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BOOK REVIEW

Multinational Enterprises and the Law By Peter Muchlinski (Oxford: Oxford University Press, 2021, third edition, with a contribution from Ebbe Rogge), 912 pp.

Peter Muchlinski's formidable volume, *Multinational Enterprises and the Law*, came out in its third edition in 2021, and should be on the reading list of all scholars working in the area – or areas, rather, as the book canvasses a remarkable number of themes relevant to multinational enterprises (MNEs). The author integrates in his analyses facts, discussions and insights from an impressive range of sources and across disciplines, balancing a depiction of the larger picture in which MNEs operate, with the nitty-gritty detail on what MNEs are, why they have become so dominant, what the positive and negative impacts are, and how they are regulated. His examples span a thought-provoking and stimulating range of regulatory regimes, countries and MNEs (although with a distinct Anglo-Saxon flavour).

Even in Part I, where the author outlines and elaborates on the conceptual framework (chapters 1–4), there is much to learn for any student or scholar interested in MNEs and the law. The reader is first taken through the evolution of the MNEs positioned in a broader setting of the developments in the global economy. The author goes on to engage with industrial organization theories as well as various micro-economic theories to explain the growth of the MNEs, combining this with an insightful analysis of some of the challenges to these theories through various other ways of collaboration in business. All this paves the way for his discussion of legal factors in the development of MNEs.

Part II, 'Economic Regulation', takes up the largest segment of the book, encompassing inward investment (chapters 5 and 6), taxation (chapter 7), multinational group liability and duties of the corporate board, and corporate governance and disclosure (chapters 8 and 9), the regulation of multinational banks by his contributor, Ebbe Rogge (chapter 10), competition, and intellectual property and technology transfer (chapters 11 and 12). In Part III, 'The Social Dimension', the author discusses what he denotes 'corporate social responsibility' (CSR), concentrating on labour, human rights, and the environment (chapters 13, 14 and 15). The book concludes with Part IV, on the impact of international investment law (chapters 15 and 16).

The chapters in Part II that I concentrate on in this review are chapters 7, 8 and 9, on 'Taxation', 'Multinational Group Liability and Directors Duties' and 'Corporate Governance and Disclosure', contrasting these with the author's discussion of the 'social dimension' in Part III. The division between 'economic regulation' in Part II and 'the social dimension' in Part III may be said to reflect a misleading dichotomy between economic issues, and all other matters. In this dichotomy, economic efficiency thinking is given primacy, while human rights and other social matters, and environmental aspects, are seen as disconnected from and somehow less crucial than the economic issues. This is not to say that this necessarily reflects the author's own thinking. On the contrary, his discussion of labour, human rights and environment in Part III, which is quite extensive and well-researched, and his sporadic and somewhat reticently formulated criticism against the still dominant thinking about

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multinational enterprises in other parts of the volume, including in Part II, indicate a broader mindset.

However, this structuring of the volume does not fully facilitate an analysis of one of the most pressing issues concerning MNEs and law, namely the role of law in ensuring the contribution of MNEs to sustainability, which I understand as securing social foundations (including human rights) for humanity now and for the future, while mitigating pressures on planetary boundaries (including climate change).[1] In aggregate, MNEs do not contribute to sustainability; rather they are drivers of the extreme unsustainabilities of our time through exploitation of people, destruction of the environment, and the undermining of the economic and governance bases for well-functioning societies.

Mitigating unsustainabilities and contributing to sustainability belong to the core of corporate governance, both from a perspective that considers business, because of the financial and corporate risks of continued unsustainability, and from one that takes a broader societal view, as the positive contribution of business is crucial to achieve sustainability. There are three aspects of the structuring and the content of this volume that seem to constrain the author's engagement with these core issues.

Firstly, the author's approach to the unsustainabilities in which MNEs are involved. Exploitation of people, in terms of modern slavery, lack of decent work, and (other) violations of human rights, is relatively well covered in chapters 13 and 14. Chapter 15 is dedicated to the environment, although I would have liked to see a clearer recognition of the seriousness of the current complex and interconnected crises. The contribution of MNEs in aggregate to the undermining of the economic and governance bases for well-functioning societies includes illicit financial flows, corruption and unethical tax avoidance as well as illegal tax evasion. Although the book canvasses the regulation of anti-corruption and discusses taxation and the prevalence of tax havens also in Europe to some extent, these issues are not covered with the rigour I expected in the volume.

Facilitating illicit financial flows, for example, are presented as normal business activities that may at best raise some ethical concerns. We see a first hint of this on p. 63 in Part I on the conceptual framework, and more in depth in dhapter 7, which explicitly states in Section 3 that the practices discussed there are 'lawful and do not constitute illegal tax evasion' (p. 266). These practices include transfer price manipulation, which the author explains through a simple example as using *manipulation* of price between two companies in a group, through under- and over-invoicing, so that the 'bulk of the profit' ends up in the company which is subject to the lowest tax (p. 266). This practice is not only usually a violation of tax laws (which the author finally touches on, on p. 273), and one of the pervasive ways of undermining the economic bases for well-functioning societies in the host states where MNEs operate; it is also domestically normally a violation of company law, including the duties of the corporate board of each company to promote the interests of that company – which naturally encompasses maintaining the capital of that company. This core company law point is something the author touches upon later, in chapter 8, in the context of protecting minority shareholder rights (p. 325).

