2006; De Schutter, Olivier, Transnational Corporations and Human Rights, Oxford 2006, 1-40.
[44] Mujih, p. 1.

such as the UN Draft Code of Conduct for Transnational Corporations (the UN Code)[45] and the subsequent UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms)[46]—have met with strong opposition from states and business. These instruments therefore have remained without legal effect and have been successful only in the form of voluntary, non-binding soft law instruments such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the ILO Declaration), [47] the OECD Guidelines for Multinational Enterprises (the OECD Guidelines)[48] and the UN Global Compact[49]—a global multi-stakeholder partnership initiative.

Why have hard law instruments failed to take effect?

Having been strongly influenced by the 1973 bombing of the ITT Inc. headquarters in New York, and accused of complicity in the toppling of the then-Chilean government,[50] the first attempt to regulate MNEs with a hard law instrument under international law came under the auspices of the United Nations. The Commission on Transnational Corporations began drafting the UN Code in 1977[51] and finalised its work in 1990.[52] The UN Code was intended to be binding, comprehensive and directly applicable to MNEs.[53] Potential abuses of MNEs were to be controlled "through national regulation backed up by international controls based on an international agreed code of conduct."[54] Its universal nature and the legal status had been a considerable bone of contention.[55] Due to ideological and political differences between, on one hand, capital-exporting

[45] Draft Code of Conduct on Transnational Corporations, UN Doc. E/1990/94 (12 June 1990).
[46] UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003), at: http://www1.umn.edu/humanrts/links/NormsApril2003.html.
[47] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 2006 edition at: http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.
[48] OECD Guideline for Multinational Enterprises, 2011 edition at: http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/2011update.htm.
[49] United Nations Global Compact at: http://www.unglobalcompact.org/.
[50] Baccaro, Lucio and Valentina Mele, "For Lack of Anything Better? International Organizations and Global Corporate Codes", *Public Administration* 89, No. 2 (2011), p. 454.
[51] Muchlinski, pp. 658-662.
[52] Buhmann, p. 28.
[53] Morgera, "The UN and Corporate Environmental Responsibility: Between International Regulation and Partnerships", *Review of European Community & International Environmental Law* 15, No. 1 (2006), p. 95.
[54] Muchlinski, p. 120.
[55] Morgera, p. 96.

industrialised countries seeking protection for foreign investors against the risk of expropriation in the wake of nationalisations in developing countries and, on the other hand, capital-importing developing countries striving to protect their resources against the potentially adverse impact of MNEs,[56] the negotiations were suspended in 1992 and the UN Code was shelved.[57]

In 2003, a working group of the UN Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights produced what was to be considered the second UN-led effort to regulate MNEs through a hard law instrument, as its 23 articles were drafted "in treatylike language".[58] The drafting of the UN Norms was guided by a human rights-based approach to corporate responsibility.[59] The replacement of the term "Code" by "Norms" seems to reflect the strongly normative approach and the legally binding nature of the framework that was set to deviate markedly from the state-centric nature of international law, in various respects. The UN Norms were said by one of the drafters, David Weissbrodt, to be intended "to evolve into a binding instrument".[60] They offered improvements in respect of six aspects:[61] First, they contain a comprehensive list of general and specific human rights obligations including also civil, cultural, economic, political and social rights. Second, the UN Norms rely on a large number of widely accepted human rights instruments from which the obligations for MNEs are deduced. Third, they do not only impose negative but also positive obligations on MNEs. Fourth, from a linguistic perspective, "shall" is substituted for "should", thus making the provisions legally binding. Fifth, the UN Norms provide for specific provisions for the implementation of human rights norms, as they propose independent and transparent periodic monitoring as well as verification by national and international mechanisms. This approach clearly deviates from the present indirect process of implementation exclusively by states. Sixth, the scope of the UN Norms is not restricted to MNEs but extends to other enterprises.

