

Article

The Commons, the Common Good and Extraterritoriality: Seeking Sustainable Global Justice through Corporate Responsibility

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Abstract: Despite their laudable intent, extraterritorial legal initiatives to promote corporate sustainability development have not been well received in practice, and are often seen as a window-dressing exercise. This article aims to conduct a conceptual and doctrinal analysis, offering a theoretical foundation that interprets corporate extraterritorial legislative attempts as legitimate in the context of globalisation, using the lens of “the commons” and “the common good”. We try to link the values and dimensions of “the commons” to the goals of corporate extraterritorial legislation, so that lawmaking attempts with extraterritorial reach will gain additional foundational support and achieve more effective and better controlled compliance. In particular, the article makes an original attempt to justify and develop a new notion, namely “the extraterritorial commons”. This notion is in harmony with, rather than contradicting, progressive legal attempts to address the mismatching and conflicting nature of the relationship between the traditional voluntarism of corporate extraterritorial responsibilities, particularly in relation to sustainability issues, and global trends towards more regulation in this area.

Keywords: the commons; the common good; multinational enterprises; extraterritoriality; corporate responsibility; extraterritorial commons

1. Introduction

Governing multinational enterprises (MNEs) requires novelty and innovation. The Organisation for Economic Co-operation (OECD) Guidelines for Multinational Enterprises clarify that MNEs “usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another” [1]. The adoption of an extraterritorial focus in the form of a projection of national law abroad is clearly one of the modern legal attempts to address corporate sustainability challenges [2] (p. 931). Indeed, this measure takes good account of the fact that breaches of responsibility are usually committed by boards of directors, who are required by national corporate law, corporate governance codes, regional legal solutions and other legislations to consider the interests of wider communities of stakeholders in addition to shareholders, such as Law No 2017-399 on the duty of vigilance of parent companies adopted in France on 27 March 2017. There are also regional legal instruments with international effects; among the most prominent of these are a number of EU directives towards greater transparency in MNEs’ global supply chains, such as the Directive on non-financial disclosure.

Despite its laudable intent, this extraterritorial legislative approach has not been well received in practice, and is often seen as a window-dressing exercise [3,4]. This is hardly surprising. After all, international business has no frontiers, but state-centred legal systems do. The domestic nature of state legal systems in general, and corporate laws in particular, struggles to adjust to the expanding reach of MNEs [5] (p. 335). Up to now the notion of extraterritorial legislation, by which State A applies its law to, and accepts jurisdiction over, activities by third parties in State B, remains alien to many jurisdictions' legal systems [2] (p. 939). This article aims to offer a concrete conceptual channel for persuasive and plausible arguments to support more effective and enforceable corporate extraterritorial responsibility through the lens of "the commons" and "the common good". It is hoped that this conceptual channel will lay further a legitimate foundation for future extraterritorial legal developments, as those that occur "*when states establish jurisdiction in regard to activities which partly or fully happen outside their territory*" [6]. We try to link the values and dimensions of "the commons" that we have contextualised from secondary sources, such as sharing, trust, responsibility, cooperation, solidarity, justice, fairness and morality [7], to the goals of corporate extraterritorial legislation, so that lawmaking attempts with extraterritorial reach will gain additional foundational support, reconcile better with existing corporate law frameworks, and achieve more effective and better controlled compliance.

Additional to contributions in the legal development field, we also hope the paper will stimulate discussions on and expand the reach of a variety of schools of thought, including progressive corporate law theory, sustainability development, corporate social responsibility (CSR), and corporate and board accountability. While it would be wrong to simply brush off the valuable attempts made by a number of schools of thought—for instance, the stakeholder model [8,9] and the institutional theory [10,11]—there remain significant theoretical gaps when these are used to support the legitimacy of demanding extraterritorial accountability of MNEs in the light of economic globalisation. When applied in a transnational or extraterritorial context, the effectiveness of these theories is limited by various factors such as the lack of explicit contracts between MNEs and extraterritorial stakeholders, disparities in the understanding and application of CSR between different jurisdictions, and the weak position or power of extraterritorial stakeholders, who are particularly vulnerable to corporate decisions and behaviours reflected in policymaking. A concrete theoretical framework of corporate extraterritorial responsibility is therefore a necessity, within which the conceptions of "the commons" and "the common good" can be expected to play a central role.

Until now, notions of "the commons" and "the common good" have not been broadly applied in arguments surrounding the promotion of corporate sustainability, not to mention extraterritorial initiatives. The commons, as a "common paradigm" for social movements and beyond [12], refers to how society and communities enable people to collaborate and share through collective action and solidarity [13] (p. 27). In a global economy in favour of economic rationalism and individual interests, these concepts are often regarded as alternatives to the profit-oriented appropriation of common resources [14,15]. However, we argue that the nature and scope of those two terms should be expanded, not only to justify extraterritorial legislative attempts, but also to give legitimacy to board members to duly consider the interests of extraterritorial stakeholders, given that the terms refer to a common pool of resources of all varieties with no territorial boundaries. Thus, these concepts could usefully fill the above-mentioned existing theoretical gaps, and in particular offer jurisprudential support for extraterritorial legalisation attempts.

In this manner, a rationale analysis of extraterritorial responsibilities through the lens of the commons and the common good leans heavily on the answers to two increasingly important theoretical questions, to which this paper now turns. First, appreciating the existing theoretical limits of corporate extraterritorial responsibility, does the pursuit of the common good (ethical concerns) and the commons (economic concerns) contribute to explicating the legitimacy and significance of corporate legal extraterritorial responsibilities? Second, suppose the answer to the first question is yes, how could we define and develop these concepts to fill existing doctrinal and theoretical voids for legalising

corporate extraterritorial responsibility to enhance corporate compliance, and to reconcile conflicts among stakeholders and MNEs in the context of globalisation?

This is a significant attempt not just in the legal sense; it also has broad-spectrum relevance to the reconciliation of the interests of business and stakeholder groups and the creation of more sustainable businesses. Externally, the analysis hopes to make a contribution to vulnerable community engagement, economic wellbeing and social cohesion by supporting NGOs, government agencies and policy makers to gain a better understanding of the rationale, importance and possible approaches for protecting extraterritorial stakeholders through corporate law. This will reduce the risk of irresponsible corporate behaviours by MNEs beyond their home jurisdictions in order to build successful corporations which make positive contributions to wider society. Internally, heightened awareness and understanding of the notion of “the extraterritorial commons” may assist board members to clearly map stakeholder coalitions and construct a matrix of stakeholder priorities in global corporate networks when making business judgements.

In particular, the article makes an original attempt not only at linking the notions of “the commons” with extraterritorial corporate legal responsibility, but also at justifying extraterritorial corporate responsibility by way of developing a new notion, namely “the extraterritorial commons”. Previous discussions on “the commons” or “the common good” in corporate contexts have discounted the sharp imbalance between the strong positions of MNEs and the vulnerable positions of stakeholders in developing countries, as well as variations in different ideas of “the good”, and in turn have been inadequate in contributing to possible legislative approaches to promote extraterritorial responsibility to mitigate these issues. “The extraterritorial commons” may fill this gap, given that it conveniently refers to resources that are consumed by MNEs but which are geographically located outside the territory where they are registered or which is their main business location. These resources may well include nature resources such as soil, clean water, raw materials and human resources, since one of the main drivers for MNEs to operate in developing countries is cheap labour, and one of the main impacts of global supply chains relates to workers’ rights. Furthermore, in the context of MNEs, the human-centric notion of “the commons” could be applied as a useful lens to connect “the common good” for society at large and the personal good for individual stakeholders in globalised supply chains or MNEs’ subsidiaries within groups of companies.

The article proceeds as follows. Section 2 offers a comprehensive review of the current theoretical explanations of imposing extraterritorial legal responsibilities on MNEs, and the challenges associated with this. An introduction to the methodology is provided in Section 3. Section 4 contextualises, rationalises and critically evaluates the current legislative approaches to the extraterritorial responsibilities of MNEs. Section 5 situates “the commons” and “the common good” within the corporate environment, and builds links between these notions and extraterritorial corporate responsibility. Section 6 proposes a new notion of “the extraterritorial commons” for a more inclusive legalising approach, reshaping the mandatory features of corporate extraterritorial accountability to achieve the ultimate goal of “the common good”. As will be seen, this notion can be expected to play a central role in the theoretical framework legitimising extraterritorial legal initiatives related to corporate activities. Following the limitations of the study and some suggestions for future research, finally, there will be some concluding remarks.

2. Literature Review

The protection of social, environmental and human rights issues is far from adequate, not just in real-life practice, but also in related research, greatly owing to the fact that both corporate structures and globalised operations facilitate corporate evasion of state jurisdiction. These gaps, which are created by the transnational nature of MNEs and the complexity of sustainability issues affecting a wide range of stakeholders, need to be filled through legal approaches with extraterritorial reach, which both existing corporate law principles and business ethics theories struggle to accommodate.

2.1. Challenges to Existing Corporate Law Principles

Despite their progressive legislative goals, extraterritorial legal initiatives, such as the transparency requirement embedded in s.54 of the UK Modern Slavery Act (MSA), are seemingly incompatible with traditional conceptions of state sovereignty [16] (p. 270) and the shareholder primacy norm [17,18], which underpins mainstream corporate laws and remains the default dogma in many jurisdictions, most prominently the UK and the US [19,20]. For instance, if one body corporate within a multinational group engages in wrongdoing, the domestic nature of corporate laws and the separate legal personality orthodoxy would effectively shield other group members from being sued or liable [21,22]. In the meantime, the distributions of power and control in MNEs have been arranged in ways that conveniently surpass territorial boundaries, mostly with a parent company being a “national” in one jurisdiction and its various subsidiaries being “nationals” in other jurisdictions where they operate [23,24] (p. 599). It is thus not surprising that MNEs are regarded as operating “in a legal vacuum” with respect to their cross-border activities [2] (p. 934).

