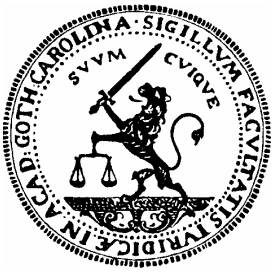

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Contents

Summary

During the last few years increased focus has been given to environmental and social issues due to worldwide changes in the weather and temperature, in some cases leading to natural disasters and dramatic changes in everyday life.

Media and politicians have begun to address related problems, acknowledging the fact that human impact on nature is a real problem that poses as a threat to our future. Following this, many organisations and organs, as well as private corporations, have developed different frameworks stipulating behavioural and ethical guidelines for enterprises and independent actors.

The participation in these frameworks is voluntary, and there are no means to hold the participants legally responsible for breaking the rules. Instead there are sanctions based on loss of goodwill and upon public disgrace. This type of self-regulating frameworks is usually referred to as “soft-law”.

This thesis aims at examining how these kinds of soft-law regulations relate to certain general principles of corporate law, existing in almost the same shape in most modern national legislations throughout the world. The thesis will present the legal context of the idea of CSR from a corporate law-perspective.

In most national legislations the joint-stock company is based upon a profit purpose. Also, the management of the company has a direct obligation not to diverge from the economical interest of the company. Therefore, it is in many situations directly illegal or at least reproachable for a management to perform actions based merely on social or environmental considerations.

Conflicts between social or environmental considerations prescribed by the frameworks discussed and the economical interests of companies have been tried in court on a number of occasions.

The discretion of the management is traditionally considered to be extensive in Sweden as well as in the U.S. and the UK, but the right directly to transfer funds from the company to other social interests is more narrow, which has been concluded through case-law regarding the gift institute of the SCA.

In order to identify socially and environmentally questionable behaviour on behalf of the company, a certain amount of transparency must be present. Most modern national legislations have adopted rules regarding information sharing through frameworks that more or less resemble American Sarbanes-Oxley Act of 2002.

Another CSR-related problem is the difficulty to create legal liability for actions on behalf of the corporations. This problem partially originates with the inability of many third world countries to protect their own citizens. If there are no means to gain compensation in the country where the damage was inflicted, the victims must search for jurisdiction in the country where the company is based. This creates a problem of a very legal-technical nature, as the rules regarding jurisdiction usually are very hard to pierce.

Establishing liability for the parent company is harder, as a main principle of corporate law is to separate different bodies in a company group legally.

The legal status of the CSR frameworks is that they are non-binding, but in special circumstances the U.S. district court of Michigan has found that company policies and oral statements are to be considered binding for the company.

The development of this legal area is standing in front of a choice between two directions, where one direction leads to the traditional view of parent company liability and codes of conduct as legal instrument without any real significance. The other direction leads to greater reponsibility for corporations acting through subsidiaries, and creating more responsibility for the statements of adopted company policies.

Preface

I would like to start this last obstacle hindering my examination by thanking a certain number of people whom have been very valuable to me in the process of completing this thesis.

I would like to thank my supervisor, Katarina Olsson, for a very firm and solid guidance between the narrow depths of inadequacy and irrelevance that tainted my work on a number of occasions.

Secondly, I would like to thank my parents, Inger and Carl-Axel, who have given me advice and grammatical remarks throughout the process.

Abbreviations

ATCA	Alien Tort Claims Act
ALI	American Law institute
CERES	Coalition for Environmentally Responsible Economics
CIME	OECD Committee on International Investment and Multinational Enterprises
CSR	Corporate Social Responsibility
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EMAS	The European Union Eco-Management and Audit Scheme
EMS	Effective Maintenance System
EST	Estimated
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
IPR	Intellectual Property Rights
ISO	International Standard Organisation
MNC	Multinational Corporation
MNE	Multinational Enterprise
NGO	Non-Governmental organisation
NJA	Nytt Juridiskt Arkiv
NCP	National Contact Point
NPA	National Contact Point Administration
PLC	Public Limited Corporation
RTP	Rio Tinto Plc.
RWI	The Raoul Wallenberg Institute
SCA	Swedish Companies Act
SME	Small and medium sized Corporations
SOA	The Sarbanes-Oxley Act
TNC	Transnational Corporation
TVPA	Torture Victim Prevention Act
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	UN Commission on Transnational Corporations
UNEP	UN Environmental Programme
UNEP-DTIE	UNEP Division Technology, Industry and Economics
UNHCR	UN High Commissioner for Human Rights

1 Introduction

In the 20th century, the economist Milton Friedman produced his theories of economical prosperity. Objecting to the idea of corporate social responsibility he presented a number of arguments developed from classic economical analysis.

Essentially, Friedman identified one single responsibility of business: To increase its profits by engaging in open and free competition, without deception or fraud. Such activity makes, according to Friedman, the corporation maximize its contribution to the welfare of the society. [1]

From that point, the debate has been ferocious, as to whether other values besides economical ones should be taken into consideration, as the world seems to suffer in both social and environmental aspects. The theories of classic economical analysis are more and more considered inconsistent with maintaining sustainable development, as taking exclusively economical perimeters into account often jeopardizes the environment of the corporations.

In response to these discussions, CSR can be considered very actual. CSR emphasizes that the corporations, to prevent the surroundings from suffering in the process of accumulating economical overvalues for the shareholders, must take other values into account than mere economical ones, i. e. that they must take greater responsibility for their actions than merely fulfilling their legal obligations.

Many corporations have accordingly adopted company policies shaped like codes of conduct, where they make various environmental and social commitments. These regulations are, however, not cogent, and there are no sanctions for breaking the rules except the goodwill-loss inflicted upon the company if the breaking of the rule attracts public attention.

The CSR frameworks have, however, an extensive legal context as many of the actions and situations they intend to counteract are regulated elsewhere in law and different international instruments. Following this, the different sources of CSR comprise both non-legal and legal norms. Non-legal norms include e.g. ethical norms, corporate values, behaviourial norms deriving from NGO:s and codes of conduct that do not create enforceable duties or rights.

Consequently the different CSR frameworks comprise amongst others international law of human and labour rights, environmental protection, mandatory national and commonwealth legislation, reporting and information on CSR related topics and legally enforceable codes of conduct, as policies of behaviour towards suppliers or employees.

There are, however, certain indications that the adoption and appliance of CSR related non-legal frameworks are questionable in relation to different general principles of corporate law, responding to the legal side of the debate between Friedman’s supporters and the CSR followers.

[1] Friedman, The Social Responsibility of Business is to Increase its Profits, NY Times 1970

The subject is very actual and appealing, as many different legal areas are involved**.** The legal status of CSR frameworks is thus not entirely clear, and my aim with this thesis is to contribute to a clarification.

1.1 Purpose

The purpose of this thesis is to identify the legal context of CSR, mainly with emphasis on different aspects of CSR questionable in relation to general principles of corporate law as presented in different national cogent legislations. As soft-law, CSR is not fully adapted to the hard-law legislations, as compliance with CSR regulations is optional for the corporations. An analysis of the legal aspects of the CSR regulations in the light of national and commonwealth legislations is yet to be performed. Considering the increased interest and importance that is devoted to CSR today, such an analysis is most urgent.

In order to present the legal context of CSR, a certain number of CSR frameworks will be presented and commented in a fashion that connects to corporate law and certain other legal areas of interest. The examination will in general focus on human rights and environmental aspects of the frameworks.

The aspects of corporate law and other law areas relevant to the legal context of CSR that will be examined are the profit purpose, the principle of loyalty, corporate transparency issues, liability and jurisdiction problems. These principles or legal subjects are very similarily presented in most modern national legislations.

1.2 Questions at issue

With focus mainly on corporate law, which is the legal context of the main frameworks of CSR?

In order to elucidate and specify the purpose of the thesis this question can be divided into different sub-categories:

1. To what extent can a corporation legally diverge from the profit purpose regarding CSR-related activities?
2. How are company transparency issues relevant to the CSR-discussion?
3. Which different theories of liability are applicable for corporations engaged in activities considered not consistent with CSR?

1.3 Delimitation

Otherwise actual and relevant legal areas such as IPR, contracting law, mere ethical and philosophical questions will not be examined further in this thesis.

I have chosen to limit the thesis to examine only five of the most commonly adopted and discussed CSR frameworks. These five frameworks will, however, not be presented in their completeness. I will limit the examination to the principles and rules I find most interesting and relevant to the thesis. The examination will in general focus on human rights and environmental aspects of the frameworks.

Considering the procedural rules regarding jurisdiction and choice of law, I have chosen not to examine the latter, as choice of law is not entirely relevant to the corporate law subject.

I have further refrained from analysing the various different international labour standards, which otherwise may be considered a part of CSR. These frameworks are sooner to be considered as a part of labour law. Following this, I have also left out parts of the various CSR frameworks presented in chapter 2 concerning labour standards.

The analysis of how foreign legislations have covered the actual CSR-related questions will mainly focus on American and English law, as CSR-related legal questions have been tried in court on numerous occasions in these countries.

In the section about liability issues, I have not examined various instruments of international law, e.g. the ICJ or ICC, as these are more fitting to be examined in another context than corporate law. Also public international acts and certain UN regulations as the ICCPR, ICESCR and the ECHR convention have been left out, as these are to be considered as human rights legal instruments. Also, according to classic international law, only states are subjects of international law, and international treaties cannot create direct obligations for corporations. [2]

Considering the relevant corporate law, I have chosen to exclude certain elements otherwise quite interesting in a corporate law perspective, namely the protection of minority shareholders and the defense against illegitimate transactions from the company. These questions are not as relevant to the CSR discussion as those upon which I will concentrate.

I will focus the thesis mainly on TNC:s as most of the regulations and frameworks presented in the thesis aim at the larger, often public, corporations. SME:s will be mentioned only where they are relevant to the purpose of the thesis, mainly in the transparency examination in chapter 3.3 and in connection with rules regarding the supply chain to TNC:s.

Finally, in section 3.1 considering management liability for economical damage against the company, I have chosen to analyse criminal law aspects only briefly, as those are more fitting to be examined in another context.

[2] Dixon, Martin, Textbook on International Law, 6th ed., Oxford, Oxford University press, 2007, p. 125

1.4 Method and materials

I have chosen to use a traditional dogmatic legal method, where preparatory work, case-law and doctrine have been examined to create a overview of the legal status of existing rules without any normative valuations.[3] The descriptive and analytical parts of the thesis will be presented separated. The reason for this is that the descriptive parts concerning CSR to a large extent consist of soft-law, and therefore tend to be examined quite theoretically and analytically in the literature and doctrine. Combining my own analysis and descriptive parts of the thesis would only create confusion for the reader.

Considering the soft-law nature of most CSR frameworks, there are substantial difficulties in applying a hard-law perspective to these frameworks. However, the purpose of this thesis is to establish whether there are certain legal aspects of the most common CSR frameworks where it is possible to apply such a perspective. Therefore the traditional dogmatic legal method is according to my opinion most fitting.

Considering the CSR-related material, I have found much help in the works of Jennifer Zerk, who, as an active solicitor, has a legally relevant approach to the otherwise quite arbitrary range of books at disposal.

Apart from the very large body of literature concerning CSR situated at the RWI library, there is very relevant case-law from especially USA and England discussing different questions at issue in this thesis.

There are also
general guidelines to be found in the most prominent doctrine in the areas of corporate law, amongst other The Swedish Companies Act by Rolf Skog, Bolagsledningens Skadeståndsansvar by Rolf Dotevall and Svensk Aktiebolagsrätt by Torsten Sandström. Especially Sandströms book covers CSR-related issues in an exemplary fashion, discussing both legal and moral issues in a legal context, both focusing on *de lege lata* and *de lege ferenda*.

Finally, the expressions MNC, TNC, MNE all refer to the same type of company, and I hope that there will be no confusion regarding their synonymity. The reason for using different expressions is that the sources differ from each other in choice of words.