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[56] Morgera, p. 94; Muchlinski, pp. 660-662.
[57] Morgera, p. 95.
[58] Ruggie, John G. "Business and Human Rights: The Evolving International Agenda", *The American Journal of International Law* 101, No. 4 (2007), p. 819.
[59] Morgera, p. 101.
[60] Buhmann, p. 43.
[61] Deva, Surya, "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in Right Direction?", working paper 112, 2004, p. 6, at: http://law.bepress.com/cgi/viewcontent.cgi?article=1270&context=expresso

However, the UN Norms encountered harsh criticism from the business community and in 2004 failed to be adopted by the then UN Commission on Human Rights, due to the lack of political acceptance. They were shelved and deprived of any legal standing.[62] Instead, in 2005, Professor John Ruggie was appointed the Secretary General's Special Representative for Business and Human Rights (SRSG) and mandated to "identify and clarify international standards and policies in relation to business and human rights".[63] Ruggie criticised the "conceptual flaws" of the UN Norms, such as an insufficiently clear distinction between the responsibilities of states and of MNEs and an unclear use of the terms "spheres of influence" and "complicity". He conceived his alternative three-pillar framework "Protect, Respect and Remedy"[64] by attributing responsibilities between states and MNEs in line with the traditional concepts of state-centric international law. His strong arguments against direct obligations for MNEs seem to leave little space for the UN Norms to be renegotiated for the purpose of a hard law instrument. Hence, the failure of the UN Code and the UN Norms seems to confirm that the present state-centric system is not receptive to direct obligations for MNEs and prefers to rely on soft law initiatives such as the Global Compact and the OECD Guidelines.

Why have soft law instruments remained quite ineffective?

The Global Compact, launched in 1999 by the then UN Secretary General Kofi Annan,[65] was aimed at engaging in a partnership with business and offering a multi-stakeholder forum to support companies in their efforts to adhere to, and integrate, the Global Compact's normative substance—i.e. its ten principles, which are all drawn from existing UN documents—into their business operations, on a purely voluntary basis.[66] The Global Compact is non-regulatory in nature, qualifying itself as a "voluntary", "light, non-bureaucratic", "network-based" "governance framework".[67] The wording of its principles ranges from broad and unspecific in relation to human rights, to quite precise concerning labour rights.

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[62] Ruggie, p. 821
[63] Ruggie, p. 821.
[64] Ruggie, John G., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5 (2008).
[65] Morgera, p. 98; Weschka, p. 650.
[66] Overview of the Global Compact, at: http://www.unglobalcompact.org/AboutTheGC/index.html.The ten principles are available at: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.
[67] Global Compact Governance, at: http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html.

Due to its voluntary nature and low benchmarks for adherence—requiring only a Letter of Commitment from the respective CEO[68]—it has attracted many MNEs but also harsh criticism for allowing MNEs to "blue-wash".[69] Meanwhile, MNEs are required to provide an annual communication on progress (COP) report specifying concrete progress on the 10 principles.[70] However, no systematic evaluation of the claimed progress takes place.[71] According to the integrity measures,[72] the Global Compact "is not designed ... to monitor or measure participants' performance" and seems to rely on public accountability, transparency and the self-interest of companies to comply with the principles. The integrity measures provide for a very soft form of "public shaming" for non-compliance with the reporting requirement, entailing a progressive downgrading of the adherence status from an initial "non-communicating" status to the final de-listing from the UN website.[73] The same "sanction" applies if a company that is accused in a written complaint of "systematic or egregious abuse of the Global Compact's principles" does not engage in dialogue with the Global Compact Office after it was asked for comments.[74] The complaints procedure, which is said to lack transparency and responsiveness,[75] provides no redress for victims, since there are no consequences for the company resulting from its alleged violations of the Global Compacts principles, except for its removal from the Global Compact's website. Unsurprisingly, some scholars are pessimistic about the added value of the Global Compact.[76] However, the dissemination of the adhering companies' reports to the financial markets through collaboration with Bloomberg L.P. is a promising means of creating a mechanism for the monitoring of compliance rooted in the financial sector.[77]

