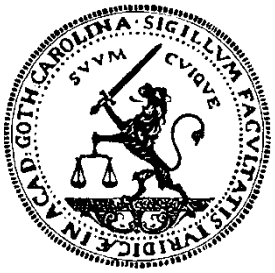

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Going Green – Entering a Judicial Grey Zone?

Corporate Social Responsibility and the Shipping Business

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Contents

Summary

Corporate Social Responsibility (CSR) has during the last decade become an increasingly relevant concept. Most Multinational Enterprises (MNEs) have formulated Corporate Codes of Conduct, and many have also joined international initiatives focusing on CSR, such as the United Nations Global Compact. Through globalisation, deregulation, paradigm shifts and not least the development of information technology; consumer awareness has increased and brand equity has become essential to MNEs. Translated to the shipping business, as more consumers consider e.g. environmental features important in their purchasing decisions, shippers and carriers alike in the maritime chain of responsibility have a keen interest in communicating the "green" attributes of their products and services.
Although CSR-measures largely are voluntary and non-binding, there are regulatory frameworks covering the making and keeping of promises, such as contract and market law, and by being brought into and activating such frameworks; CSR-measures may confer legal implications.

The purpose of the thesis is to explore the wider legal implications of CSR, with focus on the environmental aspect, as applied to the shipping business. It intends to present a bird's eye view of the topic to the legal layman as well as to the legal reader; to serve as legal overview to the shipper or carrier, and to give the jurist an insight into the shipping business.

The thesis initially outlines the history, development and various concepts of CSR, highlighting motives and stakeholders and exemplifying international initiatives. The findings are then applied to the shipping business, elucidating the significance of CSR for shippers and carriers; also discussing the general status of CSR-measures as constituting soft law.
Within this framework, with a starting point in a business transaction concluded in Sweden, the possible legal implications of CSR-measures under English and Swedish contract law are explored, in terms of interpretation and breach of contract, outlining available remedies. Using the example of an environmental commitment-clause in a transportation framework agreement, the investigation suggests that, depending on the actual circumstances of the case in question, contractual liability may arise.
Further, the possible legal implications of CSR-measures under Swedish market law are investigated, focusing on marketing practices, unfair commercial practices and outlining available sanctions. Due to its influence on Swedish market law, a comment is also made on European Union (EU) market law. Using the example of a carrier marketing its environmental commitment towards a shipper, the investigation suggests that, depending on the actual circumstances of the case in question, misleading marketing practices may be at hand.
The comparative comments in the summarising analysis indicate that under English contract law, parties need to look after their own interests to a greater extent than under Swedish contract law. Similarly, comparative

comments on EU and Swedish market law highlight the greater protection of not only consumers, but also companies, under the latter.
The concluding discussion as to the future legal status of CSR, especially as applied to the shipping business, suggests enforcement and enhancement of already available legal systems and organs as a viable alternative; leading to common guidance on concepts and methods of implementation, and removing uncertainty as to legal status.

Sammanfattning

Corporate Social Responsibility (CSR) har under det senaste decenniet blivit ett allt mer relevant koncept. De flesta multinationella företag (Multinational Enterprises, MNEs) har formulerat uppförandekoder och många har också anslutit sig till internationella initiativ som fokuserar på CSR, som exempelvis Förenta Nationernas Global Compact. Genom globalisering, avreglering, paradigmskiften och inte minst utvecklingen av informationsteknologi, har konsumentmedvetenheten ökat och varumärkeskapitalet blivit essentiellt för MNEs. Översatt till sjöfartsnäringen, med fler konsumenter som överväger exempelvis miljöegenskaper vid sina köpbeslut, har både befraktare och transportörer i den maritima ansvarskedjan ett starkt intresse av att kommunicera de ”gröna” attributen hos sina produkter och tjänster.
Även om CSR-åtgärder i stort ses som frivilliga och ej bindande, finns det regelverk som gäller avgivandet och infriandet av löften, som exempelvis avtals- och marknadsrätt, och genom att föras in i och aktivera sådana regelverk, kan CSR-åtgärder medföra rättsliga konsekvenser.

Syftet med uppsatsen är att utforska de rättsliga konsekvenserna i vid mening av CSR, med fokus på miljöaspekten, applicerat på sjöfartsnäringen. Den avser att presentera ämnet ur ett fågelperspektiv för lekmannen såväl som den juridiskt utbildade läsaren; att fungera som en rättslig översikt för befraktaren eller transportören, samt ge juristen en inblick i sjöfartsnäringen.

Initialt beskriver uppsatsen CSRs historia, utveckling och olika koncept, framhäver motiv och intressenter samt exemplifierar internationella initiativ. Slutsatserna appliceras sedan på sjöfartsnäringen, belyser betydelsen av CSR för befraktare och transportörer; samt diskuterar den allmänna statusen av CSR-åtgärder som utgörande ”soft law”.
Inom detta ramverk, med utgångspunkt från en affärstransaktion i Sverige, utforskas de möjliga rättsliga konsekvenserna av CSR-åtgärder under engelsk och svensk avtalsrätt, med avseende på avtalstolkning, avtalsbrott och tillgänglig gottgörelse. Med användande av ett exempel av en miljöåtagande-klausul i ett ramavtal för transport antyder undersökningen att, beroende på omständigheterna i det enskilda fallet, kontraktsansvar kan uppkomma.
Vidare undersöks de möjliga rättsliga konsekvenserna av CSR-åtgärder under svensk marknadsrätt, med fokus på marknadsföringsåtgärder, otillbörlig marknadsföring och möjliga sanktioner. På grund av dess inflytande på svensk marknadsrätt, görs även en kommentar om Europeiska Unionens (EU) marknadsrätt. Med användande av ett exempel av en transportör som marknadsför sitt miljöengagemang till en befraktare, antyder undersökningen att, beroende på omständigheterna i det enskilda fallet, vilseledande marknadsföring kan vara vid handen.
De komparativa kommentarerna i den summerande analysen indikerar att under engelsk avtalsrätt behöver parter bevaka sina egna intressen i högre

grad än under svensk avtalsrätt. På liknande sätt framhävs i komparativa kommentarer om EU- och svensk marknadsrätt det större skyddet av inte bara konsumenter, utan även företag, under den senare.
Den avslutande diskussionen angående den framtida rättsliga statusen av CSR, särskilt vid applicering på sjöfartsnäringen, antyder förstärkning och förbättring av redan tillgängliga rättsliga system och organ som ett livskraftigt alternativ; medförande allmän vägledning angående koncept och implementeringsmetoder samt undanröjande av osäkerhet kring rättslig status.

Preface

Upon completing this thesis and thus also my time as a student at Lund University, I would like to thank my family and friends, as without their invaluable support the journey would have been tougher.
I would also like to extend a warm "Thank you!" to Birna Ödefors, Managing Director of CMA CGM Scandinavia, for taking time out of her busy schedule for an interview on the topic of this thesis.

Christina Holmgren

Lund, May 2010

"What is the argument on the other side?
Only this, that no case has been found in which it has been done before.
That argument does not appeal to me in the least.
If we never do anything which has not been done before,
we shall never get anywhere.
The law will stand still while the rest of the world goes on,
and that will be bad for both."

Denning LJ, *Packer v Packer (1953) 2 All ER 127*

Abbreviations

BSR	Business for Social Responsibility
CCC	Corporate Code of Conduct
CCWG	Clean Cargo Working Group
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
DNV	Det Norske Veritas
EC	European Community
ECJ	Court of Justice of the European Union
ECT	Treaty establishing the European Economic Community (Rome, 1957)
EU	European Union
EUT	Treaty on European Union (Maastricht, 1992)
GRI	Global Reporting Initiative
ICC	International Chamber of Commerce
ISO	International Organization for Standardization
LJ	Lady/Lord Justice, judicial title
MD	Marknadsdomstolen
MNE	Multinational Enterprise
NGO	Non-Governmental Organisation
NJA	Nytt juridiskt arkiv, avd 1
OECD	Organisation for Economic Co-operation and Development
PECL	Principles of European Contract Law
SEK	Swedish Krona
SOX	Sarbanes-Oxley Act
TEU	Twenty-foot Equivalent Unit
TFEU	Treaty on the Functioning of the European Union (formerly ECT)
UN	United Nations
UNGC	United Nations Global Compact
UP	UNIDROIT Principles of International Commercial Contracts 2004
US	United States
USD	United States Dollar
WSC	World Shipping Council

1 Introduction

1.1 Background

The corporation is a central economic institution in our society, playing an important role through creating workplaces and contributing with necessary goods and services, today on a global level. Due to this great impact, the precise role of the corporation – its rights and obligations – have long been a topic for discussion, the views changing and developing over time.[1]

Today, the focus on Corporate Social Responsibility (CSR) is immense. However, there is no unity or uniformity in the precise definition of CSR, although a popular description, also used by the European Commission, is: "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[2] Another definition is: "a responsibility beyond the requirements of national law regarding questions of human rights, environment and social rights".[3]

Since the boom of CSR in the early 2000s, the concept has continued to flourish: in 2005, 80% of the Fortune 500 companies were mentioning CSR at their websites, in 2009, despite the economic recession, many corporations did not cut back on the CSR-related budgets.[4] Evidently, the concept is here to stay. The value of CSR naturally lies in its positive effects on social and environmental development, however, it is a fact that it also has positive monetary effects for the various stakeholders involved. A study shows that CSR-measures are directly related to brand equity; for a company with a market value of approximately USD 48 billion, a modest increase in CSR-ratings resulted in about USD 17 million more profits on average in subsequent years.[5]

The rise of CSR and its continued growth can be attributed to a number of things, in correlation; globalisation, deregulation, paradigm shifts, corporate scandals, and not least the development of information technology. Due to the availability of and ease in spreading information, consumer awareness has increased and the importance of brand equity, of which CSR is an essential part, has grown.[6]
To exemplify, in a recent article in Harvard Business Review on social media and its impact on brand reputation, a Pew study is mentioned in which nearly 40% of the participants said that they have doubted a medical

[1] Grafström (2008), p 16.
[2] Löhman (2003), p 15. and http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm, 2010-05-12.
[3] Magnusson (2003), p 9. See also Grafström (2008), p 16.
[4] Bhattacharya (2006), p 1, Delevingne (2009), p 1.
[5] Bhattacharya (2006), p 15.
[6] Grafström (2008), p 34 et seq., see also Löhman (2003), p 15, p 37 et seq.

professional's diagnosis because it conflicted with information they had found online – the concluding comment being: "If users put that much faith in what they learn on the internet, what will they be willing to believe if members of a social media forum start trashing your organization?".[7]
Further, in a Swedish survey participants were asked: "How do you think that you can influence society the most?" To this, 36% answered: "By voting in public elections" – a whopping 53% answered: "Through conscious consumption".[8]

Thus, the importance of CSR in relation to brand equity and consumer awareness means that most Multinational Enterprises (MNEs) today are working intensely with various CSR-measures such as e.g. environmental concerns. Applied to the shipping business; when an MNE, in its role as a shipper, is reviewing its supply chain looking for the most environmentally friendly transport solutions – it will choose the carrier who shares and expresses the same "green" values.
However, although seen as a competitive advantage or an investment, CSR also entails great costs for the implementers; for a carrier it could be renewing or restructuring its fleet, large-scale projects in ports and terminals, or renewing its container fleet. In addition to this, since most CSR-measures are voluntary and thus carry no immediate sanctions, it could be tempting for MNEs to slide a bit on their costly commitments.