1.5 Disposition

The thesis is divided into five chapters, the introduction being the first one.

Next, in chapter 2, the five of the most common CSR frameworks will be presented, in order to give a picture of how these regulations are compiled. In the presentation of the frameworks I have concentrated upon the key ingredients relevant to my subject. I have also concentrated the presentation of the frameworks on environmental and human rights issues. The frameworks will thus not be presented in their completeness as only excerpts are needed. Relevant comments and additional facts found in

[3] Peczenik, Aleksander, Juridikens Allmänna Läror, Svensk Juristtidning 2005, Iustus Förlag, p. 250

doctrine and other sources are presented together with the presentation of the rules to elucidate the context.

In chapter 3, I will present the legal context of possible conflicts between CSR-related issues and various hard-law-regulations. National legislations will be assessed together with relevant case-law. When the disposition permits, I will begin with the American legal approach, followed by the English and finally the Swedish. The reason for this is that the American legislation provides the richest source of facts for the subject of this thesis, and in many contexts sets the frame for other national approaches.

The legal aspects of CSR concerning liability issues will be divided into three different sections of the third chapter. Intracontractual liability will be presented in section 3.1 together with the closely connected questions about the duties of the management. The non-contractual liability and criminal liability, together with the jurisdiction aspects of the issues, will be presented in section 3.2 and the questions about parent company liability for actions of a subsidiary will be examined under section 3.3. Finally, the profit purpose will be examined in 3.4 and transparency issues in 3.5.

After the soft- and hard-law examination, I will use chapter 4 to describe the more precise legal implications of CSR frameworks from an empirical point of view, as the legal status of the CSR frameworks lately has been tried and mentioned in a certain number of cases. This chapter will ultimately aim at connecting the second and third chapter of the thesis.

Finally, chapter 5 will contain my own analysis of the facts presented in the earlier chapters. I will begin with some general remarks, followed by more precise comments in a corporate law context and a specific section for liability and jurisdiction, considering that those legal areas generally relate to public international law and therefore are to be separated from the analysis related to corporate law.

2 Corporate Social Responsibility

The first attempt to codify a behaviour model for larger corporations came in the 70[ts], when the United Nations initiated a Commission on Transnational Corporations, UNCTC, to form an international code of conduct for TNC:s. However, the work was never finalized. Following this initiative, OECD developed a set of voluntary guidelines for MNE:s, and ILO developed a declaration aiming at making MNE:s adopt certain social guidelines. Also the ICC adopted ethical guidelines for international investments, The Business Charter for Sustainable Development. [4]

This chapter will present the content of five different CSR frameworks. Three commonly adopted codes of conduct will be presented in the 2.3 section and two commonly adopted environmental standards in 2.4. Together with the examination, relevant comments found in literature will be presented. In the sections 2.3.2 and 2.4.2 concerning the CERES Principles and the EMAS Regulation, I will in some extent comment the content of the frameworks myself.

2.1 CSR Regulations in General

There are a number of different types of CSR-related frameworks. They can generally be divided into codes of conduct, environmental and processing standards, international conventions and independently developed regulations from different NGO:s. This presentation will focus on codes of conduct and environmental standards.

Codes of conduct are general frameworks establishing certain ethical and environmental guidelines. There are various codes of conduct, some of a more general type, some with focus on certain types of environmental impacts. Environmental standards are frameworks that are specialized on helping companies to identify, monitor and report their environmental and social impact. There are also management systems, another type of environmental standards, which help a corporation to amend the necessary management and reporting systems to ensure compliance with other types of CSR-related frameworks. [5]

A certain number of international regulations and acts also have different CSR-aspects, mostly in the liability and jurisdiction context. International conventions belonging to this area are for example the ICCPR and the ILO working standards.

[4] Bottomley, Stephen and Kinley, David, Commercial Law and Human Rights, Aldershot, Ashgate Publ. Corp., 2002, p. 28

[5] Neef, Dale, Supply Chain Imperative: how to ensure ethical behavior in our global suppliers, New York, American Management Association, 2004, p. 229.

2.2 Legal Context and Problems at Large

In the western world, human rights and environmental issues have traditionally been given a relatively high priority in the legal system. The responsibility of a state to protect individuals within its territory is explicit and extensive following international human right laws as ICCPR and ICESCR. Generally, these acts focus on the responsibility of a state to adopt constitutional, judicial, administrative and executive measures to protect the human rights within its territory. [6]

Yet, many states are unwilling to comply with these responsibilities. For example, many developing countries are afraid to lose valuable TNC presence and investment if they pursue a stricter protection of human rights. Therefore, many TNC:s can apply very low standards in their operations in these countries. Furthermore, the developing countries are expected to comply with the stipulations of international law on expense of their developing aspirations which their counterparts in the western world enjoyed without any inhibition. [7]

The difficulty to attain liability for corporations active in countries that do not sufficiently pursue human right violations is one of the legal problems considering CSR-related issues that will be assessed further under transparency and liability issues. The extra-territorial application of home country laws in host country jurisdictions is very unlikely to succeed for practical reasons, as the identification and indiction of the perpetrator. There are however certain other measures of liability. [8]

In addition, a large problem involving smaller, non-public corporations is their very limited transparency. Also the actions of corporations which are based in countries where transparency as part of corporate governance is not as developed as in e.g. Sweden is part of this problem.

2.3 The Codes of Conduct as Company Policies

Company policies are as a rule designed as codes of conduct. They are in most cases generally expressed declarations of behaviour, adopted by corporations as a token of good intention. A code of conduct is in general not legally binding, but is none the less a public document, meant to be easy to measure against the activities of a corporation. There are thousands of different individual codes of conduct not included in any official framework, but many of the larger public corporations choose to adopt an already existing framework, as these are more commonly acknowledged.

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[6] Sandra Lovelace v. Canada

[7] Duruigbo, Emeka, Multinational Corporations and International Law, Ardsley NY, 2003, Transnational Publishers, Inc., 2003, p. xix

[8] Addo, Michael K, Human Rights Standards and the Responsibility of Transnational Corporations, Hague, Kluwer Law International, 1999, p. 11

Three of the most commonly adopted codes of conduct will be discussed here, i.e. the Global Compact, the CERES and the OECD Guidelines for Multinational Enterprises. They will not be presented in their completeness, as only the for the thesis most interesting parts will be examined.

2.3.1 Global Compact

At the World Economic Forum in Davos 1999, the UN Secretary-General Kofi Annan encouraged the business world to take global social and environmental responsibility. The resulting Global Compact may be seen as a coordination of various international declarations and conventions, the Rio Declaration on Environment and Development, ILO's Declaration on fundamental labour rights and principles, the Universal Declaration on Human Rights and the UN Convention against Corruption, all originating from different UN organs. [9]

It consists of 10 principles, meant to provide corporations with a controlling tool in their work to decrease damages to the planet's life support and eco systems by means of self-regulation, research, innovation and education. Participating is voluntary for the corporations, but the Global Compact rules were from the start signed by fifty MNE:s and twelve labour organisations and NGO:s. [10]

The declarations and conventions that the Global Compact are based upon are not legally enforceable against the corporations, as concluded already in the delimitation. However, when the corporations adopt the principles they make a moral commitment to respect and comply with the principles of non-binding international law that the Global Compact is based upon. [11]

The adoption of the Global Compact can be seen as a politically very interesting turn of events, as the decisions in the UN are taken by individual states. Thus, an increased awareness of the importance of corporate social responsibility initiatives can be identified in the international community. [12]

The idea of Global Compact is essentially to rely on public accountability and transparency to pursue the ideas which the principles supply. [13] There are two principles regarding human rights, four regarding labour standards, three regarding the environment and one regarding anti-corruption. For my thesis, the principles 1, 2, 7, 8, and 9 are of special interest.

Principle 1:
Businesses should support and respect the protection of internationally proclaimed human rights.

This very general principle emphasizes amongst other things that a corporation is to act in compliance with national and international law, treat

[9] Buhmann, Karin, Corporate Social Responsibility: what role for law? Some aspects of law and CSR, Corporate Governance (Bradford), 2006, volume 6:2, Emerald Publ, p. 195
[10] Bottomley and Kinley, p. 30
[11] Ibid., p. 196
[12] Ibid.
[13] http://www.unglobalcompact.org/AboutTheGC/index.html

employees with respect, work through supply chain management with selecting appropriate business partners and addressing community and consumer needs. [14]

Examples of behaviour consistent with human rights are

- developing a company policy and strategy to support human rights,
- creating a health and safety management system,
- providing staff training on human rights issues,
- performing human rights impact assessments of business, activities and reviewing them regularly,
- discussing human rights impacts with affected groups, and
- working to improve working conditions in consultation with the workers and their representatives. [15]

Principle 2:
Businesses should make sure they are not complicit in human right abuses.

This principle is interesting, as it gives the corporation an obligation to act if any human right abuse that the corporation can influence is identified. The corporation is also obliged to make a human rights assessment in every country of activity, which gives that the company can not claim ignorance of the present human right conditions. [16]

Principle 7:
Businesses should support a precautionary approach to environmental challenges.

The term "precautionary approach" connects to the 1970th West German concept of "Vorsorgprinzip",[17] and includes prevention of risk, cost effectiveness, ethical responsibility towards the environment and a principle of caution because of the uncertain nature of human knowledge and understanding. [18]

The precautionary approach in terms of businesses could be described as a reminder for corporations that even if there are certain costs connected to the implementation of an environmental approach, much larger costs are connected to remedies for environment treatment or goodwill damages. Additionally, corporations are reminded that environmentally sound investments usually are more sustainable in a long-term perspective, and therefore often are more economically effective than cheaper, short-term solutions. Also research and development related to environmentally sound

[14] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html visited 2008-04-08
[15] Ibid.
[16] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html visited 2008-04-08
[17] http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html Visited 2008-05-28
[18] Ibid.

products, processes or services are often more economically efficient in a longer perspective. [19]

Principle 8:
Businesses should undertake initiatives to promote greater environmental responsibility

This principle aims at making corporations change their present business activities towards a more responsible approach. The most commonly addressed issues may be summarized as prioritizing resource productivity, cleaner production, corporate governance, proactive life-cycles, business design and active dialogue with stakeholders. If a company adopts the Global Compact, certain demands on the business activities interpreted under principle 8 will be activated. The corporation must:

- adopt the same operating standards regardless of location,
- ensure supply-chain management,
- facilitate technology transfer,
- contribute to environmental awareness in company locations,
- communicate with the local community and
- share benefits equitably. [20]

Principle 9:
Businesses should encourage the development and diffusion of environmentally friendly technologies.

Agenda 21, the action programme originating from the UN Conference on Environment and Development in Rio 1992, establishes that environmentally sound technologies are those which "*...protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes. [ESTs] are not just individual technologies, but total systems which include know-how, procedures, goods and services, and equipment as well as organisational and managerial processes.*" [21]

Here, Global Compact emphasizes the financial benefits of more efficient technologies. For example, more efficient production makes use of less raw material and produces less waste. Use of less hazardous materials also

[19] http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle7.html Visited 2008-05-28
[20] http://www.globalcompact.org/AboutTheGC/TheTenPrinciples/principle8.html visited 2008-01-31
[21] Agenda 21, chapter 34.1, 3

decreases risks for employees exposed to these, creating a safer working environment. [22]

The adoption of Global Compact activates a process of adjustment. The first step is to analyse the business from an environmental perspective.
The result of this analysis provides the data that organisations need when deciding what actions to take. If the analysis establishes a certain level of risk, a range of actions is possible:

- Establishing certain safety margins in areas of uncertainty,
- ban or restrict an activity whose impact on the environment is uncertain,
- promote usage of best available technology,
- implement cleaner production and industrial ecology approaches in other areas to compensate uncertainty or
- communicate with stakeholders for a third person-perspective. [23]

The control mechanisms which the Global Compact offers consist mainly of the possibility for various third party actors, e.g. unions and NGO:s, to comment or complain on the standards of corporate behavior regarding compliance with the principles at the center of the Global Compact, thereby giving the possible abuse or breach public attention. [24]

To maximize the effectiveness of the appliance of socially responsible techniques and practices, the Global Compact has also initiated an information network, identifying the best practices on different issues and thereafter inform corporations of these practices. [25]

2.3.2 CERES

The CERES, the Coalition for Environmentally Responsible Economics, was created in 1989 by a network of investors and NGO:s. The trigger for creating the organisation was the Exxon Valdez-incident. The same year the organisation released the CERES Principles, initially called the Valdez-principles, a code consisting of 10 principles, all concerning the environment. Imbeded in the principles a wide reporting duty considering measures taken concerning the principles was stipulated. Over 50 corporations have today endorsed the CERES Principles, amongst those 13 can be found on the Fortune 500 list. [26]

The principles will be presented when deemed of interest for the thesis.

