Unveiling the Role of Multinational Enterprises in a World of Global Value Chains

Review of Peter Muchlinski Multinational Enterprises and the Law(Third ed., 2021)

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1. *Introduction*

# The Vedanta dispute arose from alleged toxic emissions from the Nchanga Copper Mine in the Chingola District of Zambia. The Claimants in this case were a group of 1826 Zambian citizens who live in the Chingola district.[[1]](#footnote-1) As noted by the Court, “[t]hey are, by any standards, very poor members of rural farming communities served by watercourses which provide their only source of water for drinking (by themselves and their livestock) and irrigation for their crops.” At [1]. The claimants argued that their health and farming activities have been damaged because of repeated discharges of toxic matter from the Nchanga Copper mine into those watercourses since 2005. The immediate owner of the copper mine is Konlola Copper Mines plc (“KCM”), a public company incorporated in Zambia and the largest private employer in that country. Vedanta Resources plc (Vedanta) is the parent of a multinational group, listed in the London Stock Exchange.

# In 2019 the UK Supreme Court asserted jurisdiction over Vedanta for alleged torts committed by its subsidiary in Zambia. The Court concluded that the published materials show that “Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine…” at [61] These published materials were sufficient to give rise to a possible duty of care of Vedanta. The Court further explained that its main rationale for providing the claimants access to justice by asserting its jurisdiction was the claimants “lack of sufficient resources of their own (even as a large group) with which to fund the litigation.” Similarly, in Nevsun Resources Ltd. v Araya, the Canadian Supreme Court asserted jurisdiction over a case brought by Eritrean victims against a Canadian company for alleged breaches of customary international and tort law.[[2]](#footnote-2) On 29 January, 2021 The Hague Court of Appeals delivered the first decision to hold on the merits that the parent company incurred a duty of care to farmers concerning large-scale oil spillage in three villages in the Niger Delta (Milieudefensie v. Shell).[[3]](#footnote-3)

# In the past, the idea that companies owed a duty of care to local communities under such circumstances was almost unthinkable. Since its first edition in 1995, Peter Muchlinski *Multinational Enterprises and the Law* sought to explain why. In the third edition of this highly influential book, Muchlinski continues to provide his readers with a meticulous account of the regulatory architecture in which multinational enterprises (hereinafter: MNEs) operate and explains why circumstances such as the 2008 financial crisis, the following backlash and Covid-19 may usher a new era of MNEs regulation.

#  Despite the immense scope of this project, *Multinational Enterprises and the Law* offers the rare combination of a rich and comprehensive synthesis with a thorough and compelling analysis. It is also a masterful example of interdisciplinary research. It combines economics, political science, sociology, history, law and a sophisticated approach to the study of regulation. This impressive monograph is divided to four parts. The first part is dedicated to a conceptual framework that covers the definition of MNEs and the various factors that explain their growth (chapter 1), the different forms of MNEs (chapter 2), different agendas, sources and sites for MNEs regulation (chapter 3) and engages with the question of jurisdiction and MNEs (chapter 4). The title of the second part of the book is *Economic Regulation.* It covers the regulation of inward investment (chapter 5) and the promotion of inward investment (Chapter 6) alongside tax regulatory measures related to MNEs (chapter 7), questions of multinational enterprises’ group liability and directors’ liability (Chapter 8), corporate governance issues (chapter 9), banks (chapter 10), competition (chapter 11) and intellectual property (chapter 12). In the third and last part of book Muchlinski addresses the *Social Dimension*. This part covers labour relations (chapter 13), human rights (chapter 14) and environmental issues (chapter 15). The last Part of the book focuses on the impact of international investment law (chapters 16 & 17).

# *(b) Unveiling the Legal Infrastructure in which MNEs Operate*

# *Multinational Enterprises and the Law* is a descriptive book and as such it isn’t always easy to distill its main arguments. Yet, one argument clearly runs as a central thread throughout the monograph: the significance of *law* and *legal infrastructure* for the operation of MNEs. This line of argument is closely linked to the main thrust of the emerging legal scholarship on global value chains (hereinafter: GVCs). In *the Role of Law in Global Value Chains: A Manifesto,* the IGLP group sought to explore “how does the law shape the structure and organization of production and distribution globally, and how do structures of production and distribution in turn reconfigure what law *is* and how it *works* in this dynamic process.”[[4]](#footnote-4) Muchlinski’s emphasis on the ways in which different legal fields shape the operations of MNEs shares a similar sensibility to the Global Value Chains Manifesto. One possible reading of Muchlinski’s book is as an attempt to map the different ways in which law shapes and informs the conditions of possibility for MNEs operations and practices and how law changes through the engagement with their practices.