Still, although CSR-measures are largely voluntary, there are other regulatory frameworks pertaining to the making and keeping of promises, such as contract and market law.
For example, a Swedish MNE with an expressed CSR-profile, such as IKEA or H&M, and a carrier conclude a business transaction in Sweden, e.g. by signing a transportation framework agreement. The carrier, in order to attract business from the shipper, has intensely marketed its "green" commitment, perhaps even included it the in the agreement. However, it eventually becomes clear that the carrier is not honouring his promises, e.g. by using substandard ships; resulting in a public scandal implicating also the shipper – with subsequent decrease in sales and loss of reputation.
Could the carrier be held liable? Are there any remedies available to the shipper? What is the legal status of CSR-measures today? What are the legal implications in a wider sense? And – how should CSR be regulated in the future?

1.2 Purpose and disposition

The purpose of this thesis is to elucidate the concept of CSR as applied to the shipping business, with a focus on environmental aspects; to explore the legal implications of CSR-measures in a wider sense – especially with regards to contractual relations and marketing efforts – and to discuss the

[7] Pew Research Center/Pew Internet & American Life Project 2009, see also Kane (2009), p 46.
[8] FörebildsFöretaget Konsument (FFK) 2002, see also Löhman (2003), p 50.

future regulation of CSR in this context. The thesis intends to present a bird's eye view of the topic to the legal layman as well as to the legal reader; to serve as legal overview to the shipper or carrier, and to give the jurist an insight into the shipping business.

The thesis is structured in the following manner: first, the history, development and various concepts of CSR are outlined, highlighting motives and stakeholders, and exemplifying international initiatives. The findings are then applied to the shipping business, illustrating manifestations of CSR and its significance to shippers and carriers. Thereafter, the general status of CSR as constituting soft law is discussed.
Second, within the framework established above, the possible legal implications of CSR-measures will be explored with regards to contractual relations. With a starting point in a business transaction concluded in Sweden, using the example of an environmental commitment-clause in a transportation framework agreement, this will be investigated under English and Swedish contract law, in terms of interpretation and breach of contract, possible liability and available remedies. English law[9] due to its status within in the shipping business, Swedish law as Swedish MNE shippers may request this.
Third, the possible legal implications of CSR-measures will be investigated with regards to marketing efforts. With a starting point in a business transaction concluded in Sweden, using the example of a carrier marketing its environmental profile towards a shipper, this will be explored under Swedish market law, focusing on marketing practices, unfair commercial practices and available sanctions. Due to its influence on national market law, an outline will first be made of the European Union (EU) and EU law.
Fourth, in the concluding analysis, comparative comments on the salient features of English and Swedish contract law will be made, as will a reflection on EU and Swedish market law. Following this, CSR as regulated by soft and hard law will be discussed, whereafter a comment on the future legal status of CSR will be made.

1.3 Method and material

In accomplishing the purpose of this thesis, various methods have been used in order to satisfactorily cover the topic and its different aspects.
The introductory chapter two is largely descriptive, defining the frame for the following chapters. Here, qualitative text analysis has been utilised in order to identify and highlight the essential areas.[10] In addition, to gather further data on CSR in practice within the shipping business, an in-depth interview has been made with the Managing Director of CMA CGM

[9] N.B.: The United Kingdom has three judicial systems; i) English law, for England and Wales, ii) Northern Ireland law, for Northern Ireland (both systems being based on common law principles) and iii) Scots law, for Scotland (a pluralistic system based on civil law principles with common law elements), see e.g. Keenan (2007), p 189. For further reading on the English legal system, see Kelly (2009).
[10] Esaiasson (2007), p 237.

Scandinavia; Birna Ödefors.[11] The format of an in-depth interview was deemed suitable for the topic of this thesis as it entails detailed answers, as well as opens up for further discussion.[12] For intersubjectivity; the interview questions are enclosed as Supplement C.[13]
The legal reviews in chapter three and four have been performed using the traditional legal dogmatic method; penetrating and describing relevant judicial sources and related issues.[14]
In chapter five a comparative method has been used in outlining and commenting on the salient features of the different legal systems respectively. For the other parts of chapter five, qualitative text analysis as well as the in-depth interview have again been used.
The thesis is descriptive-analytic and in addition to the concluding analysis and discussion, continuous analysis is made throughout.
Footnotes have been used not only to cite sources, but also to suggest further reading on various subjects or issues.

The material used has, for the legal dogmatic and comparative parts, been international and national text of law, case law and doctrine. In this context, it should be noted that any litigation involving scenarios or parties as relevant to the thesis is often settled through arbitration, wherefore available case law may not entirely reflect the current legal position. However, it is still possible to comment on the features of the legal systems that will be used in arbitration.
For the translation of Swedish acts and legal terms, mainly *Fundamental Commercial Legislation: Swedish Law in Translation* (Norstedts Juridik, 2009) has been used.
Regarding the overview of CSR and for some parts of the concluding analysis, texts from other disciplines such as economics, political or social science have been used. In addition, material has been collected from company websites and folders. For this the latter material however, it should be noted that this is commercial and should thus be assessed accordingly.

Further, on the exemplifying choices of carriers and shippers – these MNEs have been chosen not only due to their size and thus impact on the shipping business, but also due to their pronounced commitment to CSR and sustainability.

1.4 Delimitation

It should be noted that, apart from in contractual relations and through marketing efforts, CSR-measures may have legal implications in a wider sense also in other areas; such as e.g. giving rise to civil liability claims or

[11] CMA CGM is the world's third largest container shipping company, with 7.9 million TEU transported in 2009. See further http://www.cma-cgm.com/AboutUs/Presentation/Default.aspx, 2010-05-12.
[12] Esaiasson (2007), p 283.
[13] Ibid., p 311.
[14] Hydén (2002), p 57.

foreign direct liability claims, this will however not be discussed, but for a brief comment in chapter 5.

Commercial contract law is an extensive area of law, and the purpose of the legal reviews in chapter 3 below is not to provide complete coverage, it is instead intended to highlight the salient features of the two legal systems respectively, in terms of interpretation, breach and remedies – wherefore e.g. formation of contract, validity of jurisdictional provisions, etc. will not be explored. Neither will liability in tort or tort law.

CSR is a very wide concept, covering a broad range of social measures, but for the purpose of this thesis focus will be on the environmental aspect, or sustainability; there being a natural link between ocean transportation and environmental regards.

2 Corporate Social Responsibility – development, international initiatives and its role within the shipping business

2.1 Introduction – history, stakeholders and central ideas

The social responsibility of corporations is not a new issue, nor is the debate surrounding it. Historically, this responsibility and its manifestations trace back to the beginning of the industrialisation, where factories and mills contributed to social development; and where in some instances the incongruities in these workplaces raised demands for improvements which resulted in e.g. schools and infirmaries for the workers.[15]

Throughout the development of the CSR-concept, its manifestations have mirrored the contemporary values of society – the earlier measures as above focused on people; on labour and welfare. In the 1960s, a shift could be seen in the increased focus on the environment and the increasing environmental concerns, as for example through Rachel Carson's "Silent spring". This book had a great impact on a global level; raised an extensive debate on corporations and environmental responsibility, and can even be said to have assisted in launching the environmental movement.[16] In the 1970s, following the increased debate on CSR, Milton Friedman wrote his famous piece in New York Times Magazine, the essence of the article being that "the business of business is business"; arguing not that corporations does not have a social responsibility, but that this responsibility is solely a financial one.[17] The further debate on corporations and business ethics in the 1980s also contributed to the formation of the CSR-concept as it looks today.
Yet, although CSR in various forms thus can be traced back quite far, with research on the topic dating back to the 1950-60s, the increase in the number of published academic articles in this area, as well as the rising engagement of businesses after the 1990s is striking.[18]

This increased focus on and popularity of CSR can be attributed to a number of things, in correlation; globalisation, deregulation, paradigm shifts,

[15] Grafström (2008), p 27 et seq.
[16] Ibid., p 30.
[17] Ibid., p 32, see further Friedman (1970), p 1.
[18] Grafström (2008), p 18 et seq.

corporate scandals and not least the development of information technology.[19] Owing to these factors, consumers are today well-informed and their consumption is often conscious in the sense that it may be based on certain requirements, as for e.g. ecological or fair trade goods.
Consumer awareness has brought on the development of "brand equity"; i.e. how the brand, as synonymous with the corporation, is perceived by consumers – brand value becoming one of the most important assets of a corporation.[20] For example, according to Millward Brown's BrandZ Top 100, a ranking that identifies the world's most valuable brands measured by their dollar value, the Google-brand is currently valued to an astounding USD 114 billion.[21]
This obviously entails that issues and publicity relating to brand image and reputation must be strategic and carefully thought through. In an ever-hardening global competition, softer values in form of CSR-measures such as codes of conduct help to build the reputation and brand of a corporation – sometimes these values might be the only thing that separates it from its competitors.[22]

To illustrate the above and put it into a context; Grafström argues that CSR should be understood in relation to three central notions, namely i) stakeholders, ii) voluntary rules and iii) norms, as follows: corporations are open systems which influence and is influenced by organisations and operators in their surroundings: stakeholders. These stakeholders pose demands and shape rules that affect the daily business for the corporation. The rules can be mandatory (i.e. law), but increasingly common are the voluntary rules, such as codes and guidelines. Voluntary rules often entail corporations to accept a social responsibility beyond what is required by law. Lastly, in addition to the voluntary rules, there are the unwritten rules, norms (as e.g. to have a website), which corporations must adhere to as it is regarded as essential and simply "the right thing to do".
Thus, to understand the concept of CSR, it is necessary to analyse the stakeholder demands, the creation of rules, and to identify the corporation's relation to these notions.[23]

As mentioned in the introduction, there is no complete consensus on the precise definition of CSR, and within CSR-concept itself there is a rich flora of terms. One of the most frequently used terms in relation to CSR, also used as a synonym, is "corporate citizenship", i.e. the corporation seen as a member of society, having rights and obligations.[24]
CSR-measures are also undertaken in a number of areas; human rights, anti-corruption, etc. As for the environmental area of CSR, this is referred to using the term "sustainability". The term originates from the United Nations

[19] Grafström (2008), p 34 et seq., see also Löhman (2003), p 15.
[20] Löhman (2003), p 38.
[21] http://www.millwardbrown.com/Sites/mbOptimor/Ideas/BrandZTop100/BrandZTop100.aspx, 2010-05-12.
[22] Löhman (2003), p 38.
[23] Grafström (2008), p 22.
[24] Löhman (2003), p 16, 172.