Additional to the obstacles created by conventional nation-based corporate law doctrines to the exercise of corporate extraterritorial responsibility, the overwhelming influence of shareholder primacy in both corporate governance practices and company laws of many jurisdictions, which recognise the maximisation of shareholders’ wealth as corporations’ fundamental objective [25,26] (p. 577), have also obstructed extraterritorial legal endeavours on corporations. Although a corporate responsibility to consider non-shareholder stakeholders’ interests during business operations has been acknowledged as a well-established social norm, the nature, substantive content and scope of this responsibility thus far still remain controversial. In the corporate context, and as a consequence, it has been commonly tackled by company-based voluntary initiatives, far from legal mandates and litigation [27,28].

2.2. Challenges to the Institutional Theory

Institutional theory highlights the role of institutions in promoting CSR, and in using CSR as an avenue to investigate various ways to ease the boundaries between business and society [10]. The theory regards CSR as a notion that is institutionally contingent, taking different forms based on various national or institutional contexts. The theory greatly facilitates a better understanding of CSR in relation to the diversity and the dynamics of the concept [29]. These diversified conceptions of CSR implicate cross-national variations in CSR practices, whereas the dynamics of the notion indicate that the practice of CSR has also been constantly evolving through imitation and adaptation, and assuming varying manifestations in different jurisdictions [10] (p. 8).

That being said, applying institutional theory to explicate CSR in the cross-national dimension needs to be complemented not only with “homogeneity and consensus” but also with “heterogeneity and contestation around the meaning and practice of CSR” [30] (p. 57). For instance, while current institutional theory work recognises the “institutional duality” of an MNEs’ subsidiaries as these subsidiaries face dual internal and external pressures, by conforming to requirements from both the host country and the parent company [31,32], the theory does not explain the institutional role played by the MNE as a whole, and the sovereignty implications of the multiple cross-border dimensions in which it operates its CSR practices. Although the current institutional analysis may justify diverse legislative approaches for regulating CSR in different countries, it cannot justify the necessity or provide a rationale for a nation imposing its extraterritorial legal forces on cross-border commercial entities.

2.3. Challenges to Stakeholder Theory

Stakeholder theory is a theory of organisational management and business ethics that cares for the interests of multiple constituencies impacted by corporations, such as employees, suppliers, customers, creditors, local communities, and others [33]. Parallel to the global CSR movement, the theory helps to explicate the practical and systematic perspectives of CSR, bridging the gap between CSR theory and company practice. A number of terms derived from the theory, including stakeholder management,

stakeholder communication, stakeholder scrutiny and stakeholder partnership, are among the most often discussed concepts in the domain of CSR [34]. Legal scholars likewise use the theory to rationalise progressive corporate law approaches such as directors' duties towards stakeholders [35,36]. However, stakeholder theory has been criticised for its limitations in balancing stakeholders' interests and the unpoliced managerial discretion of directors [37,38]. One acute problem facing stakeholder theory, as pointed out, is the difficulty of resolving the tensions among conflicting stakeholders' interests [39], since preferences for certain groups of primary stakeholders are always highly subjective. The theory is also in need of clear criteria to normatively categorise the rights corresponding to each stakeholder group [40].

The disadvantages of stakeholder theory may be more prominent when applied to the case of extraterritorial responsibilities. This theory, which views a corporation as a locus in relation to wider external stakeholders' interests, focuses on protecting the interests of non-shareholders in general, without highlighting the divisions between stakeholders in the home and extraterritorial jurisdictions. Lack of criteria in terms of stakeholder ranking also makes it difficult to maintain a consistent approach when ascertaining the identities and rankings of extraterritorial stakeholders. For some MNEs' extraterritorial stakeholders, such as local people who are harmed by the pollution emitted from an MNE's overseas' subsidiary, they will not be able to *ex ante* contract with the MNE in a direct or fair manner that protects their legitimate interests. Those groups of extraterritorial stakeholders without contractual ties to the corporations are particularly vulnerable, as it is proven to be hard for them to assert their rights to the MNE, or to raise direct legal claims for such rights against the MNE, in the absence of a contractual relationship [41,42]. This is made even more challenging by the complexity of global supplier chains and corporate groups, which adds the separate legal personality concern into the overall picture, as discussed in Section 2.1. For some corporations, they may also have explanations for their deliberate ignorance of the interests of certain extraterritorial stakeholders, in circumstances where serving extraterritorial stakeholders' interests would not only sacrifice the legitimate rights of other stakeholders who have explicit contracts with the companies, but also affect the wealth-creation capability of companies, and thus risk infringing the sanctity of shareholder primacy, as previously explicated.

The table (Table 1) below displays the relevant theories, the source of the theories, and dimensions of the arguments:

Table 1. Theories, Sources and Dimensions of the Arguments.

Theories	Sources	Dimensions
conceptions of state sovereignty	[16]	incompatibility with extraterritorial initiatives
shareholder primacy norm	[17–20,25,26]	conflicts between the norm and mandatory CSR, including extraterritorial attempts
separate legal entities	[23,24]	being separate legal entities, whether parent companies should be responsible or accountable for the actions and decisions of their extraterritorial subsidiaries or suppliers
limited liability principle	[21,22]	limited liability principle shielding shareholders and parents companies from liability and the problem of corporate (extraterritorial) irresponsibility
institutional theory	[29]	diversity and the dynamics of CSR and legislative attempts for addressing extraterritorial challenges
	[10,30]	blurred boundaries between business and society and different forms of CSR (law) at national level
	[31,32]	“institutional duality” of MNEs' subsidiaries

Table 1. Cont.

Theories	Sources	Dimensions
stakeholder theory	[8,9,33,34]	nature and scope of (extraterritorial) stakeholders; origins and development of stakeholder theory
	[37–40]	criticism of the theory on its clarity, effectiveness and implementation
	[35,36]	connections between stakeholder theory and progressive corporate law
	[41,42]	limited legal responsibility of an MNE towards its extraterritorial stakeholders

In summary, the limitations of existing research on institutional theory or stakeholder theory become more evident when one uses them to support extraterritorial corporate responsibilities with a focus on instructionally bounded directors' consideration of extraterritorial stakeholders' interests, which are more indirect compared with those of domestic stakeholders. In the next two sections, support for corporations' extraterritorial social responsibility will be discussed through the lens of "the commons", an angle that has somehow been overlooked.

3. Methodology

3.1. Analytical Strategies

This is a library-based study utilising a mixed methodology consisting of doctrinal, theoretical and socio-legal research. Parts of this research will adopt the doctrinal approach, and the findings will be based on analysing and contextualising relevant legal authorities, primarily statutes and case law. We also take an integrated theoretical approach, using philosophical, sociological and economic theories to rationalise lawmaking endeavours in corporations' extraterritorial responsibility. This also evidences the interdisciplinary nature of the research. While theoretical analysis forms a central thread in the article, the discussions of the importance of legalising extraterritorial corporate responsibility and theoretical supports for the conceptions of "the commons", "the common good" and "the tragedy of the commons" are also inherently socio-legal, as the law is a social phenomenon after all, as pointed out by Cotterrell [43] (p. 296). Lady Hale, the former president of the Supreme Court of the United Kingdom, also highlighted the significance of this approach, particularly the fact that a number of socio-legal studies had been cited in court [44]. The approach is functional and appropriate to interpret and clarify an ambiguous field of law, such as extraterritorial responsibility, in its social context of the dominance of MNEs and their incompetence in addressing extraterritorial environmental and social challenges.

3.2. Methodology Framework

The methodology framework (Figure 1) consists of theoretical, doctrinal, interdisciplinary and social-legal research methods carried out in three parts of the article. First (presented in green), we discuss the relationships between extraterritorial responsibility and current mainstream theories through theoretical and doctrinal research. Second (presented in blue), it investigates the connection between "the commons", "the common good" and corporate extraterritorial responsibility through theoretical research. Third (presented in grey), this study examines "the extraterritorial commons" and its force in support of corporate extraterritorial responsibilities through doctrinal, theoretical and interdisciplinary research.