# Muchlinski describes how the shift to international production through global production chains using non-equity modes of business organization defy the conventional distinction between corporation and contract and form a distinct type of business association that applies corporate and contractual methods.[[5]](#footnote-5) The controlling entity could avoid its responsibility for the acts of the controlled entity if the contract between them includes risk-shifting clauses exempting the controlling entity from liability.[[6]](#footnote-6) As noted by Muchlinski, “[m]anagerial control by dominant undertakings raises the question … whether the ‘contractual veil’ be lifted so that the dominant undertaking can be made liable for the acts of subordinate undertakings, regardless of the contractual allocation of risk between them.” (77) These processes challenge the traditional model of corporate limited liability and call for creative regulatory approaches the book addresses at some length.

The first part of the *Multinational Enterprises and the Law* sketches the history of ideas underpinning the concept of the MNE and key approaches to its regulation. The early restrictive approaches to the MNE (then mostly referred to as the Multinational *Corporation*) emerged in the 1960s and 1970s. Postcolonial nations challenged the legitimacy of an international legal order that enhanced the power of investors without taking the interests of the new states into account. The coalition of postcolonial states under the auspices of the New International Economic Order (NIEO) launched a series of initiatives against the growing influence of foreign companies and brought to the fore a distributive justice approach to international investment regulation. Yet, as Muchlinski describes in different segments of the book, the 1980s marked the ascendance of a more open-door regulatory approach to foreign investment. The terms of the emerging investment regime would be hitherto set in bilateral agreements that ‘divided’ the South and leveraged exporting nations to dictate rules that were compatible with their (investors’) interests.[[7]](#footnote-7) Conceptually, corporate responsibility in international law would hitherto be defined primarily in human rights terms and implemented through soft law mechanisms such as corporate codes, third party certification, regulation through disclosure, with mixed results.[[8]](#footnote-8)

Since the 1990s scholars in a variety of disciplines began to trace “a transition from hierarchically organized MNEs, with their traditional focus on managing internalized overseas investments, to MNEs as international lead firms. These firms work with and integrate their geographically dispersed strategic partners, specialized suppliers, and customer bases into complex structures.”[[9]](#footnote-9) Muchlinski points to the financial crisis of 2008 as a key turning point leading, together with other factors, to a global backlash and a change of sensibility to corporate regulation. Muchlinski speculates that “the emphasis on regaining control over the country… coupled with a stated desire to help the ‘left out,’ suggests this wave might result in regulatory changes that would limit, if not actually reverse, the current ascendancy of “neoliberal” economic policies.”[[10]](#footnote-10) Amid these changing sensibilities, some of the older North/South distributional concerns of the 1960s and 1970s return to the fore accompanied by concerns over inequality within societies of the North. As Covid-19 persists longer than anticipated and the detrimental effects of raging storms, unruly fires and mounting temperatures bring the climate crisis to every home, the impetus for a regulatory shift intensifies. As Muchlinski argues, “perhaps, in the long run, the most important critique of all is the environmental perspective, which questions growth-led economics and the rise of consumerist values…”[[11]](#footnote-11)

# *(c) What Difference does the MNE make if production is “Made in the World”?*

# One intriguing aspect in Muchlinksi’s approach to the theory and practice of business regulation lies in his choice to use the term Multinational Enterprise (MNE) rather than the more conventional Multinational Corporation (MNC) or the more recent “Global Value Chain” (GVC).

# Historically, During the late 1960s and throughout the 1970s, the MNC became a subject of inquiry in diverse disciplines such as economics, political science, international relations, business management, and history.[[12]](#footnote-12) Raymond Vernon described the surge of interest in the MNC in *Sovereignty at Bay*. "In only a few years…there have been scores of books and hundreds of articles about corporations that are 'global' or 'transnational' or 'international' or 'multinational' . . . governments have begun to ask how these entities were affecting their national interests and what polices were needed to deal with them."[[13]](#footnote-13) MNC as a concept and a subject of scholarly debate and analysis served as an important predecessor, among other bodies of literature, to the contemporary literature on GVCs.[[14]](#footnote-14) As noted by Jennifer Bair, the term GVC refers to “outsourcing, off-shoring, fragmented production, vertical trade, production sharing and so on... [it] refer[s] less to any particular way of organizing production than to the overall concept of value-added trade…the idea that many goods and services are created via a sequence of discrete activities spread across multiple countries. “[[15]](#footnote-15) Global value chains have been celebrated as harbingers of employment and economic growth. Nevertheless, GVCs are also associated with exploitative relations and environmental harm as well as greater instability and employment insecurity in both the Global North and the Global South.[[16]](#footnote-16)