The CERES principles stipulate the following:

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[22] http://www.globalcompact.org/AboutTheGC/TheTenPrinciples/principle9.html visited 2008-01-31
[23] http://www.globalcompact.org/AboutTheGC/TheTenPrinciples/principle7.html visited 2008-01-31
[24] Williams, Cynthia, Conley, John, Is there an Emerging Fiduciary Duty to Consider Human Rights?, University of Cincinnati Law Review, volume 74, nr. 1, 2005, p. 29
[25] Ibid.
[26] www.ceres.org visited 2008-03-25

1. *Protection of the Biosphere*

This principle prescribes to the corporation that it should minimize and strive to eliminate the release of pollutant that may cause environmental damage to air, water, or earth or its inhabitants. It further aims at safeguarding habitats in rivers, lakes, wetlands, coastal zones and oceans and minimize contributions to the greenhouse effect, depletion of the ozone layer, acid rain or smog.

2. *Sustainable Use of Natural Resources*

This principle aims at making sustainable use of renewable natural resources and conserving nonrenewable resources through efficient use and planning. It further aims at protecting wildlife habitats and wilderness while preserving biodiversity.

3. *Reduction and Disposal of Waste*

The corporation should take measures to reduce waste, and dispose of produced waste in a environmentally sustainable way.

4. *Wise Use of Energy*

The corporation should make every effort to use environmentally safe and sustainable energy sources to meet its needs. It should also invest in improved energy efficiency and conservation and maximize the energy efficiency of products.

5. *Risk Reduction*

The fifth principle prescribes to the corporation that it should minimize the environmental health and safety risks to its employees and the communitiy by employing safe technologies and operating procedures and by being constantly prepared for emergencies.

6. *Marketing Safe Products and Services*

The corporation should take measures to make safe products that cause no harm against the public or the environment.

7. *Damage Compensation*

The corporation further makes itself responsible for any harm it causes, and binds itself to make every effort to fully restore the environment and to compensate those who are affected.

8. *Disclosure*

The corporation should disclose to its employees and to the public incidents and potential incident posed by its operations that cause environmental harm or pose safety hazards. It should not take any action against employees who report any conditions endangering the environment or poses safety hazards.

9. Environmental Directors and Managers

The corporation also undertakes to continue management resources to implement the CERES Principles, to monitor and report upon these efforts, and to sustain an informative process to ensure that the management and board are fully responsible for all environmental matters. It should establish a Committee of the Board of Directors with responsibility for environmental affairs. At least one member of the Board of Directors should be a person qualified to represent environmental interests to come before the company.

10. Assessment and Audit

Finally, the corporation should conduct and make public an annual self-evaluation of its progress in implementing the 10 principles and in complying with applicable laws and regulations throughout its worldwide operations. The corporation should work towards the timely creation of independent environmental audit procedures which it should complete annually and make available to the public. [27]

Altogehter, the CERES principles must be considered to be more strict and detailed than Global Compact in the environmental area. Global Compact has only three articles concerning the environment, and expresses the obligations in a more general way. However, the CERES principles do not establish a system for monitoring and reporting as e.g. the following-up system of the OECD Guidelines based on contact points which will be examined further below in 2.3.3.

I have noticed several interesting facts in the CERES Principles. After the more generally expressed first three sections, the corporation undertakes to make direct investments in improved energy efficiency in section four.

Following this, the corporation also undertakes to invest in technologies for a safe working environment and operating procedures. Even more interesting, in the seventh section, the corporation makes a direct commitment to give full compensation if any personal or environmental harm is caused by the company. This is, however, a good example of a condition without any effective sanction. The corporation is most likely already obliged to give compensation under national legislation, but the difficulty is also here to prove fault and responsibility.

Also, the eight section is very closely connected to the transparency discussion, and the ninth section is also very interesting, as the corporation undertakes to create a special company organ with responsibility for environmental matters.

[27] http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=416&srcid=425 visited 2008-04-08

A company which commits to the CERES Principles will be extensively obliged to change the company activities. Especially the commitment to make direct investments in improved energy efficiency and improved technology are very interesting in a profit purpose perspective as discussed in section 3.4.

2.3.3 The OECD Guidelines for Multinational Enterprises

The OECD Guidelines of 1976 are a set of recommendations, developed by the governments of the OECD member countries. The aim of the guidelines is to ensure that the MNE:s are behaving in line with the rules and policies of their home country when operating abroad. [28]

The Guidelines are not legally binding, but provide a quite broad range of behaviour modifications for MNE:s.

In its 2001 Green Book on CSR, the EU Commission provides corporations with quite precise recommendations to demonstrate social responsibility through adoption of the OECD Guidelines as minimum standards for the company activities.[29] The single recommendation is merely a recommendation and not sanctioned. However, as Buhmann states, the possibility of a future legislative requirement introduced by the Commission, following the recommendations in the Green Book, gives the OECD Guidelines a legal or practical status that makes them not fully voluntary. [30]

Below only those chapters that I consider of interest for the subject of my thesis are presented..

1. *Disclosure of Information*

An important and prioritized idea through the OECD Guidelines is that the MNE has to provide the public with sufficient information about structure, company policies and other activities.

2. *Employment and Industrial Relations*

According to this chapter the MNE is obligated to allow certain labour rights, as right to representation, refraining from unfair influence in labour negotiations and even providing adequate information on larger changes in operations that would affect the employees. Most important is probably the obligation to provide the employees with the same working standards as in the MNE:s host country.

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[28] Karl, p. 89

[29] Promoting a European Framework for Corporate Social Responsibility – Green Paper, European Commission, Luxembourg, Office for Official Publications of the European Communities, 2001, p. 9
Unit EMPL/D.1

[30] Buhmann, p. 195

3. *Competition*

Here, the MNE is encouraged not to engage in cartels or to abuse dominant position through anti-competitive aquisitions or predatory pricing.

4. *Environment*

To protect environmental interests, the OECD Guidelines state an obligation for the MNE to take due measures to preserve environment and to avoid environmentally related health hazards. [31]

The following-up procedure involves an NCP, a national OECD office in each one member states. If any third party entitled to complain finds that the Guidelines have not been sufficiently observed, or is uncertain of the applicability of the Guidelines, that party can contact the NPA. Member states governments, labour and business organisations may raise these issues. The NPA is thereafter to approach the corporation in question and inform that a Guidelines issue has been raised. [32]

If no solution can be worked out between the NPA and the corporation, the case can be submitted to the OECD Committee on International Investment and Multinational Enterprises, the CIME. CIME is to give a final clarification of how the Guidelines are applicable in a certain case. It must be noted that CIME doesn't give any judgement of the behaviour of a certain corporation in a specific situation. CIME only gives the legal clarification of how the Guidelines apply to the current situation. [33]

The Guidelines also address the supply chain responsibility issue. Supply chain responsibility is the idea that the CSR-related obligations of the company include controlling the behaviour on all levels of the supply chain. It may be considered natural to assume that liability and responsibility of the CSR-related obligations mainly should fall on the parent company. [34]

The Guidelines, however, use another approach. Different entities in the corporation are expected to cooperate and assist one another in accordance with the actual distribution of responsibility between them. The parent company is not singled out in this respect. [35]

To give the public and other interested parties a possibility to monitor the business activities, the Guidelines also contain an extensive obligation to disclose information through different reports. The corporation undertakes to make public "*timely*, *regular*, *reliable and relevant information*" regarding their activities, structure, financial situation and performance. [36] Additionally, enterprises are encouraged to go outside the mandatory reporting obligation and also disclose information about environmental, social and ethical policies and systems in place. [37]

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[31] Buhmann, p. 91 f.
[32] Ibid., p. 93
[33] Ibid., p. 94
[34] Zerk, Jennifer A, Multinationals and Corporate Social Responsibility, Cambridge, Cambridge University Press, 2006, p. 93
[35] OECD Guidelines (2000), n. 52 chapter 1, section 3
[36] Ibid., n. 33, chapter 3, section 1
[37] Ibid., section 5

The OECD Guidelines expressly state that they are a non-legal recommendation that companies may follow voluntarily. However, their influence should not be underestimated. Initially, they constitute a highly sofisticated declaration of an internationally powerful public body. The International Council of Human Rights compares the Guidelines with "*the detailed "political" commitments made by states of east and west Europe in the Helsinki process*". These commitments were considered to have legal force. [38]

It may also be maintained that the Guidelines have become part of customary international law through consistent state practice since 1976, making them cogent for MNE:s which have never adopted them. This is, however, a question which needs to be evaluated thoroughly. There exists no research on the subject at this point. [39]

2.4 Environmental Standards

There are different types of environmental standards. They are usually very complex and detailed due to their specific nature. Therefore they will only be examined here in aspects relevant to the purpose of the thesis.

One group of environmental standards is known as performance standards. They consist of guidelines for social and environmental performance and they resemble guidelines mostly included in codes of conduct, but on a level of detail that allows corporations to identify, monitor, assess and report their performance in the relevant areas more effectively. Performance standards either focus on general, broad environmental issues or are more specifically adjusted to a certain type of industry. They are usually based on transparency, comparability and quality improvement. The corporation is to uphold a significant level of transparency to enable comparability, thereby giving incentive to improvement. [40]

Another type of environmental standards are the reporting standards. These are various systems for identifying and monitoring environmental performance. [41]

The thesis will examine two of the most commonly adopted environmental standards, the ISO 14001 and the EMAS, both to be regarded mainly as performance standards.

2.4.1 ISO 14001

ISO 14001 is a certification instrument developed by ISO, the International Organisation for Standardisation. The ISO is an international body composed of representatives from various national standardisation organs.

[38] The International Council of Human Rights Policy, Beyond Voluntarism – Human rights and the developing international legal obligations of companies, Versoix, 2002, p. 67
[39] Ibid. p. 68
[40] Neef, p. 141 f.
[41] Ibid.

ISO is essentially an NGO, but considering the strong link it has to national governments and the fact that the standardisations conducted by the ISO are often adopted as law, ISO must be considered more influential than most other NGO:s. [42]

ISO 14001 is a standard adoptable by any corporation or organisation. The aims of ISO 14001 are to help companies to make their environmental work more efficient, to constantly monitor the results to ensure that the negative environmental effects decrease, to make sure that they have control over the development of their policies, and finally to give them possibility to display the fact that their environmental work is effective and in progress. [43]

The ISO 14001 gives very detailed guidelines for corporations, but it does not give any guidelines as to how the corporation should set its minimum standards. The participating parties are free to determine the goals for the certification process themselves, as the intention is to ultimately put an internally run manageable system into action. [44]

The ISO 14001 seems to include only the environmental aspects that the organisation can control and can be expected to have an influence over, and there is no requirement concerning audit frequency and the relevance of past activities in ISO 14001.