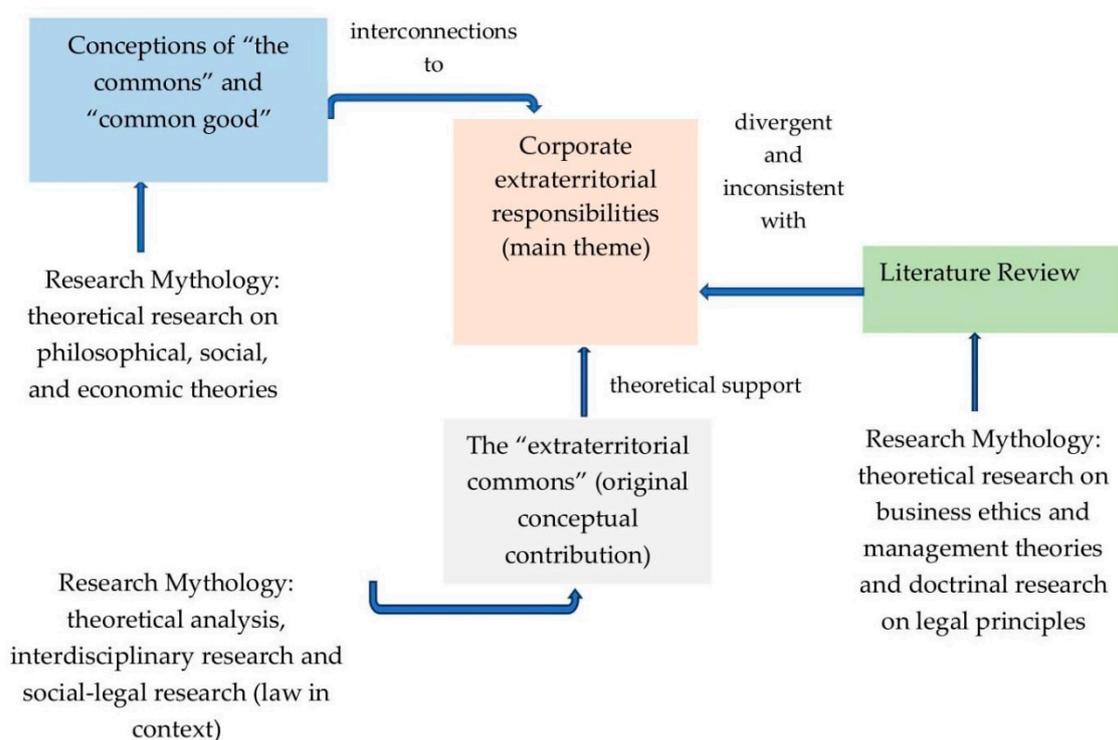


Figure 1. Research framework and analytical methods.

4. Extraterritorial Responsibilities: Forms and Applications

“Extraterritoriality of regulation has become a fact of life”, albeit a controversial one [45] (p. 93). It is a “situation in which state powers (legislative, executive or judicial) govern relations of law situated outside the territory of the state in question” [46] (p. 491). The extraterritoriality we discuss in this article is a situation where state power coordinates and governs stakeholder relationships outside the territory of the state, achieved through concurrent actions in contract, tort and other legal means. On the theme of ethical challenges, considering the inadequacy of voluntary CSR measures at both the domestic and global levels, a more effective regulatory response to the adverse social and environmental externalities generated by MNEs must be advocated and achieved through “legally binding rules together with official attempts to create such rules (to accompany) the ‘CSR journey’ at every step” [47] (p. 317). The creation of rules for extraterritoriality in this regard is thus expected to be one of the most important approaches in this area.

Extraterritorial legislation relates to governments’ claims to be international frontrunners in settling global sustainability challenges. It is desirable that extraterritoriality is involved in dispute settlements to promote corporate sustainability with the purpose of achieving justice globally, since domestic measures and resources are unable to deal with the situation sufficiently. The most often discussed aspect of corporate extraterritorial responsibility is normally embedded in a dimension where the responsibilities of developed states are discharged and executed through regulating the MNEs which regard these states as their homes.

Regulatory approaches can be dynamic in form, including disclosure rules and substantive regulation in the extraterritorial context. They can also arise in a variety of forms, for instance, by way of imposing extra duties on either the companies or the boards of these companies in order to align the scope of MNEs’ international responsibility with their sphere of control [4]. An example of a proactive disclosure approach is the supply chain disclosure requirements embedded in s.54 of the UK MSA. However, the pragmatic effectiveness of such approaches has been criticised. It is suggested that the UK government should improve the monitoring and enforcement of the MSA for better compliance, and penalties should be included for non-compliance [5,48]. It is claimed that the approach

represents a “softer” version that is almost private governance in a statutory form [49,50]. The impact of transparency reports alone may not be sufficient to achieve positive social ends, although it is a necessary step and may be used as a solid foundation for more accountable companies [51,52] (p. 246).

Examples of more substantive regulation include the following approaches: a due diligence programme is adopted in s.7(1) of the UK Bribery Act 2011, which creates an offence where a company fails to prevent bribery committed by a person associated with the company. Through the lens of directors’ duties, an additional duty of skill, care and diligence is made available in the French Commercial Code, which includes a section that creates an obligation for companies to prevent and mitigate environmental, health and human rights harms resulting from their activities, including those carried out by their subsidiaries and in their supply chains, in the form of a duty of care imposed on parent companies (Art. L. 225-102-4 of the French Commercial Code). This extraterritorial reach may stretch throughout the global supply chain, and victims can bring actions in France against a French parent company for damages that have occurred in another state’s territory by its subsidiary [53]. Regional legal instruments with international effects are also seen; the most prominent of these is the EU Directive on non-financial reporting [54].

5. “The Commons”, “the Common Good” and Extraterritoriality

The critics of mandatory extraterritorial corporate responsibilities frequently complain that such legislation lacks a theoretical foundation, even though it may be very appealing on ethical grounds. This void indeed makes any formulation of the corporate duty to their external stakeholders somewhat arbitrary. In this section, we aim to link the legislative approach with “the commons” and “the common good” in order to promote a wider acceptance of extraterritorial corporate responsibility.

5.1. “The Commons” and “the Common Good” in a Corporate Environment

The concept of “the commons” is based upon the ethics of virtue inspired by Aristotle’s philosophy [55] (p. 224). The approach proposed by Aristotle emphasises virtues and sees corporations primarily as communities, which inherently facilitates the usage of “the commons” in the corporate context [56] (p. 235). The notion of “the commons” delivers the idea that the wealth and resources that belong to all should also be protected and managed for all in a positive manner. Thus, “the common resource pool” in a company is shared by all stakeholders and they should have a voice in relation to it, expressed in the form of rights or even obligations, which would also guide companies towards a sustainable direction [57]. This is particularly relevant to MNEs, which have been criticised for generating a number of social, environmental and human rights problems in their commercial practice, not only in corporations’ home countries but also in other countries, especially in developing countries with lower ethical expectations, norms, inadequate statutory protection or weaker law enforcement [58]. Therefore, the scope of corporate constituencies that may legitimately enjoy “the common resource pool” should also be enlarged beyond an MNE’s domestic territory, in order to better address global sustainability challenges and achieve fairness and equality. “The common good” is “the overall conditions of life in society that allow the different groups and their members to achieve their own perfection more fully and more easily” [59]. “The common good” of corporations may be seen as the ultimate corporate objective to foster wealth and increase the overall long-run market value of the company [60]. As key references for business ethics, corporations are expected to make positive contributions to society, employing the notion of “the commons” to achieve “the common good” [61].

5.2. Linking “the Commons” and “the Common Good” with Extraterritorial Corporate Responsibility

5.2.1. What Role Should MNEs Play to Promote “the Common Good”?

“The commons” elaborates a set of rules for the governance of shared resources, and the effectiveness of this governance closely relates to two characteristics of “the commons”. These are non-excludability, which refers to the fact that no one can be efficiently excluded from using “the

commons”, and subtractability, which refers to the degree to which one party’s usage of a resource diminishes others’ use [62,63] (pp. 8–9).

Considering the “*vast human and financial capital, advanced technology, international footprint, market power and financial motivation*” possessed by these companies [64], and in light of the ideals of “the commons” and “the common good”, it is only logical to expect MNEs to play a key role in solving the daunting sustainability problems that emerge in their global operations. It is also legitimate to impose enlarged extraterritorial responsibilities on MNEs due to the following two interrelated reasons. First, no one in developing or the least developed countries may be excluded from using “the commons” they are entitled to, and these commons, such as clean drinking water, are always bounded at the local or regional level [65] (p. 215). Second, MNEs’ usage of a resource diminishes its use by the local community. In return, MNEs should make contributions towards local communities with less bargaining power. The governance mechanism could and should control MNEs which tend to maximise profit from collective resources for their own shareholders’ benefit, at the cost of others’ legitimate rights to “the commons” [66]

Inherent in the management and promotion of “the common good”, the trend towards legalised extraterritoriality is consistent with institutional arrangements in favour of “the new commons”, through participatory governance by a community or a group of citizens collectively [23]. MNEs probably also need to do some positive thinking about the nature of their business if they are to become proactive contributors to “the common good” or consider themselves among “the commons” as entities with collectively-held rights against corporate resources.

5.2.2. Enforcement Measures and Participation from Extraterritorial Stakeholders

In order to achieve fairness and sustainability at the global level, a bargain must be struck: MNEs may have access to resources and opportunities in a jurisdiction, but they must also shoulder the burden of being held liable. Therefore, the enforcement of laws that aim to address extraterritorial sustainability challenges is key, and this may come from various sources. It may involve efforts from constituencies who are eligible to “the common good” through private enforcement. For instance, extraterritorial responsibilities may provide redress to the multiple groups of external, internal and extraterritorial stakeholders who fulfil the role and identity of accountees (the ones to whom the board is accountable). A legislative attempt that is worth mentioning is s.1324 of the Australian Corporations Act, which allows “*a person whose interests have been, are or would be affected by the conduct*” of a director contravening the section to seek an injunction [67]. This provision could potentially be a model for effective remedies for distressed stakeholders of an MNE, including extraterritorial stakeholders connecting to subsidiaries or suppliers, particularly under circumstances where there is the prospect of an injunction being granted [68,69].