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[68] Berliner, Daniel. "From norms to programs: The United Nations Global Compact and global governance." *Regulation and Governance* 6, No. 2 (2012), p. 4.
[69] Weschka, p. 651.
[70] Baccaro, p. 459.
[71] The annual review consists of an anonymous online survey conducted to take stock of environmental and social performance. In 2011, 1325 companies from 100 countries have responded. Unfortunately, this figure is not related to the overall number of registered Global Compact companies which cannot be found on the website. The search for US companies resulted in only three matches (Tiffany, ACT Global Sports and J.C. Penney marked "non-communicating"). The review revealed that companies take most action on environmental and labour standards, while anti-corruption efforts and human rights action lag behind. "Annual Review" at: http://www.unglobalcompact.org/AboutTheGC/annual_review.html.
[72] "Integrity Measures" at: http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html.
[73] Weschka, p. 652, Baccaro, p. 459.
[74] "Integrity Measures" at: http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html, Weschka, p. 652.
[75] Berliner, p. 4.
[76] Oldenziel, Joris, *The Added Value of the UN Norms. A Comparative Analysis of the UN Norms for Business With Existing International Instruments*, Amsterdam, 2005, p. 13, at: http://somo.nl/publications-en/Publication_417.
[77] "Analyzing progress" at: http://www.unglobalcompact.org/COP/analyzing_progress.html.

The OECD Guidelines have recently been thoroughly reviewed and are now available in their 2011 edition.[78] They are binding for the 44 adhering governments[79] and directly addressed by those governments to MNEs operating in or from adhering countries.[80] While the Guidelines' geographical scope remains considerably smaller than that of the Global Compact, its subject matter is much broader—covering additional aspects such as competition, consumer interests, science and technology, and taxation. Interestingly, the 2011 edition adds a separate section on human rights incorporating the "Protect, Respect and Remedy" framework of Professor Ruggie.[81]

The Guidelines' implementation mechanism consists of National Contact Points (NCPs) which must be established by every adhering government and the Specific Instances Procedure.[82] Since adhering states have significant discretion in shaping the structural arrangements of their NCP, huge differences exist in their institutional design.[83] The independence of those NCPs that are hosted by a Ministry in charge of promoting industrial development and foreign investment,[84] or by a business authority, might be seriously questioned when they are required to evaluate disputes involving MNEs.[85]

Complaints of alleged violations of the Guidelines by MNEs can be lodged by trade unions or NGOs with an NCP under the Specific Instances Procedure.[86] The NCP examines them and facilitates access to conciliation or mediation.[87] While the procedures are on-going, all partners must maintain strict confidentiality.[88] At the end of

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[78] See the comparative table of changes made in the 2011 update at: http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/49744860.pdf.
[79] The Guidelines 2011 were adopted by the then 32 OECD members and 10 non-adhering countries (Argentina, Brazil, Egypt, Estonia, Israel, Latvia, Lithuania, Morocco, Peru, Rumania and Slovenia) on 25 May 2011 at the OECD's 50th Anniversary Ministerial Meeting. OECD Guidelines, Foreword, p. 3, OECD Guideline for Multinational Enterprises, 2011 edition at: http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/2011update.htm.
[80] OECD Guidelines, Foreword, first paragraph, p. 3.
[81] OECD Guidelines, IV. Human Rights, Commentary on Human Rights, para 36, p. 39. Note also the important shift to the need to respect "the internationally recognised human rights" from previously only those "consistent with the host government's international obligations and commitments" which could be assumed to be much lower than the home countries' human rights obligations. II. General Policies, para 2, p. 19.
[82] OECD Guidelines, Concepts and Principles, para 11, p. 18.
[83] Guidelines 2011, p. 71; NCPs exist as single departments within government ministries (UK), in multi-departmental formats operating across a range of ministries (Korea), as tripartite entities incorporating commercial and trade union representatives as well as ministries (Sweden) or even as quadripartite entities (unique of Finland). MacLeod, Sorcha and Douglas Lewis, "Transnational Corporations. Power, Influence and Responsibility", *Global Social Policy* 4, No. 1 (2004), p. 79.
[84] Baccaro, p. 463.
[85] OECD Watch criticizes the remaining potential conflict of interests of the newly created Danish NCP placed under the Danish Business Authority, "OECD Watch welcomes Denmark's strengthened NCP: the New Mediation and Complaints Mechanism, with a mandate to investigate allegations and make recommendations", 5 October 2012, at: http://oecdwatch.org/news-en/oecd-watch-welcomes-denmark2019s-strengthened-ncp.
[86] Baccaro, p. 455.
[87] OECD Guidelines 2011, pp. 71-74.
[88] OECD Guidelines 2011, pp. 73.