The standard does, however, demand that the environmental policy compiled for the company shall oblige the company to comply with all applicable legal requirements and that the organisation shall continually evaluate and improve its EMS and prevent pollution. [45]

This system has been very popular and widespread, as it permits each company to adopt an environmental policy that suits its organisation and trade of industry. However, the flexibility of the ISO 14001 creates a risk that a company will create an environmental policy that is very easy to follow but pointless. Therefore, ISO 14001 contains requirements of different measures which are to be included in the environmental program. The undertaking must establish, document, implement, maintain and continually improve the established environmental program. [46]

Apart from the rules considering the establishment of the program and the adoption to it, ISO 14001 also contains different guidelines regarding prevention of and reaction to emergency situations. [47]

2.4.2 EMAS

1993, the European Council adopted the EMAS regulation 1836/93. Three specific aims are set out by the EMAS: to reduce, prevent and eliminate

[42] Krut, Riva and Gleckman, Harris, ISO 14001 – A missed opportunity for sustainable Global Industrial Development, London, Earthscanm, 1998, p. 2

[43] Göran, MiljöledningsGuiden – Steg för steg mot ISO 14000 och EMAS, Gothenburg, SIS Forum AB, 1997, p. 35.

[44] ISO 14001:2004 section 1

[45] Ibid., sections 5, 2b, 4.3.2, 4.5.2

[46] Ibid., section 4

[47] Ibid., section 4.4.7

pollution, to ensure a sound management of resources and to increase usage of clean technology. [48]

The more specific requirements stipulated in the EMAS are very similar to the ones under ISO 14001, which has ultimately led to the EMAS II regulation 761/2001 where the European Commission stated that the existing appliance under an ISO 14001 program also gives admission under EMAS. The EMAS II was additionally amended in a third EMAS regulation, 196/2006.

Thus, EMAS is very similar to ISO 14001. However, a certain number of differences still exist. The audit of EMAS checks for the improvement of environmental performance, rather than for the existing system performance as ISO evaluates. EMAS also provides the company with an initial review, declaring that a complete overview of the environmental standard will be given after the company activities have been analysed. EMAS further requires that all identified environmental effects or impacts of a company are documented in a register, to facilitate future evaluations of improvement. [49]

In the preamble to EMAS II 761/2001 it is stated that the member states should encourage corporations to participate in EMAS on a voluntary basis, calling attention to the benefits of the participation as reduced costs and improved public goodwill and regulatory control. [50]

Following this, Member states are also obligated to create incentives for the corporations to participate in EMAS. [51] The Netherlands and Germany have made some parts of EMAS almost mandatory, assimilating the rules in the national legislations.[52]

As ISO 14001, EMAS stipulates that participating corporations shall act in accordance with applicable national laws. Furthermore EMAS also obligates the management of a company to continually evaluate and improve the environmental program. More general environmental aspects that the corporation have to address are also described:

"An organisation shall consider all environmental aspects of its activities, products and services and decide, on the basis of criteria taking into account the Community legislation, which of its environmental aspects have a significant impact, as a basis for setting its environmental objectives and targets. These criteria shall be publicly available." [53]

The list of direct environmental issues which the organisation has full management control over is not exhaustive:

- *Emissions to air,*
- *Releases to water,*
- *Avoidance, recycling, reuse, transportation and disposal of solid and other wastes, particularly hazardous wastes,*

[48] European Council Regulation 1836/93, Preamble
[49] Authors annotation
[50] EC Regulation 761/2001, preamble, section 9
[51] Ibid., section 15
[52] Neef, p. 150
[53] EC Regulation 761/2001 Annex VI, clause 6.1

- *Use of contamination of land,*
- *Use of natural resources and raw material (including energy),*
- *Local issues (noise, vibration, odour, dust, visual appearance, etc.),*
- *Transport issues (both for goods and services and employees),*
- *Risks of environmental accidents and impacts arising, or likely to arise, as consequences of incidents and*
- *Effects on biodiversity.* [54]

Nor is the list of indirect environmental issues which the organisation does not have full management control over exhaustive:

- *Product related issues (design, development, packaging, transportation, use and waste recovery/disposal),*
- *Capital investments, granting loans and insurance services,*
- *New markets,*
- *Choice and composition of services (e.g. transport or the catering trade),*
- *Administrative and planning decisions,*
- *Product range compositions and*
- *The environmental performance and practices of contractors, subcontractors and suppliers.*

> "*Organisations must be able to demonstrate that the significant environmental aspects associated with their procurement procedures have been identified and that significant impacts associated with these aspects are addressed within the management system. The organisation should endeavour to ensure that the suppliers and those acting on the organisation's behalf comply with the organisation's environmental policy within the remit of the activities carried out for the contract.*
>
> *In the case of these indirect environmental aspects, an organisation shall consider how much influence it can have over these aspects, and what measures can be taken to reduce the impact.*" [55]

The 6.4 clause addresses issues not normally taken into consideration during normal activities. The organisation shall analyse the environmental impact during starting and shutting down procedures and hypothetical emergency situations. [56]

If a breach or inobedience of the framework can be identified on behalf of the corporation, the competent body of EMAS has the right to refuse registration or to suspend the corporation from the register if already

[54] EC Regulation 761/2001 Annex VI, clause 6.2
[55] Ibid., clause 6.3
[56] Ibid., clause 6.4

registered. Also here, no economical sanctions are possible, but the corporation gets punished by losing the goodwill of the public and media. [57]

Being a regulation adopted by the European Council, I consider the EMAS to hold a higher legal authority compared to frameworks composed by NGO:s. EMAS is, as already layed down, not legally enforceable, but the authority of being an official EC regulation probably gives an incentive to comply. Also, the possible future leap of making the EMAS mandatory for corporations is not as wide as for other CSR frameworks.

[57] EC Regulation 761/2001 Annex VI, 6.4

3 Corporate law in a CSR-context

In chapter 3, I will present and examine common general principles of corporate law considering loyalty issues, different forms of liability, profit purpose and transparency. Furthermore, CSR-related values which can be identified in the different national legislations and cases referred to will be pointed out.

In 3.1, the intracontractual liability for the management of a corporation considering breaches of different forms of the principle of loyalty will be examined. This discussion is very closely connected with the duties of the management, and will therefore be assessed together with this subject. In section 3.2, non-contractual liability will be examined while the responsibility of the parent company for the actions of the subsidiary is presented in 3.3. In section 3.4 the profit purpose and in section 3.5 transparency issues will be treated.

3.1 Loyalty issues

In most national and organisational corporate law frameworks the board and executives of a company are assigned a duty of loyalty towards the shareholders and the company. This is the case in both the SCA as well as in the OECD Principles of Corporate Governance, originating from the same organisation as the OECD Guidelines examined in section 2.3.3. However, companies are also, in quite vague wordings, assigned a duty to act in a manner consistent with the interests of their surroundings. [58]

The OECD Principles are based on the Millstein Report[59], which concludes that the the primary interest of the shareholders and the company is to generate economic profit in a long term perspective, at the same time as social, economic and other national objectives should be fulfilled. [60]

In USA, several different regulations discuss the loyalty of a management in different situations. The regional Pennsylvania Act of 1990 states that the management of a company is not required to regard any alternative interest as long as the action serves the best interest of the company. [61]

It can therefore be established that the possibility of a general conflict exists between the traditional company loyalty towards the shareholders and actions more or less CSR-natured. E.g. in the USA, such questions have been tried in court on numerous occasions, as will be presented below.

[58] Principle of Loyalty, OECD Principles of Corporate Governance Art. 6.a.2 and 3.a.2

[59] A report from 1998 by the OECD's Business Sector Advisory Group on Corporate Governance, chaired by Ira M. Millstein

[60] Mares, Radu, Business and Human Rights - A Compilation of Documents, Leiden; Martinus Nijhoff , 2003, p. 31

[61] Ibid., p. 34

The continental European view of the loyalty duty is very similar to that of the common-law systems, and the American case-law and legal theory in the area might be used as a model for concretisation of the general principles considering loyalty to the interest of the company. [62]

3.1.1 The American Principle of Loyalty

Both the UK and U.S. systems declare that the board and the executives should work for the best of the company, at the same time as they should take different ethical responsibilities. In USA, the duties are split into *duty of loyalty* and *duty of care*, and are most closely based on the legal status of a *trustee*. The board is strictly committed to the principle of loyalty, but less committed to the duty of care. The opposite applies to the management. [63]

The legal status of a *trustee* is not perfectly translatable to the legal status of the management, but certain fundamental features are very much alike. A trustee must, following her fiduciary duties, administer the trust with the skill and prudence that any other reasonable and careful person would use. The trustee must further act in accordance with the trust purposes. A failure to act in this manner may render the trustee liable for breach of trust, regardless of whether the actions were made in good faith. A trustee must further be loyal to the beneficiaries, in this case the shareholders, and administer the trust solely for their benefit and never for any personal advantage. A trustee would probably violate the fiduciary duty if e.g. she sold company property to herself. [64]

Directors or managements charged with violating their duty of care are to a certain extent protected by the Business Judgement Rule, which is the essential conclusion of the *Shlensky v. Wrigley case* examined below. The rule states that even if the decisions of the management turn out badly for the corporation, the directors themselves will not be personally liable for losses if the decisions were based on reasonably accurate information and if the directors acted rationally. The courts focus on the internal process of reaching a decision, not on the results of the decision itself. [65]

The usual sanction for an action infringing the principle of loyalty is annullment after a court appeal. The action is therefore not annulled by its own unlawfullness, as annullment comes first after a complaint is lodged. The regulation has traditionally been considered as a matter of course for the individual state, but has since the *Securities Act* of 1934 been the object of federal case-law. The line between liability for infringing the responsibility for fiduciary duties and culpa in situations clearly included by the *Securities*

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[62] Dotevall, Rolf, Skadeståndsansvar för styrelseledamot och verkställande direktör, Stockholm, Norstedts Juridik AB, 1989, p. 129

[63] 2006 Companies Act, UK 2006 article 172, MBC Act, USA 1996, para 8.30

[64] The American Law Encyclopedia volume 10, http://law.jrank.org/pages/10925/Trust-Management.html visited 2008-05-07

[65] The American Law Encyclopedia volume 3, http://law.jrank.org/pages/5765/Corporations-People-Behind-Corporation-Rights-Responsibilities.html

Act is however unclear and has to this point never been fully explained through case-law. [66]

Given the through case-law continuing development of ATCA litigation, the fiduciary duties of the management now also include a duty to be aware of human rights risks and potential violations within the global activities of a corporation, and also to develop company policies and procedures to reduce the risks of such violations. After the Supreme Court case *Sosa* which will be examined below in section 3.4.1.1, human rights violations are probably to be considered part of the liability risks that the management need to consider, at least to the extent of making sure that the corporation has established enough information and reporting systems and enough company policies to address different conditions relating to the company that may create such risks. [67]

3.1.1.1 Dodge v. Ford Motor Co., 1919

The Ford Motor Company was at the time owned by Henry Ford, who controlled 58 % of the stock. Two minority shareholders, the Dodge brothers, together owned 10 % of the stock.

The Ford management decided to limit the dividend to 5 % per month, to use the remaining gains for expansion by building a new plant, with the aim to employ more people which would ultimately help to spread the wealth of the company and increase the prosperity of the business and the community as whole. The Dodges challenged Ford's decision, as they pursued that Ford did not have the right to enrichen the community on expense of the shareholders.