This section of law is also evidencing legislators’ willingness to accept enlarged directorial duties, not only along the “objective” axis but also along the “scope” axis [4]. Along the “objective” axis, corporations should be regarded as economic institutions with a social impact as well as a profit-making function. Along the “scope” axis, directors could be required to consider elements of extraterritoriality so as to apply consistent sustainability standards throughout the operation of MNEs in their interactions with suppliers or sub-contractors, regardless of whether such operations take place within or outside the home territory of the MNEs. This duty may be enforced through the involvement of extraterritorial stakeholders, facilitating challenges from various constituencies to ensure that boards’ decisions are in line with the interests of domestic and extraterritorial stakeholders. Extraterritorial regulation also demands teamwork, with contributions from stakeholders, corporations, states and inter-governmental organisations. The contributors see the company as a team production [70,71] with the creation of certain shared value globally. Clearly, the establishment of international governance with an element of extraterritoriality is an enormous challenge, since it involves an expanded theoretical foundation, developing from the notion of “the good” to clarify the nature and scope of MNEs’ objectives, powers and duties. This new foundation requires states and MNEs to recognise the moral and political

legitimacy of stakeholders' rights beyond their territory. MNEs' extraterritorial responsibilities require harmonisation, convergence, shared responsibility and legal accountability that take into account the rights of stakeholders of their subsidiaries, suppliers and "the commons".

To summarise, the new global economic system and its social contracts will be grounded in MNEs' accountability mechanisms that are secured by teamwork between the home state, the host state, the MNEs themselves and their home and extraterritorial stakeholders, in order to achieve the ultimate goal of "the common good".

5.3. Mitigating the Implications of Various Ideas of "the Good"

One of the conceptual difficulties that is likely to be encountered in using the notions of "the common good" and "the commons" to offer support to an extraterritorial legal approach in the global context is the contested conceptions of "the good". Rawls, for instance, notably addressed five ideas of the good found in his nominal work *Justice as Fairness*: (1) the idea of goodness as rationality, (2) the idea of primary goods, (3) the idea of permissible comprehensive conceptions of the good, (4) the idea of political virtues, and (5) the idea of the good of a well-ordered (political) society [72]. In the eyes of liberal theorists, even in the political sphere, not all conceptions of the good are identical, nor do they all demand the same degree of involvement on the part of the state [73] (p. 645). This is not to mention the variety of conceptions of the good in religious, moral or philosophical settings, the scope of which tends to be "general and fully comprehensive" [72]. One might thereby plausibly ask: how to define the good that legitimises extraterritorial legal approaches?

We propose that the existence of these various ideas of the good need not cause moral harm or unjust bias in extraterritorial legislating and implementing processes, with the following three considerations ameliorating the implications of contested conceptions of the good, functioning at both cognitive and pragmatic levels.

First, the good that we employ in denoting extraterritorial responsibilities resonates more with its thin theory version, i.e., goodness as rationality [72] (p. 178). In this manner, a scheme of primary goods including equal basic liberties and fair opportunities could undoubtedly be presented to justify extraterritorial legislative efforts. As practice shows, existing extraterritorial legislative initiatives have not extended to involve the pursuit of values that require aesthetic judgement. Most states' extraterritorial legislative efforts thus far are attached only to the pursuit of primary goods, for instance, anti-slavery initiatives in global supply chains.

Even if some advocate the thick theory of the good over the thin version, legislative and judicial practices have proved that a partial similarity in the structure of citizens' permissible conceptions of the good is practicably identifiable, and permissible forms of life could gain adherence over time [74] (p. 274). In the case of extraterritoriality, the lines of defence, i.e., limiting conditions which resolve political disagreements, could be subtracted among people without holding a conceptual idea of the good superior to the other versions. To take the practicality of global anti-slavery initiatives as an example, slavery is now *de jure* illegal in every country. This provides a good foundation for global anti-slavery legislative initiatives. Theoretically, various schools of thought have also managed to explicate available justification that is mutually acceptable to citizens regardless of their varied conceptions of the good—for instance, the neutrality theory [72,75]. While it is neither possible nor just to allow all conceptions of the good to be pursued in way of extraterritorial legislative efforts, a fundamental structure embodying broad principles of justice could "permit a wide range of conceptions fully worthy of human life" [72] (p. 258) without running afoul of moral egalitarianism [73] (p. 656). It is therefore plausible to suggest that theoretical differences in the conceptions of the good do not and would not shadow the rationality of extraterritorial legislative attempts that much in reality.

Second, we fully acknowledge that the implementation of extraterritorial legislative initiatives involves tackling conflicting moral values in different countries, which somehow connects to the perennial debate between relativism and absolutivism. After all, absolutivism mainly functions at the level of cognizance rather than practice, and thus conceals the pragmatic risk of conflicts among nations.

This is also where the Achilles' heel of international law lies, referring to the fact that global international law norms have to be interpreted and enforced through disparate domestic mechanisms [76]. To take regulating slavery in a global supply chain context as an example, while slavery is condemned by multiple international instruments for it being injurious to the rights to liberty, the inherent dignity and physical integrity of human beings, and as such norms prohibiting this type of behaviour are indisputable as *jus cogens* [77] (art. 5), the state of *jus cogens* does not dispose of most "ordinary value conflicts among different bodies of law" [28] (p. 67). Issues that require clarification in imposing and enforcing anti-slavery legislation remain open to different ways of interpretation in different cultures, underpinned by the diversity of national culture and moral values [78] (p. 320).

To tackle this problem, we propose that extraterritorial legislative and implementation approaches need to be prudently designed so as to be adequately reflexive and flexible, particularly in terms of their content and structures, so as to avoid the risk of practically treating other states who hold controversial conceptions of the good with disrespect. In simple words, there is more than one way to achieve the aim of extraterritoriality. For instance, the issue of territoriality and extraterritoriality are not purely binary; there are domestic measures that have extraterritorial implications and could be exercised in relation to egregious activities abroad, s.7(1) of the UK Bribery Act being a typical example. This type of lawmaking has primary force on domestic companies and indirectly induces those commercial organisations to place proactive controlling measures on related third parties within its global business proximity. It thus meshes better with a pluralistic world, in comparison to the method of directly granting extraterritorial force to domestic courts and laws. It takes into account the extensive economic and political powers of MNEs, relying on those global giants' established internal networks and control devices, without substantially infringing the territorial-based jurisdiction ideal that conventional conflict of laws holds dear.

Third, we propose the importance of aligning legal discourse with social science definitions, as this would help to illuminate the essential socio-economic elements of the regulated subject. To take the crime of slavery as an example, the 1926 Slavery Convention provides a dominating legal definition, focussing on the powers pertaining to the rights of ownership [78] (p. 282). However, in practice, cases of slavery are often first dealt with by workers in social services or human rights organisations, who would find it difficult to comprehend the attributes of ownership that apply with the law of property. Hence, in practice social scientists have provided operational guidelines, and usefully summarise control, use, management, and profit as "instances of ownership" that characterise patterned activities of slavery [79]. This practice has proved functional in accommodating the varied and constantly evolving social reality—for instance, in effectively identifying modern forms of slavery, which have transformed to become more concealed and dynamic [5] (p. 331). This approach may be applied more broadly in other extraterritorial legal initiatives to make them reflexive to the complexity and diversity of social communities. Operational social science guidelines set in the relevant social and cultural contexts, such as values and standards inherent to "the commons" and "the common good", are thus needed to supplement the universal legal definition, so as to ensure a general applicability in both the legal realm and the empirical fields.

6. Introducing "the Extraterritorial Commons" to Achieve "the Global Common Good"

6.1. From "the Global Commons" to "the Extraterritorial Commons"

Understanding of "the commons" has thus far been human-centric, since the origins, operations and ultimate purposes of all institutions can be traced back to natural human beings. Corporations as social constructs are likewise established to serve the interests of human beings, individually or in groups. This human-centric principle is thus seen as the golden rule for understanding the relationship between "the common good" and personal good.

Contrasting with the pursuit of narrow self-interest [80], "the common good" and "the commons" have been discussed since ancient times in terms of "the public good" for the purpose of "social equity

and livelihoods” [81]. They indicate the goods that serve every individual member collectively within a society/community and its institutions. In this view, “the commons” is “*natural or human-made resource systems that are or that could be enjoyed collectively*” [82] (p. 120). Similarly, we appreciate the concept of “the common good” with the emphasis upon ethical goals of promoting more socially responsible companies and the importance of protecting vulnerable parties, both domestically and extraterritorially. Therefore, “the commons” can be employed as a useful rationale to explicate legislative attempts in relation to corporate extraterritorial responsibility going forward, whereas the “common good” is the ultimate goal for adopting these legislative measures as “the end of law” [83]. Individual human beings connected to an MNE are expected to share common resources such as a safe and healthy working environment, and they also contribute together to the long-term interest of the company. Therefore, “the common good” of corporations relies very much on “the common good” of all the individual stakeholder groups that contribute to corporate success, and who are mostly human beings. For an MNE, these people include stakeholders in the parent company, its foreign affiliates and partners in global supply chains. These foreign affiliates and global supply chain partners also tend to be in countries with lower labour or environmental standards because of weak institutional and fragile legal settings, and stakeholders in these jurisdictions are more likely to be vulnerable and may easily be exposed to social and environmental harms. Therefore, “the common good” of MNEs should be defined broadly to include the consideration of “the global common good”.

“The global common good” is rational and necessary, considering that a number of MNEs have been found to be taking advantage of weak accountability systems and poor enforcement of laws in developing countries, using them as safe havens for profit-making at the expense of sustainability [84]. The scope of “the common good” must be globalised in order to strike a balance between the business environments of home and host states. The notion of “the global common good” also supports the argument that more channels should be provided to stakeholders who engage with MNEs or their subsidiaries in order for them to have access to justice, especially in cases where there is limited access to justice for poor and marginalised communities in these stakeholders’ home countries [85].