the procedure, the NCP issues a statement with the minimum information relevant to the case and the outcome. More detailed information is only released if the parties agree.[89] The handling of the confidentiality requirement has been strongly criticised as it tends to undermine transparency and the credibility of the implementation system.[90] It has been argued that the Special Instances Procedure is hardening into a "semi-institutionalised international tribunal".[91] But given that there are no sanctions foreseen, the implementation mechanism appears to be devoid of any instrument to force MNEs to comply with the Guidelines, if they are unwilling to do so.[92] However, one promising fact is that sometimes complaints lodged with an NCP trigger parallel judicial proceedings in national courts.[93] In these cases the procedure may be said to operate as a "pre-judicial" preparation phase. This could be extremely relevant for victims who wish to address the NCP of an MNE parent company with activities in a non-adhering country with a weak judiciary. Nevertheless, the OECD redress system has been found to lack a homogeneous impact, "since it depends heavily on the responsiveness and effectiveness" of the relevant NCPs.[94]

This brief discussion of the two soft law models has demonstrated that they appear to fill a regulatory gap but their impact might be said to be inadequate, if judged upon criteria generally used to assess the efficiency of hard law, such as monitoring systems with the potential imposition of sanctions. To enhance the effectiveness of soft law instruments it might be advisable to increase the economic advantages that can be derived from compliance with the OECD Guidelines or the Global Compact's principles, for example conditioning the access to financial instruments on the implementation of the OECD Guidelines or the Global Compact principles. The Dutch NCP appears to have proposed that adherence to the OECD Guidelines could be a prerequisite for obtaining export credit coverage and government subsidies.[95]

The following case study on Wal-Mart's entry into the South African market will shed some light on the impact of the current piecemeal approach to MNEs at the national level and might be best introduced with the following question: Can South African

[89] OECD Guidelines 2011, p. 73.
[90] Oldenziel, p. 10.
[91] Baccaro, p. 456.
[92] Weschka, p. 649.
[93] Baccaro, p. 455.
[94] Baccaro, p. 457.
[95] MacLeod, pp. 81-82.

competition courts be reasonably expected to address the full range of potential negative implications of the future exposure of the South African economy to Wal-Mart-dominated global value supply chains, using only national competition law?

On 27 September 2010, Massmart[96] announced that Wal-Mart[97] intended to acquire a controlling interest in Massmart [9]. The Competition Tribunal of South Africa conditionally approved the merger on 31 May 2011.[1] An appeal against this judgment was lodged by Massmart's biggest union, the South African Commercial, Catering and Allied Workers' Union (SACCAWU), and the Ministries for Economy, Trade and Industry, and Agriculture, Forestry and Fisheries brought a review for lack of a fair hearing.[4] On 9 March 2012, the Competition Appeal Court of South Africa set the Competition Tribunal's judgment aside and replaced it with an order containing modified conditions.

Wal-Mart's acquisition of Massmart represented its biggest investment in an emerging market and the first by a global retail chain in South Africa.[98] For Wal-Mart the merger signified the entry ticket into the African continent, given Massmart's engagements in other African countries.[99] Therefore, the judgment was seen to have implications for other African countries as well as for South Africa's attractiveness as a future FDI destination,[100] a crucial factor not to be underestimated against the background of high unemployment in South Africa.[101] The merger proceedings received considerable media coverage,[102] since they had triggered protests by unionists fearing not only job losses and wage cuts but also an erosion of their bargaining power, as Wal-Mart's record of poor labour relations could be imported into South Africa through the merger. [123]

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[96] Massmart, incorporated under South African laws, controls ten subsidiaries operating within South Africa and in other parts of the African continent. It is a wholesaler and retailer of grocery products, liquor and general merchandise and focuses on low end customers [8]. The numbers in brackets in this section refer to the paragraphs of the Court's judgment.