The Court decided that Ford had breached his responsibility towards the shareholders, and stated that the loyalty of the company towards the general public and towards the shareholders should not be mixed-up. "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." [68]

However, the Court continued to evaluate the expansion in itself, and concluded that the economical consequences of the expansion could not be left to the Court to evaluate. The Court states that the expansion very well could be in the interest of the shareholders regarding competition, increase in prices and other future considerations that could not be further evaluated by the Court. Therefore, the motives for the expansion were not deemed to interfere enough with the interests of the shareholders to prohibit them. [69]

This case ultimately discusses the discretion of a managament to pursue a business strategy, nearly regardless of the legal context. This discretion, however, is not unlimited. It must under any circumstances not interfere

66 Dotevall, Rolf, Bolagsledningens Skadeståndsansvar, Stockholm, Norstedts Juridik AB, 1999, p. 125 f.
67 Williams, Conley, p. 13
68 Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919), p. 507
69 Ibid.

with the revenue-gathering orientation of the company. The courts are however hesitant to make the economic evaluation. [70]

3.1.1.2 Shlensky v. Wrigley, 1968

This case is interesting as the Court used a cost-benefit model for determining the degree of responsibility for the action taken by the management.

A director, Wrigley, refused to install nightlights on a baseball-stadium, because of his personal opinion that baseball was a daytime-sport. He was afraid that nighttime baseball would have a deterioriating effect on the neighbourhood. A shareholder, Shlensky, challenged the decision, pursuing the fact that the decision was taken regardless of the possible economical benefits of the company, only because of Wrigleys own personal believes. [71]

In its analysis the Courts discussed whether a bad impact on the neighbourhood in a longer perspective would strike back on the finances of the company, regardless of the direct gains or losses from the nightlights. Further it was discussed whether a bad influence on the neighbourhood would have a bad effect on attendance. Additionally, the Court concluded that the plaintiff had not proved that any substantial economical benefits would come from installing nightlights. Finally the Court hesitated to limit the discretion of the management and dismissed the suit of the plaintiff.[72]

This case is considered to show that the American case-law is altogether quite generous towards the discretion of a management, and that a management is quite free to act on behalf of interests not necessarily clearly consistent with the direct financial interests of the shareholders. [73]

3.1.2 The English Principle of Loyalty

In English common-law, the legal status of the director is considered to be the same as the status for an agent. As in American common-law the responsibilites of the director are considered to be very similar to the responsibilities of a *trustee*. The fiduciary duties are divided into *the duty to act bona fide* and *the duty not to allow one's interest and responsibility to conflict*. [74]

Basically, these duties respond to the responsibility of a director to act in the interest of the company. The examination of a possible infringement of the loyalty duties is to be performed objectively, which means that the nature of the conflicting interest is irrelevant. Consequently, CSR-related interests can possibly be considered not included in the interest of the

[70] Mares, p. 42
[71] Shlensky v. Wrigley, 237 N.E2d 776, Illinois App. 25 april 1968, p. 177
[72] Ibid., p. 180 pp.
[73] Mares, p. 43
[74] Dotevall, 1999, p. 126

company and be object for a liability-claim against the management. The liability discussion is more thoroughly examined in the chapter 3.4. [75]

3.1.3 The Swedish principle of loyalty

In Sweden, the board and the directors are considered to have a fiduciary responsibility towards the company. [76] With the responsibility for the administration of foreign capital comes a special duty of loyalty which is included in the assignment as in other legal circumstances of commission. The duty of loyalty consists, amongst other things, of the duty to avoid causing damage to the company and the duty to act in the interest of the company shareholders. [77]

According to the traditional interpretation of the duty of loyalty, it aims at refraining the management and the board from increasing their own gains, in addition to the compensation following their assignment. The aims of the principle of loyalty may, however, include refraining the management or the board from benefiting interests traditionally not included in the interests of the company, regardless of any element of self-interest. This view of the regulation is actual in the CSR-related issues discussed in this thesis. [78]

If the management causes economical damage through carelessness or on purpose, it will be liable for compensation claims against the company according to the chapter 29 section 1 of the SCA. In very serious situations, they may be criminally persecutable through the Swedish Criminal Law chapter 10 section 5, unfaithfulness against principal.

3.2 Non-contractual liability

It is a well known and widely debated fact that it often is very difficult to direct compensation claims against corporations which have been, or are, involved in actions which are questionable from a legal perspective as well as from a corporate social responsibility perspective. Corporate actions breaching national legislations or international laws regarding environment or human rights are unexceptionally also breaching CSR frameworks. As there, as already ascertained, are no direct legal sanctions for breaches against CSR frameworks, this section of the thesis describes the legal context of creating non-contractual liability against corporations or the management of corporations.

Many developing countries where corporations have allegedly committed crimes choose to not, or have no possibility to effectively, persecute and try these crimes and claims for compensation in court. Therefore, many of these cases are brought before courts in the home country of the corporation

[75] Ibid.
[76] Considering the translation of the term ”Fiduciary” to Swedish legal language as “Sysslomanna”, see Åkerman, 2005, p. 52
[77] Dotevall, 1999, p. 124
[78] Ibid.

referring to different rules of jurisdiction. Several independent NGO:s and Human Rights-organisations are very active in giving legal aid to third world citizens who have no possibility of directing a compensation claim in their home countries to gain jurisdiction in a western world country.

The problem refers partly to accessing personal liability for the management of a corporation and partly to the difficulty of directing a civil action for compensation against the corporation itself. Also, the fact that many manufacturing MNE:s are supplied by a chain of subcontractors makes the liability-problem more complicated. [79]

3.2.1 The American Approach

3.2.1.1 The Alien Tort Claims Act

The U.S. Alien Tort Claims Act originated from the Judiciary Act of 1789, and asserts that American district courts have jurisdiction over any civil action of an alien, for a tort committed in violation of an international law or of a treaty of the US. [80]

During the 20th century, the courts were reluctant to grant jurisdiction under the ATCA. In Filartiga v. Pena-Irala, a case of the second circle in 1980, only two previous cases where jurisdiction had been granted under the ATCA could be identified. The case treated a suit in New York under the ATCA against a former Paraguayan police official for acts of torture and murder in Paraguay. Additionally, the case explicitly concluded that torture perpetrated under the color of a state authority is in violation of international law and therefore also of the U.S. domestic-law, thus that torture should give rise to a claim under the ATCA whenever the perpetrator can be properly summoned within the borders of the United States. [81]

Following Filartiga v. Pena Irala, an increasing number of plaintiffs claimed jurisdiction under the ATCA, which resulted in a number of cases where the scope of the regulation was defined. In Kadic v. Karadzic from 1995, the Washington D.C. court of the second circle held that ATCA was applicable to any action between private parties provided that it be undertaken under a certain state authority or otherwise violates a norm of international law applicable to the conduct of private parties. [82]

The first case where a corporation was brought before a U.S. court under the ATCA was Aguinda v. Texaco Inc. from 1993. The case was dismissed on formal grounds, but became the starting point for dozens of cases asserting liability for corporations under the ATCA. [83]

Very recently, Estate of Rodriguez v. Drummond Inc., a case where a corporation was sued under the ATCA, escaped dismissal, and was tried before a jury. The evidence was not deemed sufficient and Drummond Inc. was freed of the accusations, but the case nevertheless provided very

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79 Woodroffe, Jessica, Regulating Multinational Corporations in a World of Nation States, 1999, p. 132

80 ATCA section 1350

81 Filartiga v. Pena-Irala, 630 F.2d 876, 887 & n. 21 (2d Cir.1980)

82 Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995)

83 Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002)

interesting legal guidelines for the assertion of liability of corporations under the ATCA. [84]

In this case, the workers of a company-owned coal mine in Colombia claimed that Drummond Inc. had hired paramilitary personel to kill three labor leaders. The actions allegedly fell under the ILO, and the defendants claimed amongst other arguments that the ATCA only was applicable to acts of torture and murder. However, the court dismissed these arguments, and held that the regulations of ILO are well established norms of international law. Therefore, torts demanding liability for interference with labor rights can also be subject to claims under the ATCA, despite the fact that United States never ratified the ILO conventions. [85]

Explaining this conclusion, the Court held that the international laws referred to in the ATCA are limited to well established, universally recognized norms of international law as set forth in international conventions, customs, and practices. Frameworks addressed to intranational politics by NGO:s are not sufficiently well established to give rise to claim under ATCA. [86]

However, the ATCA is not applicable to environmental claims. One of the most common charges against MNC:s operating in developing countries is that the corporation operates without respect to the environment, which gives the ATCA a substantial limitation. [87]

In The Supreme Court of the USA further cleared the scope of the ATCA in the *Soza v. Alvarez-Machain* litigation from 2003. Following the kidnapping and torturing of a Mexican citizen, an ATCA claim was risen in the U.S. on grounds that the international norm of prohibiting wrongful arrest was to be considered a rule of *jus cogens*. The Supreme Court concluded that this was not the case and turned down the claim, but further recognized and defined the fact that ATCA establishes a federal possibility of action based on mandatory international norms. The range of the ATCA follows the legal development of these norms, which gives the act a very dynamic shape. [88]

3.2.1.2 The Torture Victim Prevention Act

Through the Torture Victim Prevention Act of 1991, the principles from Filartiga v. Pena Irala were ratified by the Congress, as it explicitly states that all actions of torture committed by any individual under actual or apparent authority of any foreign nation are liable under United States jurisdiction for extrajudicial killing. International Law prohibiting torture is therefore fully incorporated into the domestic law of United States. [89]

In Sinaltrainal v. The Coca Cola Co., the U.S. District Court of Florida drew guidelines for the examination of a jurisdiction claim under the TVPA.

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[84] Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003). p. 12, section 16

[85] Ibid., p. 7, section 9 f.

[86] Ibid.

[87] Duruigbo, p. 142

[88] Williams, Conley, p. 12

89 The Torture Victim Prevention Act, 106 Stat. 73, U.S. Code Title 28, section 1350, note, § 2(a)(2).

Following the wording of the act, three different prerequisites must be alleged by the plaintiffs:
(1) that the individual defendant acted under color of law,
(2) that the defendant subjected an individual to torture or extrajudicial killing,
(3) that the plaintiff has exhausted "adequate and available remedies" where the violative conduct occurred. [90]

In Sinaltrainal v. The Coca Cola Co., the defendants pursued the fact that TVPA was not applicable to corporations, as the wording expressly stated that an “individual defendant” was to be considered the target for the claims. This interpretation was also followed by an earlier case, the Beanal. [91]

The Court, however, identified different arguments against this interpretation. Initially it notes that the court in Beanal concluded that "congress does not appear to have had the intent to exclude private corporations from liability under the TVPA." The *Senate Judiciary Committee Report* mentions that the purpose of the TVPA is to “permit suits against persons who ordered, abetted, or assisted in torture.” There is no mention of an exemption for private corporations in the report. [92]

The Court also takes into consideration the quite recent Supreme Court judgement of Clinton v. New York,[93] where the Court suggested that the word “individual” is synomous with the word “person”, and that the legal meaning of the word “person” usually is broader than in ordinary usage. Bearing this in mind, the Court concludes that if the Congress would have meant to exclude private corporations in the TVPA it would have done so explicitly to avoid confusion and misinterpretations. [94]

3.2.2 English Common-law Approach

In English common-law, the problem refers to a jurisdiction rule, the *forum non conveniens*, that such a case should be tried in the country where it can be litigated most effectively concerning the burden on the defendant. If jurisdiction is found in England, the defendant has the burden of proof to establish that there is another “clearly and distinctly more appropriate forum” elsewhere. [95]

Following article 2 of the Brussels Convention which is otherwise presented below, the courts have to be satisfied that there is another tribunal with competent jurisdiction where the case may be tried more suitably for the interests of all the parties and for the ends of justice. [96]

[90] TVPA, 106 Stat. 73, U.S. Code Title 28, section 1350, note, § 2(a, b, c)
[91] Sinaltrainal v. The Coca Cola Co. Section 11
[92] Ibid.
[93] Clinton v. New York, 524 U.S. 417, 428, n. 13 (1998)
[94] Sinaltrainal v. The Coca Cola Co. Section 11
[95] Spiliada Maritime Corp. v. Cansulex Ltd. (1987) AC 460
[96] Estate of Lubby v. Cape Plc. (House of Lords, 2000) WLR 20