(UN) Rio Declaration on Environment and Development adopted in 1992, and intends to describe how the balance between social, economical and environmental questions shall be successfully managed in a long-term perspective.[25]
In addition to being performed in various areas, CSR-measures also have various forms, such as Corporate Codes of Conduct (CCCs) or strategies, which in turn may be general or specific. The methods for implementation and verification also vary; internal or external. Further, the initiatives may be individual or joint, private or public, made on national or international level – CSR comes in a myriad of shapes in as many places, this which will be further illustrated in the following.

2.2 International CSR-initiatives and standards

2.2.1 The United Nations Global Compact

At the World Economic Forum in 1999, the then UN Secretary-General, Kofi Annan, encouraged the corporate world to contribute in achieving the UN Millennium Development Goals, by accepting their social responsibility; proposing the formation of the UN Global Compact (UNGC).[26]
The UNGC is both a policy platform and a practical framework, with the aim of aligning business operations and strategies globally with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption (see Supplement A for the Ten Principles of the UNGC). The principles are derived from e.g. the UN Universal Declaration on Human Rights and the Rio Declaration on Environment and Development.
Since its official launch in July 2000, the UNGC-initiative has grown to more than 7700 participants in 130 countries around the world, involving various social actors; corporations, governments, NGOs and the UN as an authoritative convener and facilitator.[27]
The UNGC is not a regulatory instrument, but a voluntary initiative that "relies on public accountability, transparency and disclosure to complement regulation and to provide a space for innovation",[28] and it is emphasised that it does not "police or enforce the behaviour or actions of companies".[29]

[25] Löhman (2003), p 16, 175, see also http://www.un.org/esa/dsd/agenda21/, 2010-05-12.
[26] http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=22, http://www.un.org/millennium/declaration/ares552e.pdf and http://www.sweden.gov.se/sb/d/2657/a/142479, 2010-05-12.
[27] http://www.unglobalcompact.org/AboutTheGC/index.html, 2010-05-12.
[28] http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf, 2010-05-12.
[29] http://www.unglobalcompact.org/AboutTheGC/faq.html, 2010-05-12. See also Magnusson (2003), p 18.

2.2.2 The EU and the European Multi-stakeholder Forum on CSR

Within the EU, CSR-work can be said to have started off during the Lisbon conference in 2000, where CSR was part of the agenda.[30]
In 2001 the European Commission published its first communication on the strategy of the EU in the area of CSR; the Green Paper, which was followed in 2002 by the White Paper.[31]
Also in 2002, the European Multi-stakeholder Forum on CSR was established, providing a place for dialogue between European stakeholders about developments in CSR and on the EU-strategy. The forum is hosted and facilitated by the European Commission, in close cooperation with a Coordination Committee, in which business, trade unions, NGOs and other groups are represented; meeting every two years, latest in 2009.[32]
Similar to the UNGC above, the EU is pointing out that the cooperation is voluntary.[33]

2.2.3 The OECD Guidelines for Multinational Enterprises

In 1976, OECD adopted its Declaration on International Investment and Multinational Enterprises, an important part of which are the Guidelines for Multinational Enterprises.
The Guidelines constitute a set of recommendations to MNEs in all the major areas of business ethics, e.g. employment and industrial relations, human rights, information disclosure and environment. Adhering countries comprise all 30 OECD member countries, and 12 non-member countries. The instrument's implementation mechanisms include the operations of National Contact Points, which are government offices charged with promoting the Guidelines and handling enquiries in the national context.
Like the UNGC and the EU-initiative, the OECD Guidelines are not binding, but are to be viewed rather as a "social contract" between the MNEs and their stakeholders.[34]

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[30] http://www.europarl.europa.eu/summits/lis1_en.htm, 2010-05-12, see in particular #39.
[31] For content, see http://ew.eea.europa.eu/Industry/Reporting/cec__corporate_responsibility/csr_eu_strategy .pdf and http://ew.eea.europa.eu/Industry/Reporting/cec__corporate_responsibility/com2001_0366en01.pdf, both 2010-05-12.
[32] http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/multi-stakeholder-forum/index_en.htm, 2010-05-12.
[33] See further Grafström (2008), p 78 et seq.
[34] http://www.oecd.org/document/24/0,3343,en_2649_34889_1875736_1_1_1_1,00.html, http://www.oecd.org /about/0,3347,en_2649_34889_1_1_1_1_1,00.html and http://www.oecd.org/department/0,3355,en_2649_34889 _1_1_1_1_1,00.html, 2010-05-12. See further Magnusson (2003), p 53.

2.2.4 International Organization for Standardization and ISO 26000

The International Organization for Standardization (ISO), perhaps best known for the ISO 9000 standard on Quality Management and the ISO 14000 standard on Environmental Management, will in 2010 launch ISO 26000; providing guidelines for social responsibility.
ISO 26000 will be voluntary to use, it will not include requirements but rather guidelines, and will thus – unlike ISO 9000 and ISO 14000 – not be a certification standard, or, as stated by the ISO: "We are looking for a golden middle way that promotes respect and responsibility based on known reference documents without stifling creativity and development. Our work will aim to encourage voluntary commitment to social responsibility and will lead to common guidance on concepts, definitions and methods of evaluation".[35]

2.2.5 The Global Reporting Initiative

The Global Reporting Initiative (GRI), founded in 1997, is a network-based independent organisation that has pioneered the development of the world's most widely used sustainability reporting framework.
The GRI reporting framework sets out the principles and indicators that organisations can use to measure and report their economic, environmental, and social performance. The cornerstone of the framework is the Sustainability Reporting Guidelines. In 2009, more than 1500 organisations from 60 countries released sustainability reports based on the GRI Guidelines.
The reporting is voluntary, but, for example, the Swedish government decided in 2008 that all Swedish state-owned companies have to report in accordance with the indicators of the GRI.[36]

2.2.6 The Swedish Partnership for Global Responsibility

The Swedish Partnership for Global Responsibility was introduced in 2002 by the Swedish Prime Minister together with the Ministers for Foreign Affairs, Trade, Development Cooperation, Industry and Environment. The purpose was to promote the OECD Guidelines for Multinational Enterprises and the principles set forth in the UNGC.
Today, the initiative serves as a platform for companies and other operators working with CSR, with the aim of facilitating the ambitions of Swedish corporations and organisations to implement CSR in practice. Important components of the initiative are e.g. production of studies on relevant issues,

[35] http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000.htm, http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html?nodeid=4451259& vernum=0, both 2010-05-12.
[36] http://www.globalreporting.org/AboutGRI/WhatIsGRI/, http://www.sweden.gov.se/sb/d/2657/a/142487, both 2010-05-12.

arrangement of seminars for dissemination of knowledge and general promotion of information on existing international guidelines pertaining to CSR.[37]

2.3 CSR within the shipping business

In the following, what has transpired above on CSR will be applied to the shipping business. Within this industry, CSR-measures such as CCCs, policies and strategies are common for the main operators – shippers and carriers – alike, which is illustrated in Table 1 at page 19 below. See also Supplement B for the Principles of Conduct of Maersk; the largest container shipping company in the world.[38]

In relation to the understanding of CSR as defined by Grafström (in 2.1 above), it is in this context interesting to note the correlation between the stakeholders – e.g. consumers, shippers and carriers – and how it influences the creation of voluntary rules and norms.
For example, brand equity is naturally important to both shippers and carriers, yet, if viewed as a chain reaction, it could be said that it is the consumers who influence the shippers, who in turn influence the carriers.
To elaborate further; Swedish MNEs such as IKEA and H&M have worked with CSR and have had CCCs in place for many years (IKEA since 2000, H&M since 1997).[39] Both these MNEs are examples of shippers who require that their suppliers – the carriers – share the same values in terms of social and environmental regards. Further, these MNEs naturally represent large volumes of goods to be carried and are hence attractive customers to and can put pressure on carriers; e.g. by requesting a certain environmental commitment, or incorporation of clauses to this effect into transportation framework agreements. Or, as expressed at the 2009 Navigate Conference on Maritime Corporate Social Responsibility: "Consumers are forcing many brands to look at their supply chains and ask not just where and how the product is made, but 'how did it get here and who moved it?' This affects public and private companies and if the charterer is under pressure then so is the carrier and every other company in the maritime chain of responsibility".[40]

CMA CGM is the world's third largest container shipping company,[41] and the Managing Director of CMA CGM Scandinavia, Birna Ödefors, has a solid experience from the shipping business. She recalls CSR in its entirety as becoming a hot topic on the agenda in the late 1990s (see also 2.1 above), however, as for the environmental part of CSR and sustainability, she believes that for carriers environmental concerns is a natural focus;

[37] http://www.sweden.gov.se/sb/d/2657/a/14557, 2010-05-12, see further Ward (2005), p II.
[38] http://www.maerskline.com/link/?page=brochure&path=/about_us/company_info, 2010-05-12.
[39] http://www.ikea.com/ms/sv_SE/about_ikea/our_responsibility/iway/index.html, 2010-05-12 and Grafström (2008), p 51.
[40] *Maritime Corporate Social Responsibility* (2009), p 2.
[41] http://www.cma-cgm.com/AboutUs/Default.aspx, 2010-05-12.