[97] The US-based largest retailer in the world, Wal-Mart, which operates in 15 different countries, had a very limited interest in the South African market prior to the merger. This interest consisted in its purchasing arm, International Produce Limited (IPL) which sourced fresh fruit produce in South Africa for the export market [5 and 6].

[98] Lal, Rajiv, "Why Wal-Mart Went Shopping in Africa", *Harvard Business Review*, 28 September 2010, at: http://blogs.hbr.org/hbsfaculty/2010/09/why-wal-mart-went-shopping-in.html.

[99] Maylie, Davon, "Africa Learns the Wal-Mart Way, Firms Sweat over Discounting, Late-Night Deliveries in Effort to Join Retailer's Global Supply Chain", *Wall Street Journal*, 6 September 2012.

[100] Maylie, Devon, "Wal-Mart, Massmart Proceed with Deal as they Await Ruling", *Wall Street Journal*, 22 February 2012.

[101] According to official figures, it stood at 25.5 % in the third quarter of 2012, at: http://www.statssa.gov.za/keyindicators/keyindicators.asp.

[102] Kelto, Anders, "South Africa Reconsiders Walmart's Bid For Retailer", 26 October 2011, at: http://www.npr.org/2011/10/26/141690739/south-africa-reconsiders-walmarts-bid-for-retailer ; Jakobs, Ken, "Balancing economic development and social welfare in South Africa: The Walmart/Massmart merger", 23 May 2011, at: http://blogs.berkeley.edu/2011/05/23/balancing-economic-development-and-social-welfare-in-south-africa-the-walmartmassmart-merger/.

The merger did not raise any competition concern under Section 12A of the South African Competition Act 89 of 1998. In other words, *prima facie* it did not prevent or lessen competition, since Wal-Mart did not compete with Massmart in South Africa.[10] Apart from reviewing the key elements of the Tribunal's judgment, which were identical to the merging parties' proposed "investment remedy",[147] the Court's main challenge centred on applying to the merger the "substantial public interest grounds" under Section 12A (3) which "seek to correct socio-economic disadvantage and distortion which arose as a result of South Africa's discriminatory past." [93]

The balancing exercise for the court consisted in weighing the expected positive effects of the merger—lower prices particularly, but not exclusively, for low-end consumers and benefits for suppliers from "Wal-Mart's unique access to global value supply chains"—[117]) against potential negative effects on "a) a particular industrial sector or region, b) employment, c) the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive, and d) the ability of national industries to compete in international markets."[12] In respect of the national law to be applied, the Court acknowledged that "the Act provides no guidance to the weight to be placed on the factors set out in s 12 A(3) nor to the relationship between the traditional competition questions contained in s 12 A and the specific public interest grounds." [113] The Court therefore had a pioneering role with "scarce technical resources available" [99] in a case with unusual dimensions.

During the hearing, SACCAWU focused on worker's rights and its bargaining power. The union submitted compelling evidence of the detrimental effects of Wal-Mart's employment practices and policies [123] from experience with Wal-Mart in Mexico, Chile and the United States and referred to sanctions imposed by various regulators on Wal-Mart for harmful effects on the conditions of its workers and suppliers.[15] Additional interventions by experts provided empirical evidence of "a structural systemic underpayment of employees", "systemic anti-union strategies",[128] and "a pay and promotion disparity through gender discrimination", [130] which has been the subject of the biggest-ever class action in the US in the case Wal-Mart Stores Inc. v. Dukes et al [129].[103] SACCAWU called for stricter safeguard measures, such as the

[103] Wal-Mart Stores Inc. v. Dukes et al, (No. 10-277) 603 F.3d 571, reversed, at: http://www.law.cornell.edu/supct/html/10-277.ZS.html. Unsurprisingly Wal-Mart's Canada CSR report strongly contrasts with these allegations of gender discrimination, as it highlights that "54.8 per cent of the management team at Walmart Canada are women and 31.1 per cent of senior management are women." However, equally unsurprisingly

strengthening of the union's collective bargaining power by group centralised bargaining and a closed shop [20] in order to remove the present asymmetry so as to protect the workforce against Wal-Mart's anti-union stance. [122, 135]