Secondly, the author is surprisingly reticent in his engagement with company law, notably concerning the core of corporate governance, in important segments of the book. Company law is the regulatory infrastructure for the establishment and governance of the company as a key legal entity of MNEs, and the corporate board is as a matter of company law the core decision-making organ in the day-to-day governance of the company. The author notes the tension between what company law envisages and the reality of the

[1] For example, M. Leach, K. Raworth and J. Rockström, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Pathway for Humanity', *World Social Science Report* 2013 (OECD Publishing, 2013), pp. 84–90.

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operations of MNEs. For example, in chapter 8, he identifies the problem of 'the ossification of corporate law into a means of liability avoidance which is hard to justify in terms of economic or social justice' (p. 319). Yet, his discussion of company law is rather limited, and the dilemmas that corporate boards, including in subsidiaries in corporate groups and in suppliers in global value chains find themselves, are not subjected to the discussion I would have envisaged in this volume. Company law and the role of the corporate board are practically absent in chapter 7 on taxation. In chapter 8, the duties of the corporate board ('directors duties' in the Anglo-Saxon terminology) are a rather limited add-on after the canvassing of some aspects of multinational group liability. Chapter 9, on corporate governance and disclosure, is, according to the author, concentrated on 'the key issue on how to make the corporation accountable' (p. 336). Yet, the corporate board is not even mentioned when the author identifies what he sees as the 'central question of corporate governance': 'for whom does the company exist and how should that influence its decision-making'. In the author's rather illuminating discussion of theories and approaches seeking to respond to this question (p. 337 onwards), the board is mentioned but the link between its company law duties and the broader regulatory framework for corporate governance is not always clear. The remainder of chapter 9, although extensive in its notably Anglo-Saxon description of the various approaches to international governance (including board structures and composition), external oversight (including regulation of auditing, stewardship, and the role of stock exchanges), and accounting standards, is somewhat segregated from the themes of other chapters.

Thirdly, and related to the latter, separating the discussion of corporate governance and the duties of the board (in chapters 8 and 9 of Part II), from the discussions of taxation (in chapter 7 in Part II), and labour, human rights and environment (in chapters 13–15 in Part III), does not facilitate an integrative analysis. This separation may be influenced by the author's reliance on a specific version of the legal-economic agency theory as popularized by Kraakman *et al.*,[2] and that theory's limiting conceptualization of what company law should deal with (see the repeated references in chapters 8 and 9, e.g., p. 303, n. 16). The author interrogates and criticizes key postulates in this strand of legal-economic theories in chapter 9, thereunder clarifying that the imperative to maximise returns to shareholders is 'not a legal requirement, but an ideological construct' (p. 399). Nevertheless, his discussion appears to remain influenced by the same legal-economic thinking. This separation between 'economic regulation', where corporate governance is situated in Part II, and the 'social dimension' in Part III, means that the author separates corporate governance and 'CSR' in a manner that is not reflective of the increasing inclusion of sustainability aspects in the regulation of business, notably in the European Union.[3] Symptomatically, it leaves out of the corporate governance analysis in chapter 8 a core corporate governance tool for the board of the parent/lead company as well as for the other individual companies in the MNEs in their corporate sustainability assessment: the increasingly important concept of what the author discusses mainly as human rights due diligence (in Part III, chapter 14).

The author's approach may in part be explained by his Anglo-Saxon perspective, which is reflected in various choices throughout the book, as I have touched upon in this review. My review, on the other hand, is written with a Continental European perspective. This is not a homogenous perspective; Continental Europe represents a range of company law cultures and traditions. Nevertheless, historically, and still, albeit to a somewhat lesser extent today,

[2] R. Kraakman, J. Armour, P. Davies, L. Enriques, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, M. Pargendler, W.-G. Ringe and E. B. Rock, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2017, 3rd edn).

[3] Which began well before the work with this volume was concluded in January 2020 (preface), although there have since been several important developments.

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it is distinct from Anglo-Saxon understandings of the role of the company and of company law, with greater emphasis on the societal role of business. Yet, in current debates on company law, corporate governance and sustainability, there is a tendency for Anglo-Saxon ideas to dominate the discussion of companies and of how to regulate them – or not – as we have seen most recently in the sustainable corporate governance debate since 2020.[4]

This is an excellent volume, which I recommend to all scholars and students interested in the regulation of MNEs. Also, for someone who has worked in the field for quite some years, the book offers knowledge, insight and food for thought. However, it should be read with the caveat that it represents a specific and, in some respects, somewhat dated approach to MNEs and law, notably in its treatment of company law, corporate governance and corporate sustainability.

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[4] B. Sjåfjell and J. Mähönen, 'Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy' (2022) 34(2) *Bond Law Review* 69–112 (preprint available at SSRN: https://ssrn.com/abstract=4039565).