considering how closely interlinked ocean transportation and the environment are.[42]
CMA CGM is very clear in its environmental profile; "Environment, a corporate value", and the Global Environmental Strategy is, in addition to being directly presented to customers, also outlined in detail at the company's website.
CMA CGM engages in various CSR-measures in the environmental area, internally and externally; restructuring of the fleet and manufacturing "green" containers, education of staff and joint projects with ports and terminals. Many of these measures are being reviewed on a monthly basis, and management has an implementation responsibility.
Some of these initiatives are also being developed in close cooperation with stakeholders, such as MNE shippers, who e.g. pose certain environmental requirements as a condition for business.[43]
Ms Ödefors concludes that investments in CSR may be costly, but naturally presents a competitive advantage – and it would be costlier still not to engage in environmental work; sustainability is something that affects us all, now and in the future.[44]

In addition to the individual CSR-initiatives by shippers and carriers, within the shipping business it is also increasingly common that the different stakeholders work together in various voluntary constellations or associations; the primary objectives of which are to focus on environmental or social concerns.
For carriers, there is the World Shipping Council (WSC). The 29 members of the WSC operate approximately 90% of the global liner ship capacity and transport 130 million TEU annually.[45] In its efforts to "promote sound environmental stewardship, the Council is working with legislators, appropriate government agencies, the International Maritime Organization, and other organizations. The scope of issues is quite broad - including regulations to improve air quality, climate, preventing the spread of invasive species, the reduction of marine noise, and a variety of other issues relating to protection of human health and the environment." [46]
As an example of a joint project involving both shippers and carriers, there is the Clean Cargo Working Group (CCWG) initiated by Business for Social Responsibility (BSR). The CCWG is connecting shippers, carriers and freight forwarders "dedicated to integrating environmentally and socially responsible business principles into transportation management."[47]

[42] Ödefors, April 2010. See Supplement C for the interview questions.
[43] Ödefors, April 2010.
[44] Ödefors, April 2010.
[45] http://www.worldshipping.org/about-the-council, 2010-05-12.
[46] http://www.worldshipping.org/industry-issues/environment, 2010-05-12.
[47] http://www.bsr.org/consulting/working-groups/clean-cargo.cfm, 2010-05-12.

Table 1: Manifestations of CSR and environmental commitment within the shipping business

1a) S H I P P E R S	IKEA	H&M
Interbrand* ranking, 2009	28	21
UNGC-member	Yes	Yes
BSR/CCWG-participant	Yes	No
Official Corporate Code of Conduct (CCC)	Yes	Yes
Environmental commitment in CCC	Yes	Yes
Reporting (external)	- Annual sustainability report - Published at website	- Annual sustainability report - Using GRI guidelines - Published at website

1b) C A R R I E R S	Maersk	CMA CGM
WSC-member	Yes	Yes
UNGC-member	Yes	No
BSR/CCWG-participant	Yes	Yes
Official Corporate Code of Conduct (CCC)	Yes (see Supplement B)	No
Environmental commitment in CCC	Yes	-
Other environmental commitment (e.g. Mission Statement, Strategy)		- "Environment, a corporate value." - Global Environmental Strategy
Reporting (external)	- Annual sustainability report - Using GRI guidelines - Published at website	

Sources: www.ikea.com, www.hm.com, www.unglobalcompact.com, www.bsr.org, www.maersk.com, www.cmacgm.com, www.worldshipping.org, www.unglobalcompact.org, www.bsr.org, **2010-05-12**.
***Interbrand** is a brand management company that every year ranks the "Best Global Brands", see further http://www.interbrand. com/best_global_brands.aspx ?year=2009&langid=1000, **2010-05-12**.

2.4 CSR-initiatives and measures as soft law

Although there are examples of legislation in the CSR-area (some of which will be commented on in 5.3 below) the vast majority of CSR-initiatives today are, as described above, voluntary – i.e. not dictated by states through laws or regulations, but formulated and monitored by MNEs or other organisations; the codes or principles carrying no legal sanctions. Due to these capacities, most CSR-measures thus qualify as "soft law".[48]

[48] Mörth (2004), p 4.

For decades the concept of soft law has been important to characterise and describe the well-known phenomenon in global politics of "governance without government". Governance, as opposed to government, rests upon multiple authorities that are not necessarily public and sharing. In systems of government the law is hard; in systems of governance the law is soft, the crucial difference being that the latter lacks the possibility for legal sanctions and is thus not considered to be legally binding.

Soft law began to be treated as an identifiable concept in the 1970s, parallel to the emergence of the new global power structures and also somewhat parallel to the development of CSR. The development of soft law reflects the ways in which globalisation makes traditional law-making more complex, as well as an increasing awareness of the importance of non-state operators, such as MNEs.[49]
To illustrate; the UNGC (see 2.2.1 above) has been developed in line with soft law, but also in line with the CSR-concept. The UNGC is an example of an emergent form of soft cross-sectional regulation which is pursued in the transformed relations among states and corporations; where regulations evolve through reciprocal dialogues. The UNGC shows that MNEs are not only targets for global governance, but they are also active in building and maintaining regulatory frameworks.[50]
The UNGC thus matches well with Snyder's definition of soft law: "Rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects".[51]

The soft regulations of the UNGC or the codes of MNEs hence operate more as a "social contract" than a legal framework. Nevertheless – the voluntary soft regulations may be brought into and activate neighbouring legal frameworks,[52] and it is this aspect of CSR-measures that will be discussed in the following.

[49] Mörth (2004), p 1 et seq.
[50] Sahlin-Andersson in Mörth (2004), p 132 et seq., p 141.
[51] Mörth (2004), p 6.
[52] Sahlin-Andersson in Mörth (2004), p 151.

3 CSR-clauses in transportation framework agreements

3.1 Introduction and hypothetical scenario

It transpired above that CSR-measures in their various forms largely constitute soft law, but that they may be brought into and activate neighbouring legal frameworks. In the following, this will be explored from the aspect of contract law.

Within the shipping business, it is common practice that an MNE, in its role as a shipper, will contact carriers with a tender invitation.[53] The invitation can e.g. cover a certain volume of goods to be carried over a period of time in one or several trade routes or "corridors". Apart from cost or price, the invitation can contain other requirements, such as environmental considerations. Carriers would review the offer, accept it or make counter offers. Once negotiations are finalised and parties are in agreement, the result would be a transportation framework agreement.[54] This framework agreement or contract will not be covered by the standard carriage of goods regulations or conventions, such as for example the Hague-Visby Rules[55] (which would cover the individual shipments), but will instead be covered by general contract law.[56]
The agreement or contract would further contain jurisdictional provisions, i.e. specify what law will be applicable. Within the shipping business, English law has a prominent position and is often the law of choice, however, Swedish MNEs (similar to those mentioned in chapter 2 above), are sometimes opting for Swedish law to apply to the contract.

If such a transportation framework agreement would contain a CSR-clause, for example a generally formulated environmental commitment on the carrier's side, but it eventually becomes clear that the carrier is not honouring his undertaking, e.g. by using substandard ships; resulting in a public scandal implicating also the shipper – with subsequent decrease in sales and loss of reputation – under contract law, could the carrier be held liable for this, and if so, what are the remedies available to the shipper?

[53] E.g. Ödefors, April 2010.
[54] Cf. Adlercreutz (2002), p 99 and Ramberg (2010), p 96.
[55] The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading.
[56] See e.g. Wilson (2008), p 113 et seq.

In the following, the legal implications of a carrier not living up to environmental undertakings made in a transportation framework agreement will be explored by outlining regulations on i) interpretation and breach of contract and ii) remedies, thereafter summing up with a iii) conclusion.
The investigation will be made under a) English law (3.2), and b) Swedish law (3.3), with a further comparative analysis in chapter 5 below.

As stated in the introduction, the purpose of the below legal review is not to provide complete coverage, but to elucidate the salient features of the two legal systems respectively, in terms of interpretation, breach and remedies, and to serve as a guide to these. Further, the below reasoning is based on the isolation of a general CSR-clause and its possible legal implications, but it should be noted that these are also naturally dependant on the contract as a whole, there may for example be a valid exemption clause[57] which covers the situation in question, or an agreed damages clause[58] or similar, however, this will not be covered below.

3.2 English law

3.2.1 General on English law and English contract law

English law is a common law system, which in essence means that legislation is not the only source of law, rather, the main body of law is the case law created by precedents. Nevertheless, there is also legislation, such as Acts of Parliament and Statutory Instruments, and as legislation is superior to precedents; in an instance of conflict between these, legislation would prevail.[59]

As for English contract law however, this is heavily dependant on common law.[60] Common law is often described as "the law made by the judges in deciding cases which come before them where there is no relevant legislation".[61] In this context, the backbone of English law can be said to be a principle that dates back to the 18th century; the *stare decisis*-principle, which confers that precedents are to be followed.[62]
Another fundamental principle of English law, although today subject to many qualifications, is the principle of freedom of contract.[63]
Also characteristic to English law and contract law is the law of evidence; entailing strict rules on allowed and illicit means of proof.[64] The parol

[57] See however Poole (2008), p 67 on restrictive interpretation of such clauses.
[58] See further Poole (2008), p 350.
[59] Bogdan (2003), p 113, Lawson (1992), p 3. Further and for a detailed introduction to English law, see e.g. Bogdan (2003), p 91 et seq.
[60] Lawson (1992), p 3.
[61] Ibid., p 3.
[62] Bogdan (2003), p 93.
[63] Whittaker in Chitty (2008), p 10 et seq.
[64] Bogdan (2003), p 96.

evidence rule states that if there is a written contract, then that writing is the whole contract and parties cannot adduce extrinsic evidence.[65]

Under English contract law, the general rule is that a party to a contract must perform exactly what he undertook to do.[66] When, as per 3.1 above, an issue would arise on whether the performance is sufficient, the contract must first be interpreted in order to ascertain the nature of the obligation, after which it remains to investigate whether the actual performance measures up to that obligation, or whether there has been a breach of contract. Thus, the legal review below will be made in the following steps; i) interpretation and breach, ii) remedies and iii) conclusion.