# Legal scholars discovered GVCs quite late in comparison to other disciplines. The great advantage of the GVC is in disaggregating and offshoring to achieve the most efficient (and least regulated) production process. GVCs “can be thought of as factories that cross international borders.”[[17]](#footnote-17) This process has been popularized through the narrative of “Made in the World.” As noted in an OECD publication wearing this title, “Today's goods, ranging from large planes to small electronic devices, such as iPods, are made up of intermediate products, both tangibles (such as cases, wings or wheels) and intangibles (such as design or computer programming). Each can be sourced from a different country, and come together into a final product through a global value chain. In effect, we are increasingly observing “Made in the World” replacing “Made in Britain” or “Made in China”.[[18]](#footnote-18)

# The flourishing of GVCs coincide with the possible surge in transnational tort litigation against parent companies. While the prospects of pursuing such litigation in American courts diminishes,[[19]](#footnote-19) British, Canadian and other European courts cautiously open their doors to such litigation.[[20]](#footnote-20) This emerging jurisprudence focuses on the responsibility of the parent company. Yet, if products are “Made in the World” could a litigation that targets a specific (parent) company at a specific (home) state make any difference? Does the shift to the GVC render the corporation obsolete as a legal target and as a unit of analysis? What is the role and significance, if any, of the corporation (or the MNC) to the operation of GVCs?

# Muchlinski’s *Multinational Enterprises and the Law* explains why we could be more sanguine about the prospects of this litigation. Muchlinski follows the Organization for Economic Cooperation and Development (OECD) definition of multinational enterprise which extends to any company or other entity that can exert a significant influence over another, or at least be so linked as to coordinate their operations.[[21]](#footnote-21) He describes how the current organization of MNEs is a distinct type of business association that applies both corporate and contractual methods of organization. His choice of the MNE as his leading concept allows him to remain focused on the corporate structure as a mode of governance and yet analyze how non-corporate mechanisms, most prominently contractual relations and the strategic use of jurisdiction enable the MNE to enhance its control and promote its interests. Similarly, Jennifer Bair cautiously argues that corporations still play a pivotal role in organizing and orchestrating functionally integrated trade. This means that “the turn to spatially dispersed, fragmented production does not indicate a reduction in corporate power so much as *a change in the way* *that it is exercised*...”[[22]](#footnote-22)

# MNEs turn to GVCs to disaggregate and redistribute their operations by outsourcing and offshoring.[[23]](#footnote-23) At the same time, the disaggregated and fragmented mode of GVC capitalism is shaped by and constitutes a ‘multiplicity of firm/state relations.’[[24]](#footnote-24) The literature on GVCs and MNEs frequently refers to the centrality of networks in their operations. Different legal mechanisms (the corporation, the contract, the legal rules governing sovereignty) constitute the links between the different elements in this network that bring it into being, enabling the MNE to control its operations. At the same time, these legal rules also constitute ‘the wholes’ in the net, the practical and judicial barriers that enable the MNE to evade responsibility and effective scrutiny. To unravel and challenge this net of havens requires a break away from the ‘traditionally demarcated fields of law.’[[25]](#footnote-25)

# To a great extent, this is the great achievement of Muchlinski’s book. It encompasses a rich and diverse analysis of different ‘demarcated fields of law’ and in doing so argues for the relevance of engaging with them all to understand and analyze MNEs. The richness and scope of Multinational Enterprises and the Law should be read as a call on lawyers of different fields – international law, corporate law, tax law, investment law, environmental law, banking, competition, financial regulation and more – to work against the grain of fragmentation in order to decipher the role and influence of MNEs to our contemporary human condition. It remains to be seen whether the changing sensibilities of our times could make such coalitions possible.