3.2.2.1 Ngcobo and Others v. Thor Chemicals Holdings Ltd. (1995)

Thor Chemicals originally manufactured mercury-based chemicals in England, but eventually shifted the production-site to Natal, South Africa, responding to significant criticism from the English Health and Safety Executive. In Natal, the same methods of production were persecuted. In addition, the labour force was untrained. Workers who experienced mercury-related health problems were laid off, and replaced with other untrained workers instead of being the target of health and safety measures on Thors behalf. [97]

1992 three workers died of mercury-poisoning, which eventually lead to a criminal prosecution where Thor had to pay a 3000 £ fine. A group of some twenty workers sued Thor for additional compensation in the English High Court. The claim based its jurisdiction on the fact that the English parent company was liable because of its negligent design, transfer, set-up, operation, supervising and monitoring of a dangerous process formerly used in England, which made the parent company responsible for not foreseeing and protecting the South African workers against mercury poisoning. [98]

Thor applied against the claim on formal grounds, but lost the appeal as the Deputy High Court Judge James Stewart appreciated the connections with England, and predicted that English law probably was applicable. [99]

Following this, Thor negotiated a settlement of 1,3 million £ in 1997. At the moment, 21 additional claims are now in progress in England based on similar circumstances. Thors appeal against jurisdiction was rejected by first instance, and the Court of Appeal dismissed further appeal. [100]

3.2.2.2 Rio Tinto PLC (1996)

A cancer victim formerly employed at RTP:s subsidiary Rossing uranium mine in Namibia, Edward Connelly, sued RTP for compensation in England. Connelly pursued the fact that key strategic and technical policies relating to Rossing were originating from RTP in England. In order to meet deadlines on RTP:s international supply of uranium, the English management was directly responsible for substantial increases in the production of uranium, thereby neglecting safety and health issues on behalf of the working forces. [101]

Initially, RTP convinced the Court that Namibia was the natural forum for the case. Thereafter, Connellys argumentation was limited to pursuing the fact that he had no possibility to obtain sufficient legal aid in Namibia to bring a claim there. The case went before the Court of Appeal, before finally ending in the House of Lords. The Lords held with a majority of 4-1 that the practical inability to litigate in Namibia, on Connellys behalf, gave him the

[97] Addo; Meeran, The Unveiling of Transnational Corporations, Human Rights Standards and the Responsibility of Transnational Corporations , Hague, Kluwer Law International, 1999, p. 164 f.
[98] Ibid.
[99] Ngcobo and Others v. Thor Chemical Holdings Ltd. (10 november 1995) TLR
[100] Meeran, p. 165
[101] Ibid. p. 166

right to litigate in England. One of the judges, Lord Goff, stated that substantial justice could not be established if the plaintiff did not have the financial means for litigating in the forum of jurisdiction, giving his vote for Connelly. [102]

In december 1998, the Court dismissed Connellys claim on legal limitation grounds, concluding that the connection to RTP was not strong enough to hold the parent company responsible. [103]

3.2.2.3 Lubbe and Others v. Cape Plc.

Cape Plc. mined blue and brown asbestos in South Africa from 1890 until 1979. Starting 1948, the mining was carried out only by subsidiaries. One of the asbest mills, the Prieska Mills, was situated in the middle of a town, close to a school. The nearby Penge mine had asbestos dust levels many times higher than the UK limit during the period. In 1997, compensation claims were evoked in the English High Court on behalf of three former workers in the Penge mine and two residents of Prieska. The three workers suffered from asbestosis and the two residents from asbestos-related cancer. The claim was based on the failure of the parent company to take measures to reduce exposure to asbestos and the failure to control the worldwide asbestos business of Cape Plc. [104]

Four Italian workers employed by an Italian subsidiary of the Cape Plc., the Capamianto, passed away in asbestos-related diseases. Manslaughter proceedings based on the same principal allegations as in Lubbe v. Cape Plc. were brought in 1993 by the Turin State Prosecutor against the Managing Director of Capamianto. However, these proceedings where suspended as the Director was diagnosed with Alzheimers. [105]

In England, the Court dismissed the forum appeal of Cape Plc. on the grounds that the alleged duty of care took place in England rather than in South Africa. House of Lords dismissed the appeal of Cape in december 1998. [106]

The story does not, however, end here. The plaintiffs used the jurisdiction grant to combine the Lubbe claim with over 3,000 other plaintiffs in a group action, and invoked a claim for compensation in the English High Court. After the Court of Appeal, House of Lords once again granted the group action jurisdiction in England, giving a substantial weakening in the corporate veil. [107]

3.2.2.4 The Brussels Regulation

The UK case-law and legal debate concerning jurisdiction issues raised doubt whether the *forum non conveniens* rules were consistent with the

[102] Connelly v. RTZ (1996) 3 WLR 373-389
[103] Meeran, p. 167
[104] Ibid, p. 168
[105] Ibid.
[106] Ibid., p. 169
[107] Estate of Lubby v. Cape Plc. (House of Lords, 2000) WLR 54

Brussels Regulation. [108] It was clear that the English courts could not stay proceedings if the alternate forum was another EU member state, but regarding other countries the position was undefined. [109]

In the Owusu v. Jackson case, the matter was settled by the ECJ, as the court confirmed that the article 2 of the Brussels Regulation prevents stays of proceedings on grounds of *forum non conveniens* regardless the domicile of the plaintiff and if the alternate forum is a member state or not, thereby effectively putting an end to the *forum non conveniens* doctrine. [110]

3.3 Parent Company Liability

A national corporation is generally a legal person under national law, and is liable for its actions to the same extent as a physical person. A parent company is, however, not responsible for the activities of an associate according to the general corporate law principle of separate corporate personalities. The basic argument for the principle of separate corporate personalities is the fact that a corporation in its capacity as shareholder is no more responsible for the action of the owned company than a physical shareholder owning one single share in the company. However, if exceptional circumstances are at hand, if it can be established that the company has acted more as an agent or dummy for the shareholder, this can be examined differently. [111]

The principle of legal separation between different companies in a company group is legally firmly established in the Swedish legislation as well as most common-law legislations even in cases where one company owns all the shares in another company. [112]

There are some exemptions to this principle. In England, the parent company owes a “duty of care” to people affected by the associate. If the duty of care is breached, the parent company may be liable for compensation. The legal examination of such a claim is however quite extensive. [113]

First, to justify a primary liability, it must be shown that the parent company was directly involved in the everyday-business of the associate. Also, the duty of supervising the activities of the associate must be determined. In some cases it can be shown that the associate acted with such *culpa* that the parent company no longer can be said to have caused the harm. [114]

An example of parent company liability based on the arguments described here has already been given above in the chapter 3.4.2.4 examining the case of *Lubbe v. Cape plc*.

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[108] The Council Regulation (EC) No 44/2001 of 22 december 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
[109] Zerk, p. 126
[110] Case C-281/02, Owusu v. Jackson (2005), n . 94
[111] Zerk, p. 215 f.
[112] Adams & Others v. Cape Industries plc and another (1990)
[113] Zerk, p. 216
[114] Ibid.

Another way of claiming parent company liability is to point at the participation or influence of the parent company in the research, development or testing of medical or biological products that eventually prove to be harmful. The American Law Institute has identified three different criteria to be fulfilled to create liability in this aspect under American law. Where a parent company provides an associate with a product or service, it is liable for physical harm on a third party caused by the product or service if

1. the failure of the parent company to exercise reasonable care increases the risk of harm,
2. the parent company has undertaken to perform a duty owed by the associate to the third person,
3. or the harm is suffered because of reliance of the associate or the third person upon the parent company. [115]

These three different alternatives are not cumulative, i.e. each functions independently of the other two as a base for liability.

Interesting enough, some sources of doctrine regard this as a sign that e.g. a creator of a dangerous technology possibly could have a similar care of duty towards anyone that comes into contact with this technology, regardless of the level of control conducted over the appliance of the technology. [116]

3.4 The profit purpose

The CSR-advocates imply that not only the shareholders are to be considered having an interest in the companies. Instead, a wider group of third parties are to be considered, the stakeholders. The stakeholders are all the people who are affected by the actions of the corporation. Shareholders, employees, customers, neighbours, creditors and suppliers are all stakeholders in the company. [117]

McCorquodale holds the opinion that the stakeholder theory is generally rejected in the USA, the UK and Australia, with the argument that a corporation should operate for its shareholders alone. In continental Europe, however, McCorquodale has found companies being more considered as working for the general good of shareholders, workers and the community as a whole. [118]

The discussion of the profit purpose is generally closely connected with the duty of loyalty.The management has an obligation to perform their assignment with regard to the profit purpose. If the profit purpose is illicitly disregarded, the management is not fulfilling the duty of loyalty towards the company. All measures not motivated by the profitability of the company are therefore basically considered illegitimate. The only deviation from this

[115] ALI, Restatement of the Law, Torts – Volume 2, 1965, § 354A
[116] Zerk, p. 219
[117] McCorquodale, Human Rights and Global Business, p. 108
[118] Ibid., p. 109

principle is a certain possibility for the management to conduct measures which include a certain element of risk. [119]

However, the purpose of the activities of a company is ultimately a question for the general shareholders meeting to decide upon. The decision is usually taken with regard to the articles of association. The delimitation of the profit purpose must therefore be individually determined from case to case. [120]

3.4.1 The American view of the profit purpose

A large part of the discussion regarding the profit purpose has already been assessed under 3.1 of the thesis. However, there are some perspectives which have not yet been investigated.

According to Dodge v. Ford Motor Co., the company has an obligation towards the community which is wider than the traditional task to provide services and merchandise. In line with the conclusions drawn from this case, the primary purpose of the activities of the company is nowadays more considered be the long term development of the company. [121]

The more exact line beween the short term purpose and the responsibility for a long term sustainable development of the company is hard to set fix. In the ALI Principles of Commercial Law, guidelines for the management of the company are established. Here, the purpose is initially established as gaining a return dividend for the shareholders in a long term perspective. However, it is also established that this purpose should be modified by a certain social responsibility. This social responsibility gives the management and directors the possibility to diverge to some extent from the rule stating that profit should be maximized. I.e. it delivers them from the obligation always to choose the measure which gives the larger possible economical outcome for the company. [122]

Thus, the demand of a long term perspective in the governance of the company gives the management a good possibility to take ethical values into consideration. However, a certain principle of proportionality is also in effect, the profit purpose can not be disregarded to an extent that is directly harmful to the company. [123]

3.4.2 The Swedish view of the profit purpose

According to the SCA, the shareholders are free to determine a purpose of the company activities which not entirely aims towards a profit purpose. [124] The profit purpose is, however, precluded, which means that a diversion

[119] Sandström, Torsten, Svensk Aktiebolagsrätt, Sthlm, Norstedts Juridik AB, 2007, p. 249
[120] Ibid. p. 255
[121] Dotevall, 1999, p. 116
[122] American Law Institute Principles section 2, The Objective and Conduct of the Corporation, section 2.01
[123] Ibid. section 2.01 b
[124] The Swedish Company Act, chapter 3 section 3

always must be expressed explicitly in the articles of association. The question regarding the possibility to include CSR-related ethical guidelines in the SCA is thoroughly discussed by Sandström. [125]

Already in the SCA of 1848 the main purpose of a joint-stock company was determined as pursuing economical gain for its owners. The reason for this clause is to guarantee as far as possible for the investors to gain a reasonable return considering the risk taken in the investment. However, in the preparatory works to the SCA of 1895, a debate on whether to obligate the company to respect other interests than those of the shareholders can be noticed.[126] The debate did not result in any changes, and from there no alterations have been made in the SCA view of purpose. [127]

The profit purpose should be viewed as a frame for the actions and decisions the board and the management are allowed to take. They can not diverge from the profit purpose of the company without the risk of being held personally responsible for the action.