3.2.2 Interpretation and breach of contract

The principles for interpretation of contracts within English law have during the last decades undergone some developments, shifting from a traditional formal or strict view (see e.g. 3.2.1 above on the parol evidence rule), to a slightly more flexible view.[67]
Part of this development is originating from the case Investors v West Bromwich,[68] where Hoffman LJ consolidated the principles for interpretation of contracts in five points. This, which has become known as the "Lord Hoffman restatement"[69] is not a complete nor systematic scheme for the process of interpretation, but rather a general guide as to what material should be regarded in the process and how the meaning of words and expression should be ascertained.
In essence, the restatement may be summarised as follows:
i) interpretation is the ascertainment of the meaning the contract would convey to a reasonable person having access to all the background information available to the parties at the time of the contract,
ii) the background information that this reasonable person should regard upon interpretation should include "absolutely anything" which would have affected the way in which the language of the document would have been understood,
iii) from this admissible background information, there are two exceptions, namely previous negotiations of the parties and their declarations of subjective intent,
iv) the meaning of words is a matter of dictionaries and grammar, the meaning of the document is what the parties using those words against the relevant background would reasonably have meant, and
v) although words should be given their "natural and ordinary" meaning, the law does not require judges to attribute to the parties an intention which they plainly could not have had.[70]

[65] Poole (2008), p 213. See however further under 3.2.2 below.
[66] McKendrick in Chitty (2008), p 1399.
[67] Hedwall (2004), p 61, see also Poole (2008), p 262 and Rosengren (2010), p 1.
[68] Investors Compensation Scheme Ltd v West Bromwich Building Society (1998) 1 WLR 896.
[69] Rosengren (2010), p 2.
[70] Poole (2008), p 261 et seq., Rosengren (2010), p 3.

Although debated, largely due to basically removing the parol evidence rule (see above under 3.2.1), this statement has had a significant impact on interpretation. The approach today would appear to be that the wording is interpreted set in the context of the contract as a whole, the "internal context", then the contract is interpreted against the "external context"; the background information available to the parties, such as previous dealings and their contractual purpose, but excluding evidence of their negotiations.[71]

Further to this, it should be noted that a rather prominent tendency in English case law is that the courts will look for an interpretation which gives due consideration to the intention of the parties, or the "commercial purpose".[72] As put by Diplock LJ in Antaios Compania Naviera v Salen Rederierna AB: "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense."[73]
In addition, in commercial contracts, the words used may have acquired a special meaning different from their natural one, hence these contracts should be interpreted according to the "usage and customs of merchants."[74]

To be used restrictively or as a last resort, there are also some general rules or principles to assist in the interpretation, one of which the more robust ones is the *contra proferentem*-rule. This entails that, if a wording is unclear, one-sided or onerous, it will be interpreted strictly against the party seeking to rely on it.[75]

Further to interpretation of the wording in the contract, or the express terms, if the contract is silent on a certain matter, implication of terms will be made. This is however done restrictively and should be used only to fill gaps on the basis of giving effect to the deemed intentions of the parties or on the basis of "necessity". Implied terms are construed primary with a starting point in custom, statute and case law.[76]

By the process of interpretation above, the meaning of the clause and contract will be ascertained and it will be possible to determine whether there has been a breach of contract.
A breach will occur when a contract party without lawful excuse either refuses to perform, fails to perform, or performs in a defective manner, a contractual obligation.[77]
Every breach of contract will give rise to the right to claim damages, but the contract will remain in force. If the breach is repudiatory however, the non-

[71] McMeel (2007), p 19, Poole (2008), p 262. See further McMeel (2007), p 93 et seq. on the internal context, p 103 et seq. on the external context, and p 54 et seq. for an informative summary on the leading principles and policies.
[72] McMeel (2007), p 55, Rosengren (2010), p 12.
[73] Antaios Compania Naviera SA v Salen Rederierna AB (1985) AC 191.
[74] Guest in Chitty (2008), p 846.
[75] McMeel (2007), p 55, Rosengren (2010), p 17.
[76] Hedwall (2004), p 94. See further Guest in Chitty (2008), p 815 et seq. and Poole (2008), p 229.
[77] Poole (2008), p 322 et seq.

breaching party will have the option to terminate the contract.[78] This rule is usually expressed as follows: "any breach of contract gives rise to a cause of action; not every breach gives a discharge from liability".[79]

Thus, as different types of breach have different effects, it is crucial to decide what type of breach is at hand. This is done through the classifications of terms, which divides the terms of a contract into the following three main categories of "promissory terms": a) conditions, b) warranties and c) innominate (or intermediate) terms.[80]
a) Conditions are important terms which involve the primary obligations of the contract and if a condition is broken, the breach is generally regarded as repudiatory. As the consequences of breaching conditions are severe, the courts will not lightly classify terms as conditions, but terms are held to be conditions if i) it is expressly so provided by statute, or ii) categorised as such by precedent, or iii) it is so designated in the contract, or iv) the nature of the contract must lead to the conclusion that the term was decisive for the parties.[81]
b) Warranties are less important terms which are not essential for the purpose of the contract and which can be adequately compensated with damages, accordingly, a breach of a warranty can never constitute a repudiatory breach.[82]
c) Innominate or intermediate terms appear to lie somewhere in between conditions and warranties, the identification of which is an uncertain process, or, as defined by Hale LJ in Rice v Great Yarmouth Borough Council: "[an innominate term is] one which can be broken in so many different ways and with such varying consequences that the parties cannot be taken to have intended that any breach should entitle the innocent party to terminate the whole contract". I.e., if the breach is not severe, it can be adequately compensated with damages, if the breach is severe, it is repudiatory.[83]
Hence, the process of classification of terms is complex and not easily predictable, and a non-breaching party should be careful in treating a breach as repudiatory, since this may constitute wrongful repudiation.[84]

In addition to the classification of terms, a further distinction can be made in breach of entire obligations, or breach of severable (divisible) obligations; the former constituting repudiatory breach, the latter not. The implications of the entire obligation rule may however be circumvented by using the doctrine of substantial performance, which has similarities to the category of

[78] Ibid., p 206.
[79] McKendrick in Chitty (2008), p 1537.
[80] Poole (2008), p 241 et seq. Conditions can be divided into i) contingent conditions and ii) promissory conditions, or "promissory terms", the latter which entails that a party undertakes that a certain result will be achieved. For further reading on the classification of terms, see e.g. Guest in Chitty (2008), p 824 et seq. and McMeel (2007), p 391 et seq.
[81] Guest in Chitty (2008), p 837.
[82] Poole (2008), p 242.
[83] Rice v Great Yarmouth Borough Council (2003) TCLR 1, (2001) 3 LGLR 4, The Times, 26 July 2000, CA. See further Poole (2008), p 242, 251.
[84] Poole (2008), p 206.

innominate terms above, as the consequences of breach depend on how serious the breach was.[85]

3.2.3 Remedies

As stated above, a breach of contract will give rise to a right to claim damages, but the contract will remain in force. If the breach is repudiatory however, in addition to the right to claim damages, the non-breaching party will have the option to either terminate the contract or to affirm the contract.
If the contract is terminated, only the future obligations of the parties are discharged, the contract itself and its terms survive and may be relevant for e.g. assessment of damages.
If the contract is affirmed, this obliges both parties to continue to perform all remaining obligations due under the contract. Further, if the non-breaching party chooses to affirm the contract, it is important to note that then "the slate is wiped clean" as to future performance of the parties; i.e. future defective or non-performance of the party electing to affirm the contract will in turn become a breach.[86]

Regarding damages; the basic legal means of enforcement of contractual obligations is by compensation for loss caused – the compensation principle. This can be achieved by the non-breaching party obtaining substitute performance, where the breaching party thus has to stand the extra cost of the substitute performance. If substitute performance is irrelevant or inadequate, the law can compel actual performance. If neither substitute nor actual performance is suitable, damages will be due.[87]

The assessment of damages payable is determined by the losses suffered by the non-breaching party, losses which may have been suffered in any of three areas of interest, as follows; i) the expectation (or performance) interest, ii) the reliance interest, and iii) the restitutionary interest.
i) The expectation or performance interest refers to whatever is necessary to put the non-breaching party into the position he would have been in had the contract been performed, thus compensation for lost profit is compensation of the expectation interest.
ii) The reliance interest refers to whatever is necessary to put the non-breaching party into the position he was in before the contract was made, thus compensation of expenditure made towards performance is compensation of the reliance interest.
iii) The restitutionary interest refers to the restoration of an unjust benefit from the breaching party to the non-breaching party, thus return of an advance payment under a contract which is discharged by frustration is compensation of the restitutionary interest.[88]

[85] Poole (2008), p 254 et seq.
[86] Ibid., p 322 et seq.
[87] Ibid., p 345 et seq.
[88] Ibid., p 348.

In order to identify the adequate compensation, the loss suffered by the non-breaching party has to be identified, and then quantified.[89]
Expectation loss is based on identifying and assessing the value of certain benefits that the non-breaching party expected to receive under the contract, benefits which may not be limited to financial ones, but can include anticipated subjective benefits, as well as the interest in getting the performance itself. Expectation loss will normally be compensated on the basis of the difference in value between the promised performance and the actual performance, alternatively it may be compensated by cost of cure.[90]
Where the measurement of expectation loss may be too speculative, uncertain or even impossible, reliance loss can or must instead be claimed. Reliance loss is based on identifying and assessing the wasted expenditure arising from the performance of the non-breaching party, expenditure which would have been recovered if the contract had been performed.[91]
There appears to be no hinder to compensate for expectation loss and reliance loss simultaneously, as long as there is no double compensation.[92]

Non-pecuniary losses are generally not recoverable in a claim for breach of contract, although in some instances a modest sum may be awarded for the disappointment suffered through not receiving the promised performance. Although difficult to prove and compensate in financial terms, damages for loss of existing commercial reputation (involving loss of trade) may be due, as e.g. in the famous Aerial Advertising v Batchelors Peas Ltd on failed advertising, but in this case advertising was also the main purpose of the contract.[93]

There are other limitations on the non-breaching party's ability to be fully compensated, such as the duty to take reasonable steps to mitigate (minimize) loss, or that loss which is too remote a consequence of the breach cannot be recovered, or that damages may be apportioned in relation to the non-breaching party's own negligence.[94]

3.2.4 Conclusion

Since the below reasoning is much dependant on the actual circumstances of the case in question and further that the current legal position is unclear, the following comments are consequently general in nature. Nevertheless, in

[89] Poole (2008), p 352.
[90] Poole (2008), p 354, for further specifications on calculation and assessment of loss, see Poole (2008) p 354 et seq. and Beale in Chitty (2008), p 1598 et seq.
[91] Poole (2008), p 352.
[92] Poole (2008), p 352, 367 and Beale in Chitty (2008), p 1600 (On compensation for expected net profit plus expenditure).
[93] Aerial Advertising v Batchelors Peas Ltd (Manchester) (1938) 2 All ER 788. The plaintiffs were to advertise the defendant's peas by flying over towns trailing a banner reading "Eat Batcherlors' peas". In breach of contract, the pilot flew over the main square of Salford during the two minutes' silence on Armistice Day. This caused great upset and the defendants' products were boycotted, leading to a fall in sales. Poole (2008), p 349, 397. See further Beale in Chitty (2008), p 1651.
[94] Poole (2008), p 349.

applying the characteristics of English contract law as highlighted above to the hypothetical scenario outlined in 3.1, some remarks can be made.