At this global level, the term “global commons” embraces areas and natural resources beyond the limits of national jurisdiction, shared by the international community as a whole and over which no state can exercise sovereignty or sovereign rights [86]. “The global commons” is established through collective actions including the interests of all stakeholders to attain “the global common good”, which focuses on international cooperation and the protection of stakeholders beyond the limits of national jurisdiction [87]. In terms of “the commons” that are consumed by MNEs in host states, it is rational and helpful for us to define these as “extraterritorial commons”, which includes things that extraterritorial citizens inherit, such as resources that have been consumed or created jointly by citizens and MNEs. In this manner, we define “the extraterritorial commons” as collective shared natural or human-made resources among MNEs, their stakeholder groups and the subsidiaries in home and host states of the MNEs. The notion accommodates both natural resources that are vulnerable to overuse in the host states of MNEs and what is achieved by corporate citizenship, via the collective actions of all stakeholders and the active participation of MNEs in home states. These rich implications of “the extraterritorial commons” reflect the aspirational impact of the notion in tackling global sustainability challenges through ethical corporate conducts and protecting vulnerable parties, both domestically and extraterritorially. According to this notion, MNEs should help in the regeneration of natural resources rather than just exploiting the resources in host states and communities. MNEs should also share the common goods available in their home states with stakeholders in host states where appropriate, especially new common goods such as knowledge commons and intellectual property commons.

6.2. Function, Nature and Scope of “the Extraterritorial Commons”

“The extraterritorial commons”, similar to “the commons” [88] but with a more specific focus, is a useful theoretical core to support global efforts in tackling social, environmental and human rights

challenges. While “the commons” is seen as an alternative to neo-liberalism for creating wealth [89], “the extraterritorial commons” is a useful tool for progressive policy makers and change-makers with a focus on issues beyond home states and corporations’ wealth-making instincts. It helps to expand the scope of “the commons” with a specific focus on host states, as well as the extensive pursuit of “the common good”, in terms of what is shared and beneficial for the wellbeing of every individual of a community achieved through collective participation [56]. It also contributes to expanding the connotation of “common goods” as merely economic goods, emphasising the limited availability of resources shared by people in developing countries who are vulnerable to abuse [90]. The companies or corporate groups, as communities of individuals, are expected to perform as both domestic and extraterritorial participants, delivering cooperative activities to provide goods and services in an efficient, competitive and profitable manner, and working together to achieve the common good [55]. No matter whether we are concerned with preserving the clean water resources of local communities, or protecting the health and safety of vulnerable employees in the least developed countries, the notion of “extraterritorial commons” could usefully draw the attention of policymakers and the controllers of MNEs towards resolving these social challenges faced by vulnerable stakeholder groups, by way of designing and performing relevant rules and policies such as due diligence and transparency requirements, to effectively respond to the social complexities of the global corporate world. This is particularly important when vulnerable parties may not be able to get access to additional care or justice in their home jurisdictions, owing to the lack of effective legal systems.

“The extraterritorial commons” is in harmony with progressive legal attempts in reality [91,92] which seek to surpass existing mainstream recognitions of corporate extraterritorial responsibilities as voluntary in nature. It is also consistent with “the global commons” since the international legal system allows for conceptualisations of “shared responsibility” between states and MNEs [93] (p. 91). The notion also serves as a useful tool for ascertaining the content of new legal duties emanating from the need to create sustainable MNEs, in a global context that is overwhelmed by growing concern about the planetary environment, particularly when there is no well-functioning legal deterrent to corporate wrongdoings in the international arena or a globalised compensatory regime available to the injured. While there is an absence of “*consistency and certainty as to the means and methods by which extraterritoriality is asserted*” [94] (p. 156), “the extraterritorial commons” could at least serve as a criterion or benchmark for testing the legitimacy of extraterritorial legislation.

6.3. MNEs as an Integrated Part of “the Commons” and the Task of Corporate Law

A company, as a separate legal entity, is regarded as “*a resource which is subject to multiple, overlapping and sometimes conflicting claims on its use*”, while “the commons” is seen as collectively held rights of access, withdrawal, management and exclusion in relation to a resource [95] (p. 368). Common-pool resources can be human-made resources, where one person’s use subtracts from another’s and where it is often necessary, but difficult and costly, to exclude other users outside the group from using the resource. In MNEs, these resources can include corporate reputation, supply chains and stakeholder networks. An MNE is a multifaceted community with shared contracts, agreements and culture [96]. Business networks with the participation of MNEs always involve “the global commons” and generate expectations for “the extraterritorial commons” due to the stakeholder networks involved, including the environment, local governments and communities outside their territory.

The scope of stakeholders in MNEs will go beyond the corporation’s home state [97], and claims are even more complicated since they most likely take into account extraterritorial interests. For the purpose of achieving “the globalised common good”, stakeholders in MNEs are categorised as global stakeholders that operate in the global “meta-environment” [98]. These stakeholders represent “global interests” and are regulated under both the home and the host institutional environments under the “meta-environment”. As in the case *Okpabi v Royal Dutch Shell plc* [99] involving 42,500 claimants against the Shell Petroleum Development Company of Nigeria Ltd. for pollution emitted in the Nigerian local community, these stakeholders can be seen as taking a progressive approach to stimulate

social and ecological development, by advocating the significance of “the extraterritorial commons” and taking a coordinated and enlarged approach to enhance corporate responsibility.

Within the environment of “the commons”, market mechanisms themselves sometimes bring ruin to the users of “the commons”, and markets can no longer make everything “right” [100] (p. 278). Therefore, it is recommended that the only solution to the problem of “the commons” is “mutual” coercion, despite the fact that few businesses like or enjoy coercion [101] (p. 1247). In the business environment under which MNEs have to fulfil their corporate responsibility, corporate law provides mandatory approaches to intervene, correct or save a company or environment from “ruin”. Legal force can be useful in directing or altering corporate behaviours in order to promote extraterritorial sustainability. Corporate law should play a proactive role in governing MNEs as “the commons”, and give legitimacy to users and controllers of “the commons” to facilitate the implementation of various duties and rights internally [63] (pp. 20–21), [102].

Corporate laws are normally drafted and implemented at the national level. The allocation and governance of “the commons” involve shifting decision-making responsibilities down to the local level, or seeking to build trust among local actors and authorities [103]. Corporate law has multiple functions, including the allocation of rights, particularly specifying the conditions under which various stakeholders may draw on MNEs’ resources, distributing corporate profits and resources, and sustaining the company’s common asset pool as a source for progressive corporate values [95] (p. 369). Mandatory corporate extraterritorial duties may provide effective means for extraterritorial stakeholders to draw on MNEs’ resources when fair and necessary. Thus, MNEs may be seen as “the commons”, including elements of “the extraterritorial commons”, to support a wider framework of corporate regulation.

6.4. *“The Tragedy of the Commons” in the Extraterritorial Context and Shared Responsibility*

Arguments for extraterritorial corporate responsibility are also subject to some objections. One of the most influential arguments against extraterritorial corporate responsibility is unpoliced directorial discretion and inherent conflicts of interest among various groups of stakeholders [104]. However, offering a particular user “*priority over the others in the use it can make of common resources and in its power to hold the managers of the resource to account*” is incompatible with the sustainability of resources over the long term [95] (p. 378). If extraterritorial corporate responsibility is applied through or supported by the idea of “the extraterritorial commons” for “the global common good”, the individual or personal good would be a contributor to “the commons” with the shared goal of “the common good”. Changes thus need to be made to the conventional belief that MNEs are more likely to be part of the problem than part of the solution, when it comes to the question of protecting “the common good” [105]. The goal of “the common good” is a good in the company’s own right, in order to achieve the goals of both the company and its inseparable team players. “The common good” of the company is created by the contributions and interventions of its stakeholders, including extraterritorial stakeholders. They not only provide their particular capital to contribute to the company’s “common good”, but also create a harmonious business environment or conditions in which every stakeholder receives a fair and reasonable share by virtue of their contribution to the company.

Furthermore, according to arguments surrounding “the tragedy of the commons”, the motivation to prioritise private gain over the common good has meant that common pool resources are fundamentally subject to a tendency to degradation, leading to “ruin to all” [101] (p. 1244), [106]. “The tragedy of the commons” could also refer to a worrying situation in a global shared-resource system where powerful MNEs act independently for their own self-interests, behaving contrary to “the common good” of extraterritorial users by depleting or spoiling resources in developing countries. These developing countries tend to have less bargaining power and desperately need the MNEs’ investment. There is also a lack of regulation to limit the amount of a “common good” resource that is available to any individual corporation, which could perhaps be achieved via a well-functioning permit system or social licence to operate [107].

Hardin's thesis [101] can be applied to MNEs' extraterritorial responsibility in order to support the rationale for "shared responsibility" of MNEs beyond their home states and avoid the tragedy of "ruin for all". Policymakers need to determine how to set conditions, such as the conditions under which individual MNEs cannot exploit "the extraterritorial commons" beyond their domestic territory, taking advantage of existing regulatory gaps. Corporate law could be the right tool to fill this gap, and the notion of "the extraterritorial commons" would be a suitable norm to achieve the goal of "the common good".