1. Vedanta Resources PLC v. Lungowe, [2019] UKSC 20. [↑](#footnote-ref-1)
2. Nevsun Resources Ltd. v Araya, 2020 SCC 5. For a thorough and insightful analysis see Andrew Sanger, Corporate Liability for Breaches of International Law Abroad: Canadian Supreme Court Opens the Door but Questions Remain, 79 The Cambridge Law Journal 381 (2020) [↑](#footnote-ref-2)
3. [Wubeshet Tiruneh](https://www.ejiltalk.org/author/wtirinuneh/), 'Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell'(EJIL Talk! 19 February 2021) <www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell> [↑](#footnote-ref-3)
4. Dan Danielsen and Jennifer Bair, The Role of Law in Global Value Chains: A Window into Law and Global Political Economy, LPE Blog, 12.6.2019 (<https://lpeproject.org/blog/the-role-of-law-in-global-value-chains-a-window-into-law-and-global-political-economy/>) [↑](#footnote-ref-4)
5. Muchlinski, 49 [↑](#footnote-ref-5)
6. Muchlinski, 317 [↑](#footnote-ref-6)
7. Doreen Lustig, Veiled Power: International Law and the Private Corporation 1886-1981 212-219 (2020). [↑](#footnote-ref-7)
8. For an overview of these measures see Larry Catá Backer, The Problem of the Enterprise and the Enterprise of Law: Multinational Enterprises as Polycentric Transnational Regulatory Space 777, 784-789, in The Oxford Handbook on Transnational Law (Peer Zumbansen, ed., 2021). See also Muchlinski, 571-584. [↑](#footnote-ref-8)
9. For an overview of the literature see Liena Kano, Eric W. K. Tsang and Henry Wai-chung Yeung, Review Article: Global value chains: A review of the multidisciplinary literature, 51 Journal of International Business Studies 577 (2020) [↑](#footnote-ref-9)
10. Muchlinksi, 18 [↑](#footnote-ref-10)
11. Muchlinski, 94 [↑](#footnote-ref-11)
12. Muchlinski surveys some of this literature in 8-12 , 20-25, 80-81, 88-89; For the history of this concept in international law and other disciplines see also Doreen Lustig, Veiled Power: International Law and the Private Corporation 1886-1981 195-205 (2020). [↑](#footnote-ref-12)
13. Raymond Vernon, Sovereignty at Bay 13(1971) [↑](#footnote-ref-13)
14. Jennifer Bair, Frontiers of Commodity Chain Research 5-14 (2009) [↑](#footnote-ref-14)
15. Jennifer Bair, The Corporation and the Global Value Chain *in* The Corporation: A Critical Multi-Disciplinary Handbook 326 (G. Baars and A. Spicer eds., 2017). [↑](#footnote-ref-15)
16. Thomas Clarke and Martijn Boersma, Global Corporations and Global Value Chains: the disaggregation of corporations? 319, 324 *in* The Oxford Handbook of the Corporation (Thomas Clarke, Justin O’Brien, and Charles R. T. O’Kelle eds., 2019) (and the references there) [“rather than global value chains the social and economic relations involved can and do often become global inequality chains, and ultimately global poverty chains.”]. [↑](#footnote-ref-16)
17. Taglioni, Daria & Winkler, Deborah, Making Global Value Chains Work for Development 11 (The World Bank, 2016) [↑](#footnote-ref-17)
18. <https://www.oecd.org/innovation/made-in-the-world.htm> [↑](#footnote-ref-18)
19. See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013) ; Jesner v. Arab Bank, PLC, 584 U.S. \_\_, 138 S. Ct. 1386 (2018); Nestlé U.S.A. v. Doe, 593 U.S. \_\_ (2021);   [↑](#footnote-ref-19)
20. [refer again to the cases mentioned in footnotes 1,2,3] [↑](#footnote-ref-20)
21. Muchlinski, page 48, footnote 46 [↑](#footnote-ref-21)
22. Jennifer Bair, The Corporation and the Global Value Chain, 326, 328 in The Corporation… [↑](#footnote-ref-22)
23. Anthony Goerzen and Ari Van Assche, Global value Chain Governance: A Multinational Enterprise Capabilities View *in* [The Oxford Handbook of International Business Strategy](https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198868378.001.0001/oxfordhb-9780198868378) Kamel Mellahi **et al eds., 2021)** R Alexander, Emerging Roles of Lead Buyer governance for sustainability across global production networks. Journal of Business Ethics 2019; Barrientos, Stefanie, Gereffi, Gary, and Rossi, Arianna (2011) ‘Economic and social upgrading in global production networks: a new paradigm for a changing world’, International Labour Review 150(3–4): 319–340 (2011) ; Humphrey, John, and Schmitz, Hubert (2002) ‘How does insertion in global value chains affect upgrading in industrial clusters?’, Regional Studies 36(9): 1017–1027**;** Sjoerd Beugelsdijk, Torben Pedersen and Bent Peterson *–* 'Is There a Trend Towards Global Value Chain Specialization?' (2009) 15(2) J. Intl. Manag., 126, 127-129; OECD, 'Multinational Enterprises and Global Value Chains: New Insights on the Trade-Investment Nexus' (2018) 8-9; Peter Gibbon, Jennifer Bair and Stefano Ponte, 'Governing Global Value Chains: An Introduction' (2008) 37(3) Econ. Soc. 315, 316-318. [↑](#footnote-ref-23)
24. Dan Danielsen, ‘Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development’, in U Mattei & JD Haskell (eds), Research Handbook on Political Economy and Law (Edward Elgar, 2015) 195. [↑](#footnote-ref-24)
25. The IGLP Law and Global Production Working Group: The role of law in Global Value Chains: A Research Manifesto, London Review of International Law, Volume 4, Issue 1, 2016, 57, 63-64 [↑](#footnote-ref-25)