Dotevall holds the opinion that only obvious diversions from the profit purpose can cause liability, which means that the management has certain possibilities to provide for other interests than the profit purpose. [128]

In the articles of association of a company, the profit purpose can be modulated to include other purposes than the profit purpose. E.g., the returns, or part of the returns, can be allocated to support scientific, environmental or otherwise public interests. [129]

The shareholders annual general meeting can decide the targets of the purpose by voting in accordance with the decision rules in chapter 7 sections 42-45 in the SCA. Following chapter 7 section 43 , a decision to relocate the return dividends from the shareholders demands an unanimous decision at the meeting, represented by 9/10 of the total stocks in the company. In accordance with chapter 3 section 5 of the SCA, such a decision must also be registered in the public register of corporations before it is introduced in the articles of association.

The profit purpose is important from a public economic perspective, and has contributed to the modern development. If the purpose of a joint-stock company includes other interests than the strictly economical, the basic motivation for an effective business will be reduced. Also, the issues regarding management liability will be very complicated. The management might be liable for a non-business motivated measure which provides for an external interest. [130]

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[125] Sandström, p. 259 ff.
[126] Prop. 1895:6, Förslag till Lag om Aktiebolag, p. 116 ff.
[127] Dotevall, 1989, p. 376
[128] William-Olsson, Teo and Luomala, Anders, Aktiebolagets inverkan på Corporate Social Responsibility, Masters Thesis, University of Gothenburg, 2005
http://www.handels.gu.se/epc/archive/00004896/, p. 53
[129] Prop 1975:103 s 476, Ny Aktiebolagslag
[130] Sandström, p. 260

3.4.3 Other than Profit Purpose

A corporation that engages in a CSR-related activity is basing the decision on a value that is subordinated economical status. Following this, the SCA restricts the possibility for a corporation to give gifts in chapter 17 section 5.

"*The Shareholders annual general meeting or, if the matter is of less importance to the corporation, the board of directors, may decide a gift to a subject of public interest or a subject of equal standing, if it with regard to the subjects standing, the corporations economical status and other circumstances is to be considered legitimate and the gift not is in conflict with 3 §.*" [131]

The third paragraf mentioned stipulates that full coverage for the stock capital must exist in the company after the transaction. [132]

This rule may be activated when a corporation begins a CSR-related programme without a significant connection to the business activities of the corporation. A legal examination of the CSR-programme must then be assessed, where the economical value (cost) of the programme is examined with regard to the stipulations of chapter 17 section 5.

The question of which actions are to be considered gifts must be determined with consideration to the purpose of the company according to the articles of association as well as the profit purpose. Company representation and sponsorship is in most cases measures taken for exclusively business-related purposes.

The outcome of an examination regarding the applicability of chapter 17 section 5 is initially depending on whether the target of the gift is a subject of public interest. Secondly, the gift must be of reasonable size, considering the economical status of the corporation. In 1962, the High Court of Sweden settled a decision more closely examining chapter 17 section 5.

In that particular situation, a company with an accumulated profit of 59 000 sek held the annual general shareholders meeting, and decided to spend 20 000 sek of the accumulated profit on a gift to the city of Borgholm. The decision was criticized in court by minority shareholders, who pursued the fact that the gift was neither targeted to a public interest nor reasonable in consideration of the economic status of the company. The Supreme Court of Sweden concluded that the target of the gift in fact was serving a public interest, but that the gift was too extensive in regard of the available funds of the company, the size of the stock capital and the size of the accumulated profits, and annulled the decision. [133]

[131] SCA, chapter 17 section 5
[132] Ibid, section 3
[133] NJA 1962 p. 182

3.5 Transparency

3.5.1 Transparency Issues

Transparency is usually regulated on two different levels in corporate law. On one hand, sharing information about the company is prohibited through different variations of the duties of secrecy and loyalty on behalf of the employees. On the other hand, different regulations mostly connected to public corporations registered on a stock market oblige the company to make public key information about the company activities. These reporting instruments are also a key ingredient in many of the CSR frameworks, e.g. the OECD Guidelines as examined above.

European company law describes the obligation to maintain secrecy of confidential information in the Structure Directive. [134] All members of a company organ - except the shareholders at the shareholder meeting – have a duty of secrecy towards third person in matters of information concerning the company and its activities of confidential nature. [135]

The CSR transparency analysis targets partly the differences between SME:s and TNC:s, and partly corporations based in an industrialized country and corporations based in a developing country.

Transparency issues have been given much attention since the late 90's scandals in Enron, Worldcom and Skandia. These cases examined situations regarding management beriching themselves on the expense of the shareholders, but the issue is none the less transparency.

Most national legislations in the western world make a difference between private and public corporations. There are very small variations in this respect between Swedish, English and American company law-rules. There are no general principles of insight enabling the public to gain information of the company activities. However, the legislate has chosen to develop a partly self-regulating framework, where the most important rules regarding transparency are to be found in the stock exchange contract of annotation.

3.5.2 Public Company Transparency

Stock exchanges usually demand that companies must adopt to a number of regulations in order to be registered.

The OMX Nordic Exchange is the corporation controlling the stock exchanges in Stockholm, Reykjavik, Helsinki and Copenhagen and is a part of the NASDAQ OMX Group, the largest exchange company in the world.[136] In the mandatory annotation contract an extensive obligation to provide the public with information is prescribed. [137]

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[134] EC Fifth Draft Directive: the Structure Directive, C 240, 9.9.1983

[135] Werlauff, Erik, EC Company Law – the common denominator for business undertakings in 12 states, Copenhagen, Jurist- og Ökonomfordundets Forlag, 1993, p. 262

[136] http://ir.nasdaq.com/

[137] The OMX Nordic Exchange's listing requirements (2006-10-02), section 4.2

This responsibility has lately been made much more extensive than before, as most larger stock exchanges have adopted frameworks more or less based on the Sarbanes-Oxley Act from 2002.[138] In Sweden, the OMX Nordic Exchange demands of annoted corporations the appliance of a framework called the Swedish Code for Corporate Governance. The framework in question are based on the principle of "comply or explain", as the corporation has to publicly explain any diversions from the rules. The market will then determine whether the explanation is sufficient or not. If the company does not provide an explanation, it will be warned and ultimately deregistered from the stock exchange. [139]

The corporations comprised by the SOA-based frameworks are amongst other things obligated to make decisions following a certain procedure, and in all reports and documents reaching the market assure that the management is fully aware and liable of the activities presented therein. [140]

In addition to the annual report, a corporate governance report shall be made public. The reason for this report is to ensure that the management is fully aware of all the company activities, making it more easy to identify liability. [141]

3.5.3 SME issues with CSR frameworks

Most investigations on CSR give great importance to the positive economical effects of adopting a corporation to sustainable development. Investing in cleaner production decreases resource expenses, improved labour rights and working environment give positive effects on motivation, production output and goodwill. Yet, this is not always the case. If competition is tough and not likely to reward the adoptment of a CSR-approach either by suppliers, customers or consumers, the likelyhood of getting a return from implementing a CSR-framework is very limited. [142]

In comparison with a TNC, where both the market and the regulations demand a certain CSR-approach and transparency, the SME:s do not jeopardize goodwill among local customers or consumers, they have no reputation to lose and no shareholder issues to take into consideration. The only acceptable reason for an SME in this particular situation to choose to adopt a CSR-framework would be if the SME is part of a global supply chain where the supplier or customer is a TNC which experiences the harsher demands considering CSR and transparency. [143]

This problem is generally the background to the supply chain rules in CSR frameworks and codes of conduct, e.g. in ISO 14001. [144]

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[138] http://www.deloitte.com/dtt/section_node/0,1042,sid%253D89404,00.html, Vägledning för styrelsearbete, bolagskoden

[139] The Swedish Code for Corporate Governance, p. 11 f.

[140] www.soxley.com

[141] The Swedish Code of Corporate Governance, chapter 5.1

[142] Rahbek Pedersen, Esben, Huniche, Mahad (editors), Strengthening Corporate Social and Environmental Responsibilities in SME:s, Copenhagen, Copenhagen Business School Press, 2006; Jeppesen, Sören, Corporate Citizenship in Developing Countries, p. 100

[143] Ibid.

[144] ISO 14001:2004 sections 4.3.1, 4.4.3, 4.4.6.1

However, there are certain indications that TNC:s tend to exclude SME:s, in particular SME:s of developing countries, when the TNC:s adopt CSR-programmes. The SME:s can not meet the requirements of the CSR-regulations, eventually making the TNC:s terminate the contracts. This is a very important instrument of self-regulation, making the CSR-effects on the TNC:s spill over to the SME:s which are incited to improve the social and environmental sustainability of their activities. [145]

[145] Jeppesen, p. 106

4 Legal implications of CSR-related frameworks

This chapter aims to examine the more precise legal implications of adopting a CSR framework. Legal aspects of the adoption of codes of conduct as company policies have even been tried in court on numerous occasions.

As already concluded, the adoption of CSR-related frameworks is performed on a voluntary basis on behalf of the companies. The cogent rules covering the environmental and social issues are to be found in the national legislations applicable on the activities of corporations.

Considering the international hesitance of issuing more mandatory regulations controlling the corporations, different means of self-regulation have gained much attention. Originating with the liberal economic theories operating our market economy today, there exists a strong belief that regulation is dangerous for the welfare and economy. [146]

The critics of this view point out the apparent risks of leaving the corporations entirely to self-regulation, as the economical interests of the corporations in many situations have proved to prevail over environmental and humanitarian values, resulting in humanitarian or environmental disasters. Codes of conduct are a useful alternative to both extreme views. They are not as imposing on the company as national law at the same time as they provide the company with a possibility to operate with a sounder environmental and social approach than before, giving public insight into the adoption of the code of conduct. [147]

In certain situations the adoption of codes of conduct have apparent benefits. Particularly in countries where the governments fail to provide sufficient legislation to regulate the company activities in considerations of actions elsewhere morally or legally prohibited, the codes of conduct serve an important purpose in imposing more adequate guidelines for the company behaviour. [148]

The codes of conduct will then refrain the corporation from participating in activities that would be prohibited morally or legally in their home country. Thus, codes of conduct often serve a better purpose than national legislation in countries where the enforcement mechanism is weaker than in the home countries of the companies. [149]

Also, codes of conduct are very useful for the employees of a TNC, as it might be very difficult to acquire knowledge of all the different national legislations and traditions in the countries the company operates in. A single

[146] Duruigbo, p. 121
[147] Ibid. p. 122
[148] Ibid.
[149] UNCTAD, World Investment Report 1992: Transnational Corporations as Engines of Growth 90-91 (1992), chapter 5

document explaining the obligations and responsibilities of the company is more easy for the employee to apply. [150]

Interesting enough, codes of conduct have in some situations been considered cogent for the company, creating liability directly supported on the undertakings in the code. In USA, some judicial authority exists to consider that the adoption of an employee manual, statement of policy or similar creates an obligation on behalf of the company to comply with the voluntary undertaking. [151]

The District Court of Florida has on a number of occasions tried the question whether a company policy of any kind can give raise to enforcable contract rights. The Court holds, however, an hesitant approach to doing so, upholding the main principle concluded in Muller v. Stromberg Carlson Corp from 1983, which also describes the most common approach to the doctrine in question all over the US. The main principle governing the binding status of policies is that "a *basic purpose of the law "is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships.*" [152]

In Michigan, however, the existing contractual doctrine as it traditionally was adopted almost nationwide in the US, was cast aside in the Toussaint. v. Blue Cross & Blue Shield of Michigan. In order to create an exemption to the main principle, the doctrine of contractual law demands a mutual understanding between the parts of the contract that the information exhanged is intended to be part of a binding contract. [153]

The plaintiff Toussaint had been given oral insurance that he could remain as an employee as long as he did his job, and had in addition been given a company policy-document where he once again was ensured that he would not get fired. Months later, he was laid off. The Court held the following regarding the binding status of the company policy:

> "*We hold that employer statements of policy ... can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his hiring.*" [154]

The cases described above show a distinct possibility for further development of the legal importance of codes of conducts.