6.5. The Enforcement of "Extraterritorial Commons": Legislative Reform and Contribution from the Board Accountability Mechanism

"The extraterritorial commons" will assist policy makers to include the interests of extraterritorial stakeholders, particularly the most vulnerable who engage with companies or their subsidiaries, into legislative reform agendas. This is not limited to state lawmaking; it may well include regional legal solutions. Taking European Union law as an example, the non-financial reporting directive 2014/95/EU constructed a regulatory framework for CSR reporting that requires large companies to disclose information on how they operate and manage social and environmental challenges [108]. The requirements may also accelerate progressive corporate decisions at the regional level by mandating due diligence and seeking information about the behaviour of subsidiaries and suppliers. Giving the fact that current studies tend to focus on one single jurisdiction and examine national transpositions of the directive [109,110] without delineating the extraterritorial scope and content of the report, "the extraterritorial commons" may also be regarded as useful theoretical support for coherently interpreting this directive by including extraterritorial elements and extending the arm of the member states beyond their territory. In order to address extraterritorial corporate abuses and mitigate vulnerabilities in global corporate settings, particularly in developing countries, "the extraterritorial commons" could help law-makers to introduce and eligible companies to comply with transparency requirements with the inclusion of strategies to deal with extraterritorial environmental, social and human rights challenges in their overseas subsidiaries and global supply chains, such as employee health and safety protection issues or bribery.

"The extraterritorial commons" may also be enforced through the lens of companies' extraterritorial responsibility by conducting adaptive governance for complex and uncertain systems [111]. A few elements of adaptive governance in complex systems are particularly well suited in terms of the enforcement of corporate extraterritorial responsibility through board accountability mechanisms. These elements include providing trustworthy information about resource stocks, dealing with conflicts that may arise among all constituencies within the scope of the global commons, encouraging compliance through both formal and informal mechanisms, and designing institutions to allow for adaptation [111]. These requirements also match the four stages of achieving board accountability [112], including the board providing accurate information, the board explaining and justifying their decisions and responsibilities, various constituencies' questioning and evaluation of the rationale for board judgements and behaviours, and finally the imposition of consequences. In this manner, compliance could be achieved through effective intervention from various constituencies who share the collective aim of "the common good".

The effectiveness of enforcement in relation to the governance of "the extraterritorial commons" depends not only on competent resource supervision and the monitoring of users, but also on the success of coordinating governance at different levels—for example, contributions may also come from soft law, other quasi-legal instruments or voluntary approaches.

To sum up, for the purpose of developing a theoretical framework in support of extraterritorial legislative moves on MNEs, we have put forward a new concept of "the extraterritorial commons", in the hope of achieving "the global common good" in the global corporate context. Reflecting on the social and pragmatic weights carried by MNEs' extraterritorial activities, the reasons why "the extraterritorial commons" could be a useful tool for progressive policy makers and change-makers are discussed.

At a more practical level, we have also addressed the justification for offering appropriate care for extraterritorial stakeholders via the lens of “the extraterritorial commons”. The relationship between progressive legal attempts and “the extraterritorial commons” in the context of the international legal system which allows for conceptualisations of “shared responsibility” between states and MNEs is also explicated. The interconnections between various concepts and arguments that construct the conceptual framework surrounding “the extraterritorial commons” are depicted in Figure 2 below.

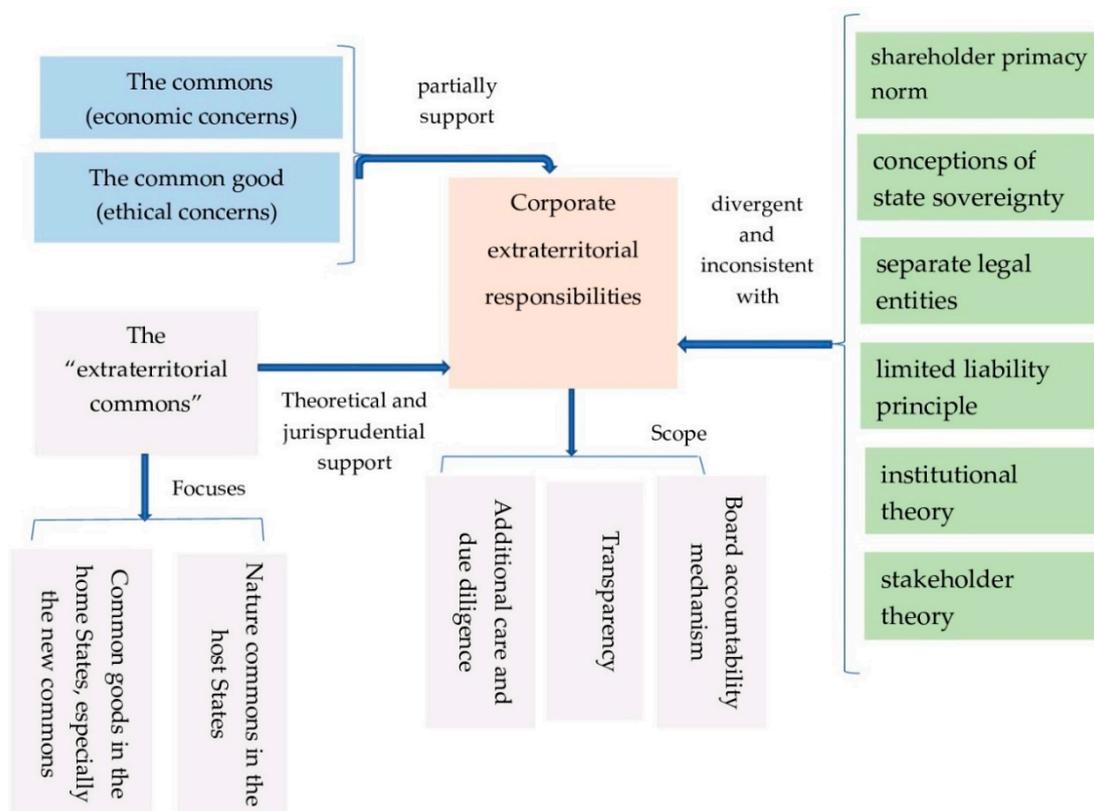


Figure 2. A conceptual framework focusing on “the extraterritorial commons”.

A limitation of this article is that it is unable to fully investigate the enforcement status of “the extraterritorial commons” in the contexts of individual jurisdictions and various industries. Further research on the adoption and adaptation of the notion in individual states’ legislations will be beneficial, both academically and practically. Furthermore, since sustainability challenges appear to be industry sensitive, it is also worthwhile to discuss the nature and scope of “the extraterritorial commons”, particularly in the context of CSR-sensitive industries such as oil and gas and tourism [113,114].

7. Conclusions

Despite the fact that the vulnerability of “the global commons” can now be addressed in an era of remarkable peace among the superpowers [86], the goals of fairness and equality are still often undermined by failures to protect vulnerable parties in the operation of MNEs. In the absence of internationally recognised and followed principles for tackling these challenges, extraterritorial legislative approaches have been introduced in various forms. These approaches, which contribute to the trajectory of mitigating socio-economic disparities and regulate corporations’ extraterritorial conduct, may bridge governance gaps so that transnational chains of accountability may be built.

Despite its growing popularity and progressive legislative goals, the rationale behind the emergence of corporate extraterritorial responsibility is an understudied area. The lack of solid

theoretical foundations has always been a concern for extraterritorial legislative attempts to promote more sustainable companies. It will not only weaken the legitimacy of various nations' and regions' lawmaking attempts, but also make any formulation of the corporate responsibilities towards extraterritorial stakeholders arbitrary and unenforceable. This article presents a convincing case by using the notions of "the commons" and "the common good", and further introducing an original concept of "the extraterritorial commons", consistent with the idea of "the global commons".

As an important component of "the global commons", "the extraterritorial commons" is a prerequisite for "the common good" in the global business environment. The notion will support policy makers to promote more accountable MNEs and encourage a management culture taking account of "the extraterritorial commons" in order to mitigate negative impacts caused by these powerful corporate entities with complex organisational structures. It will also bridge the legislative rationale and directors' decision-making, and make corporate extraterritorial responsibility sensible, logical and convincing.

The notion of "the extraterritorial commons", as explicated in Section 6 in detail, provides a solid theoretical background for corporate law legislative approaches beyond companies' domestic territories. This notion will be particularly helpful when transnational disputes between companies, which often involve extraterritorial issues, cannot be settled through contracts, negotiation, arbitration, or any of the other dispute settlement means commonly applied within the traditional business context. With the expected increasing trajectory of litigation against MNEs in developed countries in relation to their extraterritorial conduct, a clear policy response to this legislative need is important at both the national and international levels. "The extraterritorial commons", as presented, may serve as a criterion for legislative consistency and rationalisation.

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References

1. OECD (Organisation for Economic Cooperation and Development). *OECD Guidelines for Multinational Enterprises, 2011 Edition*; OECD Publishing: Paris, France, 2011.
2. Kinley, D.; Tadaki, J. From talk to walk: The emergence of human rights responsibilities for corporations at international law. *Va. J. Int. Law* **2003**, *44*, 931–1024.
3. LeBaron, G.; Rühmkorf, A. Steering CSR through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance. *Glob. Policy J.* **2017**, *8*, 15–28. [[CrossRef](#)]
4. Zhao, J. Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability. In *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*; Sjäfjell, B., Brunner, C., Eds.; Cambridge University Press: Cambridge, UK, 2020; pp. 29–42.
5. Wen, S. The cogs and wheels of reflexive law: Business Disclosure under the Modern Slavery Act. *J. Law Soc.* **2016**, *43*, 327–359. [[CrossRef](#)]
6. De Schutter, O. *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*; Business and Human Rights Resource Centre: London, UK, 2006; Available online: <https://www.business-humanrights.org/en/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations> (accessed on 12 November 2020).
7. National Research Council. *The Drama of the Commons*; The National Academies Press: Washington, DC, USA, 2002.