The contract is a commercial contract, and the parties are fairly equal MNEs. Within commercial contract law, the starting point is that the parties have a basic knowledge of the contract issues, wherefore they are not awarded the same protection as for example a consumer would be, or which could be relevant also if there is inequality of bargaining power.[95] Thus, the demands on the parties are quite high.
Considering the available background information, using the contextual and commercial approaches in the interpretation process, the meaning of the clause will be ascertained, as will the weight given to it. As for its meaning; once ascertained, the actual performance can then be compared to the contracted one. In general, the more specific the clause, the easier the assessment. As for the weight; this will be largely dependant on the available background information. The clause might not be classified as a condition (unless of course designated as such in the contract) but possibly as a warranty or perhaps an innominate term, wherefore failure in performance may constitute a breach of contract, entitling the non-breaching party to compensation.
Substitute performance would probably not be a suitable remedy, but damages to compensate the expectation interest in form of lost profit, possibly loss of commercial reputation as well as the reliance interest in form of any expenditure or similar, could be due. If the breach is regarded as severe, it might be repudiatory.

However, the above is dependant not only on the actual circumstances, but also on the ability of being able to prove these, on the other contents of the contract and of course on how the case is argued – from both sides.[96]

3.3 Swedish law

3.3.1 General on Swedish law and Swedish contract law

Sweden is a civil law country, which in essence means that the only or "real" source of law is legislation. However, there are also other legal sources which jurists can turn to for guidance; preparatory works, case law, doctrine and sometimes custom. The importance of preparatory documents is unique for Sweden, although as the law ages, relevant case law becomes

[95] Hedwall (2004), p 16. Considering e.g. the Unfair Contract Terms Act 1977, which also has greater bearing on inequality in relations. See further Bernitz, p 133.
[96] The layman reader is advised that there are a naturally a number of defences which could be argued in favour of the breaching party (the defendant), which may be pleaded alternatively or cumulatively; e.g. that the defendant did not commit the act, that the act does not constitute breach of contract, that the claimant (the non-breaching party) did not suffer the alleged or any loss, that the claim is irrecoverable as the loss is too remote, etc. See further e.g. Goode (2009), p 143.

more important. In addition, and as will be further outlined in 3.3.2 below, if a main law is silent on a specific matter, other laws covering similar issues may be used for analogy purposes.[97]

Regarding Swedish general contract law, this is regulated by the Contracts Act,[98] which is also the frame for Swedish contract law; although there are a number of specific laws relevant to contractual relations in other areas, such as consumer law, family law, etc.
The Contracts Act is aimed at individual contracts rather than standard contracts, and the act covers formation of contract, agency and the invalidity of certain legal transactions. However, there are several areas which are not covered; e.g. interpretation and implication, although these areas can be said to have been "solved" by case law.[99]
Further, the regulations in the Contracts Act are largely optional or non-compulsory, meaning that they will come into force only if the parties have not decided otherwise. This is a consequence of the fundamental principle of freedom of contract; parties are free to decide if and with whom to enter into agreement with, as well as free to decide the content of the agreement.[100]

In Swedish law, there is no law of evidence; but free submission of evidence applies, meaning that everything that can be used as evidence may be used, regardless of its form. In the context of contract law, this means that in addition to the written evidence of e.g. the contract, the parties' actions pre and post the formation of the contract will also be regarded as evidence, as will oral statements, although these may be difficult to verify.[101]

For the purpose of consistency, the legal review of Swedish contract law below will be made in the same steps as were used for the legal review of English contract law above, i.e.; i) interpretation and breach, ii) remedies and iii) conclusion.

3.3.2 Interpretation and breach of contract

As mentioned above, the Contracts Act does not contain any regulations on interpretation; this is instead performed using various methods with the guidance of e.g. general legal principles, analogies with other laws, or custom, with a starting point in case law.[102]
Fundamental legal principles which are matters of course for Swedish contract law and thus important also in interpretation, are; in addition to the

[97] Further and for a detailed introduction to Swedish law, see e.g. Kabir (2009). Also international instruments may be used for guidance, such as for example UNIDROIT Principles of International Commercial Contracts (UP) or Principles of European Contract Law (PECL). However, for interpretation, an "international element" should be considered after due regard has been given to the national interpretation procedure, see e.g. Grönfors (1989), p 52.
[98] SFS 1915:218 Lag om avtal och andra rättshandlingar på förmögenhetsrättens område.
[99] Adlercreutz (2002), p 33 et seq.
[100] Adlercreutz (2002), p 34, Bernitz (2008), p 131.
[101] Bernitz (2008), p 79, Bogdan (2003), p 96.
[102] Adlercreutz (2001), p 9, Bernitz (2008), p 83, Hedwall (2004), p 73.

principle of freedom of contract mentioned above, the principle of *pacta sunt servanda* and the loyalty-principle.[103] The former entails that agreements should be kept, the latter that the parties to an agreement should enable and facilitate the performance of the agreement to the extent possible. In the words of Hellner: "This is written nowhere in Swedish legislation, but nobody is in doubt about its validity".[104]

The facts which the interpretation process will be based on are called data of interpretation. In order to identify these, it first needs to be decided what exactly constitutes the contract; written and oral parts, and once the contract itself has been thus specified, the relevant data of interpretation can be defined. This can, in addition to what the parties have said or written, also be their actions at the formation of the contract, as well as under the duration of the contract.[105]

The starting point for the interpretation process is to clarify the common intention of the parties, by using an objective method, focusing on the wording.[106] However, although the wording or terminology may be quite straightforward, great weight will still be given to the intention of the parties. This can be illustrated by the case NJA 2000 s 685, in which the Swedish Supreme Court stated that the terminology used in the contract is an important, but not conclusive, datum of interpretation; and in interpreting the entire contract situation, considering the other contents of the contract and the common intention of the parties, the real meaning of the contract may be different from the one expressed by the terminology used.[107]

Also essential to the interpretation process is to identify the nature and purpose of the contract,[108] as well as to view an individual clause in the light of the whole contract, an example of the latter being the statement of the Supreme Court in the case NJA 1992 s 403; that a contract should be regarded as a cohesive entirety and when interpreting one clause, guidance can be found in the other clauses of the contract.[109]
Further, interpretation is done against the background of optional or non-compulsory law, using the general legal principles that are expressed in these sources, as well as giving due consideration to the norms of trade usage and custom.[110]

A principle for interpretation of somewhat limited significance but which has nevertheless been applied in case law to mainly consumer, but also commercial, contractual relations, is the *in dubio contra proferentem*-rule,

[103] Ramberg (2010), p 37.
[104] Hellner (1996), p 30. The author's translation. See also Adlercreutz (2001) p 9. Further, these principles can be said to be expressed in the Contracts Act's regulations on formation and invalidity, see Ramberg (2010), p 162 and the discussion in footnote 32.
[105] Hedwall (2004), p 48 et seq. See also Adlercreutz (2001), p 44 et seq.
[106] Hedwall (2004), p 48 et seq.
[107] NJA 2000 s 685. See further Hedwall (2004), p 50, 67.
[108] Ramberg (2010), p 156 et seq.
[109] NJA 1992 s 403. See further Bernitz (2008) p 81 et seq. and Ramberg (2010), p 160.
[110] Bernitz (2008), p 83 et seq.

which entails that if there is doubt as to the meaning of a clause in a contract, this is interpreted to the disadvantage of the party who has construed or relies on it (cf. 3.2.2 above).[111]

In addition to the interpretation of the express wording in the contract and the other relevant data of interpretation, if these are incomplete, implication of terms will be made. This is done restrictively, by filling the gaps in line with the contract as a whole, using optional or non-compulsory law, custom or general legal principles.[112]

As mentioned under 3.3.1 above, the Contracts Act contains regulations on invalidity of legal transactions. Examples of circumstances which would render a contract invalid are duress, coercion or fraudulent deception (§§28-30), this is however used restrictively, and courts are reluctant to rely on these rule unless the act is also punishable under the Swedish Penal Code (e.g. 9 §1/Contracts Act §30).[113]
Under §36 of the Contracts Act, contract terms may be modified or set aside if deemed unconscionable or unreasonable. In using this rule, consideration is given to a weaker party, as e.g. a consumer, but the rule is also applicable to commercial relations, however, then usually only if there are any special circumstances justifying this. As with §§28-30 above, this rule is used restrictively, and is much debated, partly due to the lack of clear guidelines for the assessment of what should be regarded as "unreasonable".[114]

When the contents and meaning of the contract have been thus defined through the interpretation process, it is possible to determine whether there has been a breach of contract. A breach of contract is at hand if a party has not fulfilled the contract in accordance with the agreement of the parties.[115]

3.3.3 Remedies

The Contracts Act does not, apart from the rules on invalidity or modification (e.g. §36), contain any regulations on sanctions or breach of contract. This is quite peculiar, and Swedish contract law here differs from many other European civil law systems that contain general rules on this.[116]

Usually, sanctions or remedies are instead defined through liquidated damages clauses.[117] However, if a contract is silent on this matter, the available remedies will be defined using the sources for interpretation and implication as mentioned above, i.e. analogies to similar laws and general legal principles.[118] The Swedish Sales of Goods Act is an important source

[111] Bernitz (2008), p 90, Ramberg (2010), p 170 et seq.
[112] Adlercreutz (2001), p 15, Hedwall (2004), p 54, 66.
[113] SFS 1962:700 Brottsbalk. See also Bernitz (2008), p 134.
[114] Bernitz (2008), p 144, Hedwall (2004), p 72.
[115] Ramberg (2010), p 219.
[116] Ibid., p 219.
[117] Ibid., p 244.
[118] Ibid., p 219.

for analogies, and also PECL or UP (see footnote 97 above) could provide useful guidance.[119]

The starting point is that it is the non-breaching party which can choose which remedy to resort to (e.g. PECL 8:101), some remedies can be combined, some are exclusive; the aim of the remedies is to place the non-breaching party in the same financial position he would have been in had the contract been performed, i.e. the expectation interest (PECL 9:502, UP Art. 7.4.(2)). Available remedies are e.g. actual performance, cure, price reduction, termination and of course, damages.[120]

Regarding damages, according to Ramberg it may not be necessary to prove that the breaching party has been negligent, but damages are due when it is proved that he has failed in performing in accordance with the contract.[121] The starting point for assessment of damages is that the non-breaching party should be placed in the same position as if the contract had been performed, thus by comparing an actual course of events with a hypothetical one; the differential-theory.[122] The assessment is fairly straightforward for expenses and costs, however for loss of profit or indirect loss due to the breach, this might of course be more complex.[123]

For contractual relations the main rule is that only financial loss is compensated, however, non-pecuniary loss (such as e.g. loss of reputation) which could be measured in financial terms could possibly also be compensated.[124]

There are limitations to the non-breaching party's ability to be fully compensated; such as that there has to be causality between the loss and the breach, proximate cause, and that the non-breaching party has a duty to mitigate loss (e.g. the Sales of Goods Act §70, PECL 9:505).[125]

3.3.4 Conclusion

As with 3.2.4 above, since the below reasoning is much dependant on the actual circumstances of the case in question and as the current legal position is unclear, the following comments are consequently general in nature. Nevertheless, in applying the characteristics of Swedish contract law as highlighted above to the hypothetical scenario outlined in 3.1, some remarks can be made.