The ministers dealt primarily with the question of how the merged firm's local procurement/import ratio would develop in the future and how employment—particularly in small and medium-sized suppliers—would be affected by this development. [115] They argued that the merger might result in a significant shift in purchasing away from South African manufacturers towards foreign low-cost producers, to the detriment of small and medium-sized business in South Africa.[22]

Ultimately, the main challenge for the court was to decide how to factor in negative implications resulting from global competition without being given detailed information, as the merging parties refused to disclose essential information, particularly on their local procurement/import ratios.[115] As regards potential remedies, the Court declined to impose procurement conditions, since these would have discriminated against the merging parties as their competitors would have been able to procure globally without restrictions. In addition, they would have been in breach of international trade obligations. [25, 164]

Another key question was to what degree competition law could and should regulate issues relating to the competence of other national regulators, such as the Labour Court.[133] The Court noted that it was faced for the first time with a phenomenon directly related to globalization: global value supply chains to which the South African suppliers would be exposed as a result of the merger which could not be avoided, but the adverse effects of which could possibly be somewhat mitigated. It acknowledged that there was an insufficient understanding of the implications of the challenges arising from these highly competitive global supply chains and that it was beyond the competence of national competition law to tackle them in full. "[C]ompetition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalization."[154]

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no additional information is provided concerning their pay as compared to their male colleagues. "Walmart Canada's Corporate Social Responsibility now available online", 9 August 2012, at: http://www.walmartcanada.ca/Pages/Press%20Releases/Article/169/188/130.

As with the Tribunal, the Court offered transitional protection for the workforce against future retrenchments and for SACCAWU's status, but it did not strengthen the union's bargaining power by supporting the structural change it requested, on the grounds that this fell under the jurisdiction of labour law and that a distinction had to be drawn between "interests" and "rights". As the Court explained: "… it is not the role of competition law to provide legal protections in potential disputes of interest which stand to be solved by the exercise of collective power." [136] Unlike the Tribunal, the Court significantly enhanced the protection of the retrenched workers by making their reinstatement obligatory. It also added a tripartite study with a strict timetable to the proposed training programme designed to empower small- and medium-sized businesses, with a view to making it more precise and operational. The Court also removed the ceiling on the costs of the programme,[148] as this was still to be defined.

Nevertheless, given Wal-Mart's dominant position and record, there remained considerable asymmetry in the relationship between the MNE and the local market. This was apparently confirmed by an intervening expert saying that "the scope existed for the merging parties to downgrade the terms and conditions of employees without violating the applicable labour laws or bargaining agreements."[124][104] Wal-Mart is known for its radical choices in the fight against unionisation. In Canada, a store was simply closed by Wal-Mart for this reason.[105] While it remains to be seen how much protection will be provided by the approved transitional conditions and those to be defined by the Court, it seems clear that the Court did not—and could not—tackle the biggest threat of the Wal-Mart business model which stems from the constant pressure on local suppliers to cut prices, backed by the threat of international competition. [111] Apart from technological innovations and the elimination of middlemen, [106] "walmartisation" in South Africa, as already seen elsewhere, will mean the survival of only the fittest small- and medium-sized business, and the gradual displacement of less competitive suppliers by larger

[104] See also the United Food & Commercial Workers International Union (UFCW), "Walmart workers paint graphic picture of working conditions throughout supply chain", 9 August 2012, http://www.ufcw.org/2012/08/09/13840/.
[105] Bird, Richard, "Canada: Supreme Court Issues Decision in Wal-Mart Closure Case", 12 March 2010, at: http://www.mondaq.com/canada/article.asp?articleid=95176&rss=5.
[106] Uni Global Union, "Walmart's Global Track Record and the Implications for FDI in Multi-Brand Retail in India", at: http://www.uniglobalunion.org/Apps/UNIPub.nsf/vwLkpById/870AFFCDCFFA1EE7C12579C00054892D/$FILE/FDI_REPORT.PDF. March 2012.

suppliers with greater economies of scale, as well as the displacement of part of the local procurement by cheaper imports.[48, 62][107]