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[150] Duruigbo, p. 123
[151] Ibid., p. 123
[152] Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. 2d DCA1983), Id. 270
[153] Ibid. Id. 263
[154] Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 614-15 292 N.W. 2d 880, 892 (1980)

In Nike v. Kasky of 2002, the California Supreme Court held that a company is liable for false statements it puts out to the public in relation to accusations of labor abuse. [155]

The court elaborated that the categorization of a particular statement as commercial or non-commercial speech requires consideration of three elements, e. g. the speaker, the intended audience and the content of the message. Following this, the Court concluded that Nike was a commercially active corporation, intended the statement to reach out to potential customers and that the message contained information intended to persuade the future general public that Nike conducted business in a responsible manner. [156]

What the case determined was essentially that a company participating in a public debate, i. e. writing letters to newspaper editors and publishing communications addressed to the general public on issues of political, social, and economic importance, may be subjected to liability for inaccuracies because of the theory of "commercial speech". As commercial speech the statements might affect the consumer opinions about the corporation and thereby affect their purchasing decisions. [157]

Nike Inc. appealed the decision on basis of the first amendment, and invoked a writ. The 26 of june 2003 the U.S. Supreme Court dismissed the writ and sent the case back to the California Supreme Court. [158]

[155] Nike v. Kasky, 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296 (2002)
[156] Ibid., 960,
[157] Samaha, 2003, The first amendment in the Rehnquist Court, p. 21
[158] Nike v. Kasky, 123 S. Ct. 2554 (2003)

5 Analysis

5.1 Future and current legal status of CSR Frameworks

Research into legal questions of a more theoretical nature about the legal context of the CSR frameworks is still, I dare say, in its initial stages but fast developing. My hope is that my thesis with the following analysis will somewhat contribute to this development.

Claims regarding the interests of shareholders and employees in conflict with environmental and social values must be addressed on ad hoc basis, often without clear guidelines on how the situation relates to legal circumstances. The case-law is under very fast development in many of these legal areas, and the foreseeability of the claims is often low. Also, different national legislations regard these regulations differently, with different legal instruments, which gives incitement to forum shopping.

Two different possible courses of action can be identified in order to change the CSR-related frameworks to make them more legible and effective. One is to continue with self-regulation and further develop transparency to make the corporations financially vulnerable for breaking the regulations. The other way is to transform the existing regulations, or at least parts of them, into mandatory hard-law legislation. Naturally, also different compromises between the two extremities can be performed.

The normative development of CSR has until this point more proven to be influenced by the former way. Corporations are expected to observe the non-binding legal norms that they have adopted, with enforcement not by a state system but through an informal system of sanctions from stakeholders.

The latter way is not promising today for a number of different reasons. Initially, individual attempts to transform the regulations into national mandatory hard-law legislation would not be effective, as the corporations easily could change domicile. Therefore, only an international initiative by a large number of countries could prove effective. This option will be further examined below.

Considering the question if whether the CSR frameworks are compatible with corporate law, it would be more appropriate to ask if the corporate law permits a full commitment to the CSR frameworks.

5.2 General remarks

Among some few large MNE:s self-regulation according to CSR-regulations has set a standard that by far exceeds those which are enforced through hard-law. The enforcement of an effective self-regulation is, however, dependent on the attention of customers, investors, media and NGO:s.

Making sure that economic activity benefits the citizens of a vulnerable developing country is in the end a task for national governments, and it is on a national level that the most effective measures can be taken.

However, there will probably always be national governments which choose not to implement an effective legislation pursuing CSR, which gives a demand for complementing international regulation. One of the more important parts of such a legislation is the possibility to extend a national jurisdiction to crimes committed in another jurisdiction. This we have already seen in the American ATCA and more and more in the UK.

The simple truth of the matter is that many victims from developing countries, where they can not obtain justice, want to sue in the TNC:s home country. The many legal obstacles in the way give the cases a very long duration, as a rule pro-longed by the legal actions of the TNC. For an English compensation claim, actual evidence of direct involvement of the parent company is essential, otherwise the claim will be dismissed on behalf of the theory of separate corporate personalities. Therefore, it is pointless for the claimants to invoke the claim in England merely because jurisdiction will be granted there if they are not quite sure that they can prove the involvement of the parent company.

The transparency issues are very well covered in the new corporate governance frameworks, and this gives a very good opportunity to control public corporations. There are however a certain number of problems. The first problem is that SME:s are not comprised by these regulations, and therefore are free to engage in activities prohibited or questionable for TNC:s. Additionally, SME:s engaged in these activities have no obligation to share information with the market or media.

Another problem is that the extensive control over the more questionable business areas raises the price on risk. Some corporations will give in to the public pressure, but the corporations remaining can conduct their business with a lessened competition, thereby increasing their profit. There will always be governments, corporations and consumers who ultimately do not care if the product or service offered is produced in a sustainable manner. Therefore, some people will enrich themselves as long as public consciousness of the CSR problems has not grown sufficiently.

Furthermore, the voluntary state of the CSR-related frameworks will always pose a problem. The possibilities for the corporation to create its own code of conduct instead of following an existing one gives the corporation an opportunity to take the easy way out, in choosing an environmental policy that does not interfere with the company activities but still sounds very impressive. E.g. a mining company would be able to adopt a code of conduct or environmental program declaring that they will quit polluting air completely, when their activities are problematic in the aspect of polluting ground and water.

This free-riding problem can only be solved through obligating the corporations to follow a sanctioned code of conduct, and we have already concluded that this alternative currently is not realistic.

Another problem of mandated CSR obligations is that it exists a potential for inefficient resource allocation. As decisions will be taken with less consideration to the economical shareholder interests, this will after a period

cause negative effects on the community, as the company loses in economical efficiency. If an inefficient factory is kept open with regards to the interests of the employees, the problem will only be deferred a couple of years as the finances of the company will deteriorate.

5.3 The CSR compliance with Corporate law

Initially, the limitations for this discussion must be determined. The main principle for the existence of an effective market economy based on the operations of companies is the profit purpose. Without the profit purpose as main aim the existence of the corporations becomes pointless regarding the market economy system. The profit purpose will therefore not be discussed in this analysis. It must also be concluded that the profit purpose is easy to defend, as the management has the complete prerogative to initiate CSR-related activities aiming for a possible future profit.

The practical aspect of the issues discussed is the reason that relevant case-law exists. The plaintiffs who theoretically have a significant economic interest which has been neglected, causing reasons to initiate a claim suit are generally minority shareholders of the company, demanding compensation for CSR-related measures the management has taken without economical purposes. Regardless of the good intentions of the management for the CSR-related actions taken, the minority shareholder as a rule prioritizes the economical gain from his investment.

Various arguments can be presented criticizing the minority for disregarding moral and social issues, but those arguments are not relevant in these circumstances. However, following the Dodge v. Ford case, it must be concluded that the competence of the management has a significant upside against the economical interests of the minority shareholders. Only in cases where the social interest satisfied by the CSR-related action is clearly inflicting on the economical standing of the company or in cases where the minority interests clearly are mistreated, the minority interests will prevail over the competence of the management to run the company.

The principles laid down in the Dodge v. Ford case have survived nearly a hundred years, and have been further reinforced by adding the social responsibility principles to American corporate law in addition to the profit purpose.

The competitive features of shareholding also places a constraint upon the managament through the very active market for corporate control, in which an inefficient management is ultimately assumed to perish through a corporate takeover by new and more effective owners. The inefficiency of the management makes the assets under their control more appealing to others who perceive the opportunities of reorganization and have the competence to extract the true value of the assets.

The fact that American corporate law is taking social issues into consideration can not be questioned, let be that it is for other reasons than

merely moral ones. The solution the courts have chosen is probably the result of the company chain of command, where the management is supposed to act independently, disregarding the opinion of the shareholders. The shareholders have been given their saying in the election of the management. They also have the opportunity to dismiss the management during the annual shareholders meeting if they are disappointed with the management.

The possibilities to create liability on behalf of the management because of CSR-related activicies are probably non-existing except in cases of carelessness. The management can always refer to the possibility of future profits, and as already concluded, the prerogative belongs to the management.

One of the basic principles of the joint stock venture is that the management has a very extensive authority over the corporation. To give the shareholders too much influence would cause obstacles in the activities of the company. The shareholders are given enough influence through electing the management.

5.4 Liability and Jurisdiction issues

Regarding corporate liability, the general principle of separate corporate personalities gives a rather narrow possibility to claim damages from a parent company. There are no guidelines for deciding on which basis, and how, different parts of the company are to be held legally responsible. The group case-by-case approach suggested by most of the codes of conduct does not add anything further in this aspect.

Regarding personal liability, one of the obstacles that confront victims of lack of social and environmental responsibility of companies in the third world is the enormous difficulty of claiming liability for the perpetrator. Most likely, the victims cannot sue in the place where e.g. the torture occurred. Instead, in many instances, the victim would be endangered by even returning to that particular place.

Neither is it easy to pursue justice in the courts of another nation. Such suits are generally time consuming, burdensome, expensive for the victim and difficult to administer for the foreign court. Also, because such claims assert inhuman treatment by a foreign state, these suits may create embarrasment for the hosting nation.

The new modifications of the TVPA express that torture committed under color of law of a foreign state in violation of international law is also a violation of United States law. If in cases of torture in violation of international law, the U.S. courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, the changes in pursuing justice for crimes in violation of international law prohibiting torture will not be effective.

Therefore, the new TVPA has clearly affected the possibility to uphold the doctrine of *forum non conveniens*. It has not entirely nullified the *forum non conveniens*, but it conveys the message that such suits should not be easily

dismissed on the assumption that foreign state business is not the business of the United States.

Considering the ATCA, it must be concluded that the U.S. provide a legal way of creating liability that none or few other countries can match. This, however, creates a risk that the number of cases brought before American courts will prove overwhelming, and that the U.S. are forced to change the legislation. The American taxpayers might feel that their resources are being used in a disproportionate manner.

Interesting and well expected enough is that it seems like legal councelling on how to avoid the risk of being sued under the ATCA has been drawn into the activities of many large law firms otherwise working with business related legal issues. Human rights law issues have therefore entered the business world. The legal councelling referred to includes strategies not to get involved in ATCA claims.

Considering the liability for the company itself, we have already established the fact that the principle of separate corporate personalitites refrains direct liability for the parent company. The parent company is most often situated in Europe or the US, and has a subsidiary conducting business in another country.

Here, transparency issues are of the outmost importance, as legal instruments often provide ineffective methods to create liability for the parent company. Legal liability can, as concluded, only be established in exceptional cases. It is more effetive to create incentives to follow existing rules and act in a environmentally and socially sustainable manner by using transparency instruments to publicly punish corporations. Bad publicity creates badwill which ultimately decreases the value of the shares of the company, giving the shareholders incentive to force the management to change the course of the activities of the company.

This course of action is, however, only effective regarding public corporations annoted on a stock exchange. For private corporations, no such instruments can be used. That is the reason why codes of conduct and environmental standards are so important in this aspect. They create new incentives for private corporations to comply with ethical values, and give means to make information about the private corporations public, thereby creating the same effects as regarding transparency of public corporations.

Further regarding the principle of separate corporate personalities, it must be concluded that it is a very important and basic principle of shareholding. The possibility of shareholding without liability for the owners are generally considered to be one of the central reasons why the joint stock corporation has been such a tremendous success during the later centuries. To undermine this principle is therefore to endanger the entire foundation of the modern corporation.

It doesn’t, however, seem impossible, or even difficult, to modify the principle by creating rules of a legally technical nature aiming to draw a line between personal liability for shareholders considering actions of the company and liability for a parent company considering activities of a subidiary. Considering the fast legal development regarding these issues, I anticipate that rules containing this type of regulation will appear more and more frequent in the future.

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