[119] SFS 1990:931 Köplag. Further, as for analogies and the features of spot contracts and standing contracts respectively, see Hellner (2006), p 24 et seq.
[120] Ramberg (2010), p 219 et seq.
[121] Ramberg (2010), p 234 et seq.
[122] See Hellner (2006), p 219 et seq. for a detailed description.
[123] Hellner (2006), p 217 et seq., Ramberg (2010), p 237 et seq.
[124] Ramberg (2010), p 239. See e.g. PECL 9:501(a).
[125] Ramberg (2010), p 236 et seq.

Similar to 3.2.4, as for commercial contracts between fairly equal parties, the starting point is that the parties have a basic knowledge of the contract issues, wherefore the demands on the parties are quite high and they are not awarded any special protection.[126]
Considering the variety of allowed data of interpretation, including the actions of the parties pre and post the formation of contract; this makes for a broad foundation for the interpretation; in ascertaining the meaning and significance of the clause.
The general legal principles of the loyalty-principle and of identifying the common intention of the parties, paired with the contextual approach and the consideration of trade usage or custom, could possibly work to the advantage of the non-breaching party. If the result of the interpretation process would be such as indicating that a breach of contract is at hand, the non-breaching party would be entitled to compensation.
Compensation would probably not be suitable in form of e.g. actual performance, cure or replacement, but for a standing contract, termination might be relevant.[127] Further, damages to compensate the expectation interest, loss which could be measured in financial terms, may be due.

Naturally, the above is dependant on the actual circumstances, but also on the ability to prove these and how the case is argued, or in the words of Ramberg: "in litigation about the contents of the agreement, the representative should not fire a single shot with a rifle; i.e. focus on one circumstance like the wording of the agreement. Instead, he should use a shotgun; i.e. attempt to show that there are many data of interpretation working in his advantage".[128]

[126] Hedwall (2004), p 16.
[127] See further Hellner (2006), p 26.
[128] Ramberg (2010), p 173. The author's translation. Cf. footnote 96 above.

4 Marketing of CSR-measures

4.1 Introduction and hypothetical scenario

In chapter 2 above it transpired that CSR-measures in their various forms largely constitute soft law, but that they may be brought into and activate neighbouring legal frameworks, this which in chapter 3 was explored from the aspect of contract law. In the following, it will be investigated from the aspect of market law and regulations on marketing practices.

Within the shipping business, both shippers and carriers are, in a number of ways, marketing their various CSR-measures in different areas; CCCs are formulated and published at websites, statements are made in the media and in advertising material, presentations are made to existing and potential customers, etc. Sometimes this is referred to as "green marketing"; the inclusion of environmental concerns in strategic marketing.[129] The degenerate offshoot of green marketing is labelled "green washing" or "green sheen"; companies disingenuously spinning their products and policies as environmentally friendly.[130]
As described under 2.1 above, the motives behind the focus on CSR and the related marketing could be attributed partly to, not only altruism and philanthropy, but also to the importance of being viewed as a trustworthy and responsible corporation or business partner, bearing in mind brand equity and the positive effects of having a strong brand. In short, to be regarded as "green" is of great interest to MNEs today.

Marketing and marketing practices are regulated under market law. From a Swedish perspective, the importance of market law has become more evident through the membership in the European Union (EU) and the role of EU law within national law. The legislative activity within the EU is intense; continuously affecting national law and giving it partly a new profile.[131]

A shipper and a carrier conclude a business transaction in Sweden, for example by signing a transportation framework agreement. The carrier, in order to attract business from the shipper, has actively marketed himself as having a clear environmental commitment or profile; however the transportation framework agreement, or the contract, is silent on this matter, containing no environmental CSR-clauses. It eventually becomes clear that the carrier is not honouring his promises, e.g. by using substandard ships; resulting in a public scandal implicating also the shipper – with subsequent

[129] McDaniel (1993), p 4.
[130] Naish (2008), p 37. See also http://www.asa.org.uk/Media-Centre/2008/ASA-puts-green wash-in-the-limelight.aspx, 2010-05-12.
[131] Melin (2009), p 3.

decrease in sales and loss of reputation – under market law, could the carrier be held liable for this, and if so, what are the remedies available to the shipper?

In the following, the legal implications of a carrier not living up to his marketed environmental standard or commitment will be explored by outlining how marketing and marketing practices may be perceived, describing the relevant legislation and possible sanctions, thereafter summing up with a conclusion. Considering its influence on national law in this area, an outline will first be made of EU law (4.2), whereafter the scenario will be investigated under Swedish market law (4.3), with a further comparative analysis in chapter 5 below.

4.2 EU law

4.2.1 General on the EU and EU law

In order to understand market law, in the context of the purpose and implications of EU law to national law, a brief outline – which could be read as an introduction or as a reminder – of the EU will be made below, focusing on the area of EU law.

The 1st of December 2009, the Treaty of Lisbon came into force; entailing some significant changes for the structure of the EU and its functions.
The Lisbon treaty amends the two founding treaties, i) the Treaty on European Union (EUT),[132] and ii) the Treaty establishing the European Economic Community (ECT),[133] the latter to be known in future as the Treaty on the Functioning of the European Union (TFEU).[134]

Previous to the Lisbon treaty, cooperation within the EU was divided into three pillars, whereof the most important one was the first pillar; the Community pillar. This was constituted of the ECT mentioned above, and dealt mainly with the economic cooperation within the union. To refer to the cooperation within the first pillar, the terms EC and EC law were used. The primary EC law was mainly the ECT, which was completed with secondary law; EC legislation in form of regulations and directives.[135] Regulations constitute directly valid legislation in all member states, they are binding in all parts and are applicable to all member citizens. Directives are aimed at member states, not citizens, and stipulate how the legislation of member states shall be modelled, leaving to the state to decide the form and mode that shall be used to achieve implementation. The objective of directives is usually to harmonise legislation of the member states in order to ensure that

[132] Treaty on European Union (Maastricht, 1992).
[133] Treaty establishing the European Economic Community (Rome, 1957).
[134] http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf, 2010-05-12.
[135] Bernitz (2009), p 19 et seq.

the inner market works smoothly.[136] The inner market, or the internal or single market, is fundamental to the EU. The cornerstones of the inner market are the "four freedoms" – the free movement of people, goods, services and capital – these freedoms or principles being enshrined in the ECT.[137]

Responsible for ensuring that "the law is observed … in the interpretation and application"[138] of the treaties, thus constituting the judicial authority of the EU, is the Court of Justice of the European Union (ECJ).[139] The ECJ is composed by one judge from every member state, currently twenty-seven judges, that are assisted by eight Advocates General, both being appointed by common accord of the governments of the member states. The ECJ consists of three courts: the Court of Justice, the General Court and the Civil Service Tribunal.[140]

The judicial system of the EU is superior to the national ones of the member states, e.g. through the Act on Sweden's Accession to the European Union[141] it is stipulated that the treaties and other EU legislation are applicable in Sweden to the effect that follows from these instruments. Further, through case law, in a number of important rulings, the ECJ has established that both the primary and secondary EC law has precedence over national law.[142]
When national courts of the member states are applying EC law, they have the possibility of requesting a preliminary ruling from the ECJ; if the national court is judging in last instance, such a request is mandatory. The national court formulates questions on the current legal position, and the ECJ returns with its preliminary ruling in reply to these questions. Not only the court that has requested the ruling is obliged to abide by it, but national courts in all member states are also bound by the ruling; thus every preliminary ruling from the ECJ contributes to a unified interpretation of EC law.[143]

Following the entry into force of the Lisbon treaty, the EU now has a legal personality and has acquired the competencies previously conferred on the EC. EC law has thus become EU law. Under the Lisbon treaty, the pillar structure will disappear (although the common foreign and security policy remains subject to special rules) and that being the case, the jurisdiction of

[136] Bernitz (2009), p 21.
[137] http://ec.europa.eu/internal_market/top_layer/index_1_en.htm, 2010-05-12.
[138] http://curia.europa.eu/jcms/jcms/Jo2_6999/, 2010-05-12.
[139] Previous to the Lisbon treaty known as the Court of Justice of the European Communities.
[140] Bernitz (2009), p 20, http://curia.europa.eu/jcms/jcms/Jo2_7024/ and http://curia.europa.eu/jcms /jcms/Jo2_6999/, both 2010-05-12.
[141] SFS 1994:1500 Lag med anledning av Sveriges anslutning till Europeiska unionen.
[142] Bernitz (2009), p 22 (e.g. Van Gend en Loos, Costa v. ENEL, etc.), http://curia.europa.eu /jcms/jcms/Jo2_7024/, 2010-05-12.
[143] Bernitz (2009), p 21, Melin (2004), p 87.

the ECJ will extend to the law of the EU, unless the treaties provide otherwise.[144]

4.2.2 EU market law

As stated above, the inner market and the four freedoms are of utmost importance within the EU. In order to ensure that the inner market functions effectively and to increase integration, supervision is needed, this which is done partly through market law.

