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Editorial

Dear reader,

In March 2011, researchers from Utrecht University's Molengraaff Institute for Private Law conducted a preliminary 'quick scan' study of the feasibility of holding Netherlands-based multinational corporations legally accountable for extraterritorial violations of human rights and environmental norms. This study, which was commissioned by the Dutch NGOs SOMO (Centre for Research on Multinational Corporations) and Amnesty International – Netherlands, was aimed at identifying (i) the possibilities under Dutch law and (ii) the barriers to conducting legal proceedings before a Dutch court against a multinational company (MNC) for violating human rights or labour rights of people outside of the Netherlands and/or harming their environment (human rights violations, labour rights violations and damaging the environment are hereinafter collectively referred to as: extra-territorial human rights violations). Furthermore (iii), the goal of the research was to indicate which areas or legal questions would need further investigation in a possible subsequent in-depth research assignment.[1]

An area identified as warranting further research was that of transparency. In relation to the feasibility of holding Netherlands-based multinationals legally accountable for harm caused abroad, one of the barriers that came up in the preliminary study pertained to the difficulties in revealing these multinationals' corporate and management structures. On the one hand, this barrier involves a procedural aspect, in the sense that it may hamper plaintiffs in identifying the legal entity or entities to which the writ of summons would have to be served. On the other hand, it also involves a substantive aspect since it hinders plaintiffs from gaining insight into the management structure and level of control executed by the holding company that is necessary for establishing whether the holding company or its officers have acted with due care.

One of the difficulties pinpointed in the preliminary study was that neither a multinational's annual accounts nor its group companies' accounts provide clear guidance on the company`s internal structure. Often, a Chamber of Commerce which keeps a register of legal entities in its territory provides some more information concerning directors and shareholders; however, it remains extremely difficult to uncover a clear picture of ownership and control lines in respect of an MNC and its worldwide network of companies. With regard to the listing of companies, Dutch securities laws require the publication of a prospectus which contains a great deal of information about the corporate structure of the company whose shares will be listed. However, similar to the annual reports, the information in a prospectus is like a picture, i.e. the situation can change the next day. For companies listed in the US, the disclosure requirements are stricter than in the Netherlands and disclosure is required on a more frequent basis. Even so, such information hardly ever provides a complete picture.

A related issue was the fact that although Dutch law acknowledges requests by the parties for document disclosure, the degree and success of access to the requested documents is quite limited in the Netherlands compared with the US and the UK document discovery system. Under the Dutch rules of procedure, the desired documents need to be described with a certain level of detail, the documents must have a connection with the legal relationship between the claimant and the defendant, i.e. the alleged tort, and they must be useful for resolving the matter at hand. A September 2011 judgment by the The Hague District Court in a civil liability suit against Shell, initiated by four Nigerian farmers and the Dutch NGO Milieudefensie, seems to confirm that the relatively restrictive Dutch approach to document disclosure may pose real barriers to plaintiffs seeking to hold Netherlands-based multinationals accountable before Dutch courts for extra-territorial human rights violations.[2]

In view of these findings, SOMO and Amnesty International – Netherlands in early 2012 commissioned a further study into some of the issues that may arise when it comes to obtaining transparency into the ownership and control structures of Netherlands-based multinationals in order to hold them accountable for their involvement in extraterritorial human rights violations. This supplemental study on multinationals and transparency sought to analyse some legal and non-legal methods to obtain insight into multinationals and (the harmful effects of) their transboundary activities, with the aim of establishing whether, and if so, in what way, Netherlands-based

1. This study was conducted by a team of researchers from Utrecht University's Molengraaff Institute for Private Law consisting of dr. L.F.H. Enneking, prof. I. Giesen, dr. M.J.C. van der Heijden, dr. T.E. Lambooy, prof. M.L. Lennarts and Y. Visser. See, for an account of its main results: L.F.H. Enneking, I. Giesen, M.J.C. van der Heijden, T.E. Lambooy, M.L. Lennarts & Y. Visser, "Privaatrechtelijke handhaving in reactie op mensenrechtenschendingen door internationaal opererende ondernemingen – De (on)mogelijkheden van het aansprakelijk stellen van Nederlandse multinationals voor extraterritoriale mensenrechten- en milieuschendingen naar Nederlands privaatrecht", 26 *Nederlands Tijdschrift voor de Mensenrechten* 2011, 541.

2. The Hague District Court, 14 September 2011, *LJN* BU3529 (re oil spills near Ikot Ada Udo); The Hague District Court, 14 September 2011, *LJN* BU3535 (re oil spill near Oruma); The Hague District Court, 14 September 2011, *LJN* BU3538 (re oil spill near Goi).

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multinationals could be compelled to become more transparent in this respect.[3]

In line with its objective of contributing to, influencing and co-setting the agenda of the ongoing societal debate concerning actual, required and envisioned changes in corporate law, governance and corporate social responsibility, *The Dovenschmidt Quarterly* presents parts of the results of this supplemental study in this special issue on Multinationals and Transparency. The issue consists of several articles. The first, written by Lambooy, Diepeveen, Nguyen and Van 't Foort, addresses the question what information on the corporate and management structures of Netherlands-based multinationals is currently available, and whether any legislative changes could be envisioned to increase transparency in this respect. The second article, by Enneking, examines what possibilities the Dutch system of civil procedure offers when it comes to creating transparency in the corporate and management structures of Netherlands-based multinationals for plaintiffs seeking to hold them legally accountable for violations of human rights and environmental norms perpetrated abroad.

These two articles, which are based on the results of the aforementioned study on multinationals and transparency that was conducted by Utrecht University's Molengraaff Institute for Private Law, are complemented by two other contributions on related topics by Verkerk and Vytopil. Verkerk discusses in his contribution the use of civil procedure as a means to obtain transparency while Vytopil focuses on the transparency requirements with regard to conflict mineral in the light of the Dodd Frank Act. Next to that she also searches for viable alternatives to conflict mineral legislation. This special issue of *The Dovenschmidt Quarterly* on Multinationals and Transparency is concluded by a summarizing paper on the need for transparent multinationals written by Oldenziel from SOMO and Tiemersma from Amnesty International – Netherlands.

We hope that these readings will provide you with further insight into the topical questions on multinationals and transparency that have arisen in debates on international corporate social responsibility and accountability around the world and in the Netherlands in particular.

The Editorial Board,
In cooperation with Liesbeth Enneking

3. This study was conducted by a team of researchers from Utrecht University's Molengraaff Institute for Private Law consisting of dr. L.F.H. Enneking, dr. M.J.C. Van Der Heijden, R. Hordijk, dr. T.E. Lambooy and prof. M.L. Lennarts.