8. Donaldson, T.; Preston, L.E. The stakeholder theory of corporation: Concepts, evidence, implications. *Acad. Manag. Rev.* **1995**, *20*, 65–117. [[CrossRef](#)]
9. Freeman, R.E. *Strategic Management: A Stakeholder Approach*; Pitman Publishing: Boston, MA, USA, 1984.
10. Brammer, S.; Jackson, G.; Matten, D. Corporate social responsibility and institutional theory: New perspectives on private governance. *Socio-Econ. Rev.* **2012**, *10*, 3–28. [[CrossRef](#)]
11. Matten, D.; Moon, J. “Implicit” and “explicit” CSR: A conceptual framework for a comparative understanding of corporate social responsibility. *Acad. Manag. Rev.* **2008**, *33*, 404–424. [[CrossRef](#)]
12. Helfrich, S. The Commons as a Common Paradigm for Social Movements and beyond. Available online: <https://commons.blog/2010/01/28/the-commons-as-a-common-paradigm-for-social-movements-and-beyond> (accessed on 12 November 2020).
13. Bollier, D. The growth of the commons paradigm. In *Understanding Knowledge as a Commons: From Theory to Practice*; Hess, C., Ostrom, E., Eds.; The MIT Press: Cambridge, MA, USA, 2011; pp. 27–40.
14. Mandalaki, E.; Fotaki, M. The bodies of the commons: Towards a relational embodied ethics of the commons. *J. Bus. Ethics* **2020**, *166*, 745–760. [[CrossRef](#)]
15. De Angelis, M. *The Beginning of History: Value Struggles and Global Capital*; Pluto Press: Londo, UK, 2007.
16. Rubenstein, K. *Australian Citizenship Law in Context*; Law Book Co. of Australasia: Sydney, Australia, 2002.
17. Ireland, P. Shareholder primacy and the distribution of wealth. *Mod. Law Rev.* **2005**, *68*, 49–81. [[CrossRef](#)]
18. Stout, L.A. The toxic side effects of shareholder primacy. *Univ. Pa. Law Rev.* **2013**, *161*, 2003–2024.
19. Armour, J.; Deakin, S.; Konzelmann, S. Shareholder primacy and the trajectory of UK corporate governance. *Br. J. Ind. Relat.* **2003**, *41*, 531–555. [[CrossRef](#)]
20. Dodd, E.M. For whom are corporate managers trustees? *Harv. Law Rev.* **1932**, *45*, 1145–1163. [[CrossRef](#)]
21. Ireland, P. Limited liability, shareholder rights and the problem of corporate irresponsibility. *Camb. J. Econ.* **2010**, *34*, 837–856. [[CrossRef](#)]
22. Fattet, B. Limited liability—A principle for the 21st century? *Curr. Leg. Probl.* **1995**, *48*, 125–159. [[CrossRef](#)]
23. Bollier, D.; Helfrich, S. *The Wealth of the Commons: A World beyond Market and State*; Levellers Press: Amherst, MA, USA, 2014.
24. McCorquodale, R.; Simons, P. Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law. *Mod. Law Rev.* **2007**, *70*, 598–625. [[CrossRef](#)]
25. Company Law Review Steering Group (CLRSG). *Modern Company Law for a Competitive Economy: The Strategic Framework*; DTI: London, UK, 1999.
26. Keay, A. Tackling the issue of the corporate objective: An analysis of the United Kingdom’s ‘enlightened shareholder value approach’. *Syd. Law Rev.* **2007**, *29*, 577–612.
27. MacNeil, I. The trajectory of regulatory reform in the UK in the wake of the financial crisis. *Eur. Bus. Organ. Law Rev.* **2010**, *11*, 483–526. [[CrossRef](#)]
28. Ruggie, J.G. *Just Business: Multinational Corporations and Human Rights*; WW Norton & Company: New York, NY, USA, 2013.
29. Tempel, A.; Walgenbach, P. Global standardization of organisational forms and management practices? What new institutionalism and the business-systems approach can learn from each other. *J. Manag. Stud.* **2007**, *44*, 1–24. [[CrossRef](#)]
30. Blindheim, B. Institutional models of corporate social responsibility: A proposed refinement of the explicit-implicit framework. *Bus. Soc.* **2015**, *54*, 52–88. [[CrossRef](#)]
31. Hine, J.A.H.S.; Preuss, L. ‘Society Is Out There, Organization Is in Here’: On the Perceptions of Corporate Social Responsibility Held by Different Managerial Groups. *J. Bus. Ethics* **2009**, *88*, 381–393. [[CrossRef](#)]
32. Hillman, A.J.; Wan, W.P. The Determinants of MNE Subsidiaries’ Political Strategies: Evidence of Institutional Duality. *J. Int. Bus. Stud.* **2005**, *36*, 322–340. [[CrossRef](#)]
33. Lin, T.C.W. Incorporating social activism. *Boston Univ. Law Rev.* **2018**, *98*, 1535–1605.
34. Bendell, J. In whose name? The accountability of corporate social responsibility. *Dev. Pract.* **2005**, *15*, 362–374. [[CrossRef](#)]
35. Fairfax, L.M. The rhetoric of corporate law: The impact of stakeholder rhetoric on corporate norms. *J. Corp. L.* **2006**, *31*, 675–718.
36. Zhao, J. The curious case of stakeholder theory: Calling for more realistic theory. *Int. Trade Bus. Law Rev.* **2014**, *17*, 1–42.
37. Sternberg, E. The defects of stakeholder theory. *Corp. Gov. Int. Rev.* **1997**, *5*, 3–10. [[CrossRef](#)]

38. Key, S. Toward a new theory of the firm: A critique of stakeholder “theory”. *Manag. Decis.* **1999**, *37*, 317–328. [[CrossRef](#)]
39. Sharma, P.; Leung, T.Y.; Kingshott, R.P.J.; Davcik, N.S.; Cardinali, S. Managing uncertainty during a global pandemic: An international business perspective. *J. Bus. Res.* **2020**, *116*, 188–192. [[CrossRef](#)]
40. Donaldson, T. *The Ethics of International Business*; Oxford University Press: New York, NY, USA, 1989.
41. Collin, H. Ascription of legal responsibility to groups in complex patterns of economic integration. *Mod. Law Rev.* **1990**, *53*, 731–744. [[CrossRef](#)]
42. Rodrik, D. How far will international economic integration go? *J. Econ. Perspect.* **2000**, *14*, 177–186. [[CrossRef](#)]
43. Cotterrell, R. *Law’s Community: Legal Theory in Sociological Perspective*; Oxford University Press: Oxford, UK, 1995.
44. Hale, B. Should judges be socio-legal scholars? In Proceedings of the Socio-Legal Studies Association 2013 Conference, York, UK, 26 March 2013; Available online: <https://www.supremecourt.uk/docs/speech-130326.pdf> (accessed on 12 November 2020).
45. Stephan, P. The Political Economy of Extraterritoriality. *Politics Gov.* **2013**, *1*, 92–101. [[CrossRef](#)]
46. Salmon, J. *Dictionary of Public International Law*; Bruylant/University Agency of the Francophonie: Brussels, Belgium, 2001.
47. Ruggie, J.G. Multinationals as global institution: Power, authority and relative autonomy. *Regul. Gov.* **2018**, *12*, 317–333. [[CrossRef](#)]
48. Business & Human Rights Resource Centre. FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action. Available online: <https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf> (accessed on 12 November 2020).
49. Wen, S.; Zhao, J. The bumpy road of home states’ regulation of globalized businesses: Legal and institutional disruptions to supply chain disclosure under the Modern Slavery Act. *Cathol. Univ. Law Rev.* **2020**, *69*, 125–162.
50. Peters, A. Checking in: How soft law and corporate social responsibility are filling governance gaps to combat human trafficking in the global travel and tourism industry. *Georget. J. Int. Law* **2018**, *49*, 1487–1513.
51. Lindsay, R.; Kirkpatrick, A.; Low, J. Hardly soft law: The Modern Slavery Act 2015 and the trend towards mandatory reporting on human rights. *Bus. Law Int.* **2017**, *18*, 29–50.
52. Reilkoff, T. Note: Legislating corporate social responsibility. *Minn. Law Rev.* **2014**, *98*, 2435–2478.
53. Schilling-Vacaflor, A. Putting the French duty of vigilance law in context: Towards corporate accountability for human rights violations in the global south? *Hum. Rights Rev.* **2020**. [[CrossRef](#)]
54. Directive 2014/95/EU of The European Parliament and of The Council of 22 October 2014. Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> (accessed on 12 November 2020).
55. Sison, A.J.G.; Fontrodona, J. The common good of the firm in the Aristotelian-Thomistic tradition. *Bus. Ethics Q.* **2012**, *22*, 211–246. [[CrossRef](#)]
56. Melé, D. Integrating personalism into virtue-based business ethics: The personalist and the common good principles. *J. Bus. Ethics* **2009**, *88*, 227–244. [[CrossRef](#)]
57. Hiller, J.S.; Shackelford, S.J. The firm and common pool resource theory: Understanding the rise of benefit corporations. *Am. Bus. Law J.* **2018**, *55*, 5–51. [[CrossRef](#)]
58. Jamali, D. The CSR of MNC subsidiaries in developing countries: Global, local, substantive or diluted. *J. Bus. Ethics* **2010**, *93*, 181–200. [[CrossRef](#)]
59. Second Vatican Council. Gaudium et spes. *Acta Apostol. Sedis* **1965**, *58*, 1966.
60. Keay, A. Stakeholder theory in corporate law: Has it got what it takes? *Rich. J. Glob. Law Bus.* **2010**, *9*, 249–300. [[CrossRef](#)]
61. Fort, T.L. Business as mediating institution. *Bus. Ethics Q.* **1996**, *6*, 149–163. [[CrossRef](#)]
62. Ostrom, E. Policies that crowd out reciprocity and collective action. In *Moral Sentiments and Material Interests. The Foundations of Cooperation in Economic Life*; Gintis, H., Bowles, S., Fehr, E., Eds.; The MIT Press: Cambridge, UK; London, UK, 2005.
63. Dolsak, N.; Ostrom, E. The challenges of the commons. In *The Commons in the New Millennium: Challenges and Adaptations*; Ostrom, E., Dolsak, N., Eds.; The MIT Press: Cambridge, UK; London, UK, 2003.

