The Brussels Effect and the Extraterritoriality of Delaware Corporate Law

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Existing Frameworks for Policing “Extraterritorial” Corporate Lawbreaking

• Existing frameworks:
  ▫ Alien Tort Statute;
  ▫ Soft law & CSR;
  ▫ ESG
Extraterritorial Corporate Governance

- Violations of “positive law” can trigger viable fiduciary duty claims against directors and officers as a matter of Delaware corporate law.

- Oversight Failure: Caremark
- Disobedience: Bad Faith
Extraterritorial Corporate Governance

• Sustained violations of non-American law standing alone can trigger viable fiduciary duty claims against directors and officers as a matter of American corporate law.

Extraterritorial Corporate Governance

Extraterritorial Corporate Governance

Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).
The European Commission’s Directive on Corporate Sustainability Due Diligence
Brussels x Delaware

European Subsidiaries of Starbucks

- Emerald City C.V. (Netherlands)
- Starbucks Coffee France S.A.S. (France)
- Starbucks Coffee Deutschland GmbH (Germany)
Over 66 percent of Fortune 500 companies are incorporated in Delaware.
The Brussels Effect
The Brussels Effect x International Law

Anu Bradford, The Brussels Effect 73 (OUP 2020) (“There are many examples of where the EU has successfully transmitted its rules to foreign jurisdictions via international organizations.”)
The Brussels Effect x International Law
The Brussels Effect x American Corporate Law
The Dominant Academic Debate

The Yale Law Journal
Volume 83, Number 4, March 1974

Federalism and Corporate Law: Reflections Upon Delaware

William L. Cary†
Should Corporate Law Even Police Corporate Lawbreaking?

Corporate “managers not only may but also should violate the rules when it is profitable to do so.”

Should Corporate Law Even Police Corporate Lawbreaking?

The New Concession Theory: Large corporations are parasitic on the law and the administrative capacity of modern states for their very existence.

Future Research

• Corporate purpose
• Corporate groups/subsidiaries
• Conflicting legal obligations
• International law and corporations