The merger case provides also interesting evidence of the unwillingness and lack of capability of the Tribunal to regulate and thus illustrates an important aspect of the "domestic enforcement gap". The Appeal Court points at the too formalistic,[78] passive [85] and lax [61] approach by the Tribunal in accepting the merger conditions drafted by the merging parties themselves [26] without attempting to verify whether the remedy was appropriate and proportionate [149] and accepting that crucial documents were not submitted by the merging parties because of alleged doubts by the Tribunal about their usefulness,[63, 87] resulting in the Tribunal's work being "bedevilled (sic) by the lack of precise evidence".[105]

In sum, the case study has revealed that mergers involving MNEs have a global dimension with far-reaching implications, going beyond the sphere of national competition law. The international dimension of competition and its potential detrimental effects on vulnerable economic actors can not be gauged in full by a national competition court which has limited resources and time constraints. Therefore, numerous aspects in the social and employment field remain unsolved. They fall victim to the fragmentation and specialisation of national law which renders it impossible to regulate MNEs more comprehensively. Hence, national law can hardly be said to offer an adequate regulatory framework for MNEs. It would appear that an international competition court with independent legal experts might be better placed to apply directly-binding competition rules to MNEs, with the court having the competence as well as the human and material capacities to look into all merger-related implications and to enforce compliance with internationally agreed minimum standards. Since such an international competition court and binding international competition rules do not exist, there remains a considerable legal gap, to the advantage of MNEs.

[107] The feared result has been confirmed by former Massmart worker, James Burns, saying that within 8 months in 2010 the local supply of products was replaced by 80% imports in the Massmart-owned Builders Warehouse. Comment to Jakobs, Ken, "Balancing economic development and social welfare in South Africa: The Walmart/Massmart merger", 23 May 2011, at: http://blogs.berkeley.edu/2011/05/23/balancing-economic-development-and-social-welfare-in-south-africa-the-walmartmassmart-merger/.

Conclusions:

This essay has discussed a number of economic and legal features specific to MNEs. It has highlighted the high likelihood of MNEs abusing their economic and political clout, depending to a large extent on the specific regulatory setting, which can be assumed to be stricter in the home state of the parent company (generally located in the developed world) than in the host state of the subsidiaries in the developing world. These findings support the argument that an MNE-specific regulatory framework at an international level could be most beneficial to close the widening gap between legality and reality. The paper has explored the reasoning of several scholars in support of important conceptual changes in international law to attribute legal personality and direct obligations to MNEs in order to accommodate their increased status in a new reality created by globalisation. While a number of solid arguments have been articulated in favour of adapting international law to this new reality, so far international law has not responded effectively to these challenges. The two UN-led attempts to create international hard law instruments—the UN Code and the UN Norms—were shelved because states and businesses opposed any profound change in the distribution of their rights and obligations under the existing state-centric international law system. Instead, preference has been given to two alternative soft law initiatives—the Global Compact and the OECD Guidelines—which currently fill the regulatory gap at the international/regional level. Although the OECD Guidelines' scope and mechanism have continuously been broadened, this paper has provided evidence of the fact that they remain weak and ineffective in implementing internationally-agreed principles, and in offering possibilities for redress for victims of MNE operations. Both initiatives could become more effective by systematically linking MNEs' performance data in relevant areas to the investment and procurement decisions of public and private entities. The OECD Guidelines may offer the greatest potential for further development, as they enjoy the backing of those states in which the vast majority of MNE parent companies are located. It might be possible to achieve progress on environmental sustainability under a scheme such as the Global Compact, because environmental concerns can easily be integrated into efforts to achieve economic gains. However, compliance in the area of human rights, which is not seen to offer economic advantage, seems less likely to be enhanced by soft law instruments. Against the background of the current regulatory framework for MNEs, the case study illustrated that there is a considerable risk of MNEs abusing their

dominant position in globalised markets, to the detriment of vulnerable groups of society. These vulnerable groups cannot be adequately protected under national law against the adverse effects of the global operations of MNEs, such as Wal-Mart. Therefore, the specific challenges posed by MNEs cannot be solved by national law and even less by international soft law instruments. Rather, these challenges must be addressed by international hard law instruments, including effective monitoring and sanctioning mechanisms, which have yet to be created.

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