64. Korngold, A. Business Can Do What Governments Can't: Solve the World's Biggest Problems. Available online: <https://www.theguardian.com/sustainable-business/business-government-world-problems-davos-multinational> (accessed on 12 November 2020).
65. Stern, P.C. Design principles for global commons: Natural resources and emerging technologies. *Int. J. Commons* **2011**, *5*, 213–232. [CrossRef]
66. Málóvics, G.; Csigéné, N.N.; Kraus, S. The role of corporate social responsibility in strong sustainability. *J. Socio-Econ.* **2008**, *37*, 907–918.
67. Corporations Act 2001 (Cth) s 1324(1). Available online: http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1324.html (accessed on 12 November 2020).
68. McConvill, J.; Joy, M. The interaction of directors' duties and sustainable development in Australia: Setting off on the uncharted road. *Melb. Univ. Law Rev.* **2003**, *27*, 116–138.
69. Cermak, R. Directors' duties to respect human rights in offshore operations and supply chains: An emerging paradigm. *Co. Secur. Law J.* **2018**, *36*, 124–149.
70. Blair, M.M.; Stout, L. A team production theory of corporate law. *Va. Law Rev.* **1999**, *85*, 247–328. [CrossRef]
71. Ho, V. Team production & the multinational enterprise. *Seattle Univ. Law Rev.* **2015**, *38*, 499–536.
72. Rawls, J. *Political Liberalism: Expanded Edition*; Columbia University Press: New York, NY, USA, 2005.
73. Sinopoli, R.C. Liberalism and contested conceptions of the good: The limits of neutrality. *J. Politics* **1993**, *55*, 644–663. [CrossRef]
74. Rawls, J. The Priority of Right and Ideas of the Good. *Philos. Public Aff.* **1988**, *17*, 251–276.
75. Larmore, C.E. *Patterns of Moral Complexity*; Cambridge University Press: New York, NY, USA, 1987.
76. Forcese, C. ATCA's Achilles heel: Corporate complicity, international law and the alien tort claims act. *Yale J. Int. Law* **2001**, *26*, 487–516.
77. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948). Available online: <http://hrlibrary.umn.edu/instreet/b1udhr.htm> (accessed on 12 November 2020).
78. Crane, A.; Matten, D. *Business Ethics, 3rd ed*; Oxford University Press: Oxford, UK, 2010.
79. Bales, K. Slavery in its contemporary manifestations. In *The Legal Understanding of Slavery*; Allain, J., Ed.; Oxford University Press: Oxford, UK, 2012.
80. Jaede, M. *The Concept of the Common Good (PSRP Working Paper No. 8)*; Global Justice Academy, University of Edinburgh: Edinburgh, Scotland, 2017.
81. Bakker, K. The "commons" versus the "commodity": Alter-globalization, anti-privatization and the human right to water in the global south. *Antipode* **2007**, *39*, 430–455. [CrossRef]
82. Van Laerhoven, F.; Barnes, C. Communities and commons: The role of community development support in sustaining the commons. *Community Dev. J.* **2014**, *49*, i118–i132. [CrossRef]
83. Diggs, B.J. The common good as reason for political action. *Ethics* **1973**, *83*, 283–293. [CrossRef]
84. Waddell, S.; Khagram, S. Multi-stakeholder and global networks: Emerging systems for the global common good. In *Partnerships, Governance and Sustainable Development: Reflections on Theory and Practice*; Glasbergen, P., Biermann, F., Mol, A.P.J., Eds.; Edward Elgar: Cheltenham, UK, 2007; pp. 261–287.
85. Newell, P.; Frynas, J.G. Beyond CSR? Business, poverty and social justice: An introduction. *Third World Q.* **2007**, *28*, 669–681. [CrossRef]
86. Buck, S.J. *The Global Commons: An Introduction*; Island Press: Washington, DC, USA, 2017.
87. Schrijver, N. Managing the global commons: Common good or common sink? *Third World Q.* **2016**, *37*, 1252–1267. [CrossRef]
88. Ratten, V.; Welpé, I.M. Special issue: Community-based, social and societal entrepreneurship. *Entrep. Reg. Dev.* **2011**, *23*, 283–286. [CrossRef]
89. Akrivou, K.; Sison, A.J.G. *The Challenges of Capitalism for Virtue Ethics and the Common Good: Interdisciplinary Perspectives*; Edward Elgar: Northampton, MA, USA, 2016.
90. Ostrom, E. *Governing the Commons: The Evolution of Institutions for Collective Action*; Cambridge University Press: Cambridge, UK, 1990.
91. Testy, K. Linking Progressive Corporate Law with Progressive Social Movements. *Tulane Law Rev.* **2002**, *76*, 1227–1252.
92. Zhao, J. Promoting more socially responsible corporations through a corporate law regulatory framework. *Leg. Stud.* **2017**, *37*, 103–136. [CrossRef]

93. Karavias, M. Shared responsibility and multinational enterprises. *Neth. Int. Law Rev.* **2015**, *62*, 91–117. [[CrossRef](#)]
94. Ireland-Piper, D. Extraterritorial criminal jurisdiction: Does the long arm of the law undermine the rule of law? *Melb. J. Int. Law* **2012**, *13*, 122–157.
95. Deakin, S. The corporation as commons: Rethinking property rights, governance and sustainability in the business enterprise. *Queen's Law J.* **2011**, *37*, 339–381.
96. Hartman, E. *Organizational Ethics and the Good Life*; Oxford University Press: New York, NY, USA, 1996.
97. Surroca, J.; Tribó, J.A.; Zahra, S.A. Stakeholder pressure on MNEs and the transfer of socially irresponsible practices to subsidiaries. *Acad. Manag. J.* **2013**, *56*, 549–572. [[CrossRef](#)]
98. Kostova, T.; Zaheer, S. Organizational Legitimacy under Conditions of Complexity: The Case of the Multinational Enterprise. *Acad. Manag. Rev.* **1999**, *24*, 64–81. [[CrossRef](#)]
99. [2018] EWCA Civ 191. Available online: https://media.business-humanrights.org/media/documents/files/documents/Shell_Approved_Judgment.pdf (accessed on 12 November 2020).
100. Burton, B.K.; Dunn, C.P. Collaborative control and the commons: Safeguarding employee rights. *Bus. Ethics Q.* **1996**, *6*, 277–288. [[CrossRef](#)]
101. Hardin, G. The tragedy of the commons. *Science* **1968**, *162*, 1243–1248.
102. Hess, C.; Ostrom, E. An Overview of the Knowledge Commons. In *Understanding Knowledge as a Commons: From Theory to Practice*; Hess, C., Ostrom, E., Eds.; The MIT Press: Cambridge, MA, USA, 2007; pp. 3–26.
103. Armitage, D. Governance and the commons in a multi-level world. *Int. J. Commons* **2007**, *2*, 7–32. [[CrossRef](#)]
104. Carney, M.; Gedajlovic, E.; Sur, S. Corporate governance and stakeholder conflict. *J. Manag. Gov.* **2011**, *15*, 483–507. [[CrossRef](#)]
105. Enderle, G.; Peters, G. *A Strange Affair?: The Emerging Relationship between NGOs and Transnational Companies*; Price Waterhouse: London, UK, 1998.
106. Hardin, G. Extensions of “the tragedy of the commons”. *Science* **1998**, *280*, 682–683. [[CrossRef](#)]
107. Moffat, K.; Lacey, J.; Zhang, A.; Leipold, S. The social licence to operate: A critical review. *Forestry* **2016**, *89*, 477–488. [[CrossRef](#)]
108. Aureli, S.; Salvatori, F.; Magnaghi, E. A country-comparative analysis of the transposition of the EU non-financial directive: An institutional approach. *Account. Econ. Law: A Conviv.* **2020**, *10*, 20180047. [[CrossRef](#)]
109. Gulenko, M. Mandatory CSR reporting—Literature review and future developments in Germany. *Sustain. Manag. Forum* **2018**, *26*, 1–4. [[CrossRef](#)]
110. Mio, C.; Venturelli, A. Non-financial information about sustainable development and environmental policy in the annual reports of listed companies: Evidence from Italy and the UK. *Corp. Soc. Responsib. Environ. Manag.* **2013**, *20*, 340–358. [[CrossRef](#)]
111. Dietz, T.; Ostrom, E.; Stern, P.C. The struggle to govern the commons. *Science* **2003**, *302*, 1907–1912. [[CrossRef](#)]
112. Keay, A.; Loughrey, J. The framework for board accountability in corporate governance. *Leg. Stud.* **2015**, *35*, 252–279. [[CrossRef](#)]
113. Valeri, M.; Baggio, R. Social network analysis: Organizational implications in tourism management. *Int. J. Organ. Anal.* **2020**. [[CrossRef](#)]
114. Valeri, M.; Baggio, R. Italian tourism intermediaries: A social network analysis exploration. *Curr. Issues Tour.* **2020**. [[CrossRef](#)]

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