Market law within the EU is comprised of e.g. regulations on competition and marketing practices; with the aim of ensuring effective and fair competition between companies and a high level of consumer protection.[145]
The most important rules regarding competition is to be found in articles 101[146] and 102[147] of the TFEU, and for marketing practices, the Unfair Commercial Practices Directive[148] is essential.[149]
The purpose of the latter is outlined in its first article as being: "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests".
The directive prohibits "unfair" commercial practices, which are defined as i) commercial practices contrary to the requirements of professional diligence, and ii) commercial practices that materially distorts or is likely to materially distort "the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers".[150]
Further, commercial practices that are "misleading" or "aggressive" are regarded as unfair and are therefore prohibited;[151] Annex I contains a list of commercial practices which shall under all circumstances be regarded as unfair ("the blacklist"),[152] this list which applies in all member states.
With regards to the blacklisted commercial practices; in the context of CSR, green marketing or green washing, it is of particular interest to note point 1-3 of Annex I concerning "misleading commercial practices", as follows:
1) claiming to be a signatory to a code of conduct when the trader is not,
2) displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation, and

[144] http://curia.europa.eu/jcms/jcms/Jo2_7024/, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf, both 2010-05-12.
[145] Bernitz (2009), p 27 et seq.
[146] Formerly article 81 ECT.
[147] Formerly article 82 ECT.
[148] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
[149] Melin (2009), p 38, 142.
[150] Articles 5.1-5.2.
[151] Articles 5.4-5.5.
[152] Melin (2009), p 46.

3) claiming that a code of conduct has an endorsement from a public or other body which it does not have.

The area of commercial or marketing practices has within the EU long been subject to intense activity with the purpose of regulatory harmonisation. As opposed to competition, for marketing practices the relevant directives have generally placed demands or minimum requirements on the standard of national legislation. This difference is largely attributed to the view that marketing practices in a more direct way influence the trade of products and services in the common market; the aim of the harmonisation in this area thus being to decrease the risk of indirect barriers to trade.[153]

4.3 Swedish market law

The core area of Swedish market law is constituted of regulations pertaining to competition and marketing practices. The central acts, which have been revised in line with the developments of EU-law within this area, are the Competition Act[154] and the Marketing Practices Act.[155] New versions of both acts were passed in 2008, the Marketing Practices Act being modelled on the Unfair Commercial Practices Directive (see 4.2.2 above).[156]
For both Acts, the competent court is the Market Court.[157] As the area of market law is viewed as an area that requires special competence, the Market Court is a specialised court; which is composed of seven judges; three lawyers with experience as judges and four members that are experts in economics.[158]

In addition to the legislation, there are also the independent regulators of marketing and advertising; e.g. the Advertising Ombudsman,[159] a self-regulation organisation founded by the industry which works for ethical marketing, in for example reviewing whether advertising is following the Code of Advertising and Marketing Communication Practice from the International Chamber of Commerce (ICC). The ICC-rules are in practice adopted by all leading Swedish business associations and have been significant not only for shaping the legislation on marketing practices, but have also provided an important foundation for interpretation for the Market Court in adjudging cases.[160]

In the following, the Marketing Practices Act, its regulations on unfair and prohibited marketing practices and sanctions will be outlined, followed by a summarising conclusion relating to the hypothetical scenario outlined under 4.1 above.

[153] Nordell (2008), p 20.
[154] SFS 2008:579 Konkurrenslag.
[155] SFS 2008:486 Marknadsföringslag.
[156] Melin (2009), p 3, Nordell (2008), p 19 et seq.
[157] Marknadsdomstolen (MD).
[158] Melin (2009), p 124.
[159] Reklamombudsmannen.
[160] Nordell (2008), p 54.

4.3.1 General on the Marketing Practices Act

The first version, or rather the origin, of the Marketing Practices Act was established in 1971; the Unfair Marketing Practices Act, a revised version of which was passed already in 1976.
In 1994, changes were made to the legislation in order to accommodate EU law, and in 1996, a new version of the act entered into force – in 2008 being replaced by the current act.[161]

The purpose of the Marketing Practices Act is to create a protection for both consumers and companies against unfair marketing practices (§2). It is the economic interest of the consumers and companies which shall be protected, and the act is aimed at marketing for commercial purposes (thus excluding practices for political or religious purposes). The act applies to marketing which is made with the purpose of furthering the supply and demand of all products – goods and services – and comprises marketing made through all types of media, before as well as during and after the commercial transaction.[162]

The Marketing Practices Act is a framework act, meaning that there are a number of other acts pertaining to marketing practices of e.g. particular products, such as the Alcohol Act[163] and the Tobacco Act[164] (some of these acts are also referred to in §1 of the Marketing Practices Act). In the event of such an act being applicable, the *lex specialis derogat legi generali*-principle applies; i.e. the special law takes precedence over the general law.[165]

4.3.2 Unfair and prohibited marketing practices

The Marketing Practices Act contains three general sections. The first (§5) states that all marketing practices should be consistent with good marketing practice,[166] the second (§7) prohibits aggressive marketing practices and the third (§8) prohibits misleading marketing practices.[167]
In order for a marketing practice to be prohibited under the general sections, the act contains an express threshold that varies somewhat depending on which of the three general sections the practice falls under. However, generally a marketing practice needs to have an effect on the receiver in order to be prohibited; to influence him to make a different decision than he would have done if the particular marketing practice had not existed.[168]

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[161] Melin (2009), p 47, Nordell (2008), p 16.
[162] Melin (2009), p 44 et seq.
[163] SFS 1994:1738 Alkohollag.
[164] SFS 1993:581 Tobakslag.
[165] Melin (2009), p 54.
[166] Which essentially refers to adherence to the ICC-rules mentioned under 4.3 above. See further Nordell (2008), p 59.
[167] The general section on aggressive marketing prohibits marketing which basically involves harassment or coercion, cf. with e.g. §§28-29 in the Contracts Act, mentioned above under 3.3.2. See further Nordell (2008), p 61.
[168] Holmén (2008), p 1.

The general sections further make reference to the blacklist in Annex I of the Unfair Commercial Practices Directive, stating that these specified marketing practices are always prohibited, regardless of their effect on receivers. The blacklist is also applicable for marketing practices aimed at companies (§4). A closer definition of the contents and limits of the general sections are to be decided through the case law of the ECJ and the Market Court.[169]

The general sections are followed by sections further specifying how marketing practices should or should not be designed, the so called catalogue-rules; regarding e.g. price information, imitation and comparison (§12, §14, §18) and also an additional section further detailing misleading marketing practices (§10).[170]

4.3.3 Sanctions

The sections of the Marketing Practices Act could also be viewed as constituting an "outer" and an "inner" area; an outer area which should not be entered, and an inner area which may not be entered, the areas also carrying different sanctions.[171]

The outer area is defined by the general sections, and embodies the principle of misuse. Marketing practices which enter the outer area can be subject to obligations or prohibitions (injunctions); an obligation to act in a certain way (e.g. provide information), or a prohibition of a certain way of acting. The obligation or prohibition is usually imposed under penalty of a fine, used as a means to put pressure on the party responsible for the marketing. There is no limit to the fine; it is for the court to decide an amount which would have the desired effect, and a typical fine today would be in the area of SEK 500 000.[172]
If the obligation or prohibition is obeyed, no actual sanction or fine will materialise, but if the obligation/prohibition is not respected, the fines will be due for payment and in addition the party responsible for the marketing will be liable for damages to an injured party (§37).

The inner area is defined by the sections further specifying how marketing practices should or should not be designed and the practices mentioned in the blacklist; and embodies the prohibition-principle. Marketing practices that enter the inner area are directly tied to specific sanctions such as direct fines, a market disturbance fee, and also entails liability for damages. The minimum amount of the market disturbance fee is SEK 5000, the maximum amount is SEK 5 000 000 (§31).[173] It should be noted that fines and market disturbance fees are payable to the state (§29).

[169] Holmén (2008), p 1, Nordell (2008), p 57.
[170] Melin (2009), p 64.
[171] Nordell (2008), p 16.
[172] Ibid., p 59.
[173] Nordell (2008), p 16 et seq., p 59 et seq.

Entrance of the outer area and violation of a general section of the Marketing Practices Act can be exemplified by the case MD 2004:4; Volvo Personbilar Sverige AB had in TV-commercials and in advertisements in papers used the statements "A car that purifies the air from harmful ozone" and "Cleanses the air".[174] In its ruling, the Market Court pointed out that it follows from relevant case law that when companies use environmental statements in their marketing, high demands are posed on the reliability of these statements. Although it was a fact that the car in question reduced the ozone level of the air that passed through its radiator, the effects of this reduction on the surrounding air could not be shown. The court thus held that the statements made by Volvo were much exaggerated and lacked in reliability, wherefore the court consequently labelled the marketing as inconsistent with good marketing practice and prohibited use of the statements, imposing penalty of a fine of SEK 400 000.[175]

4.3.4 Conclusion

Since below reasoning is much dependant on the actual circumstances of the case in question, and further that the current legal position is unclear, the following comments are consequently general in nature. Nevertheless, in applying the characteristics of Swedish market law and the Marketing Practices Act as highlighted above to the hypothetical scenario outlined in 4.1, some remarks can be made.

If aimed at consumers, the standard or statements marketed by the carrier could possibly have qualified under the blacklist, or as misleading under the general sections (e.g. §8) or the specific sections (e.g. §10), or as inconsistent with good marketing practice (§5). If so, following §37, the marketing practice might then have been i) subject to an obligation or prohibition imposed under penalty of a fine (and if the obligation or prohibition was not adhered to, damages might have been due), and ii) subject to directly sanctioned damages. Concerning damages, it is further stated in §37 that when the damages are assessed; also circumstances other than economic ones may be regarded.

However, the hypothetical scenario involves business-to-business marketing, and although the Marketing Practices Act is aimed also at protecting companies against unfair marketing practices (§2), the demands on commercial parties are quite high; the receiver is supposed to have expertise in the field. Yet, if special competence would have been required, or if statements would have been complex and difficult to verify, the demand posed for reliability of the statements would have been as high as if the receiver would have been a consumer.[176]

[174] The author's translation.
[175] MD 2004:4. See also MD 2004:12 and MD 2008:10. These were adjudged under the previous Marketing Practices Act, but due to the similarities of the acts, the same assessments and judgements would probably be made also under the new Marketing Practises Act. See further Nordell (2008), p 128 and Svensson (2008), p 48.
[176] See e.g. MD 1980:1.

5 Analysis and conclusions

In the previous, the concept of CSR was outlined with regards to its meaning, development, role within the shipping business and general status of soft law. Thereafter it was discussed how CSR-measures may nevertheless entail legal implications by being brought into and activate neighbouring hard law systems; such as contract law or market law.

In the following, a comparative comment between Swedish and English contract law will be made, as will a reflection on EU and Swedish market law. Thereafter a discussion on CSR as regulated by soft and hard law will be held, followed by a concluding comment on the road ahead for the legal status of CSR within the shipping business.

5.1 Contracts under English and Swedish law

Firstly, it can be established that both English and Swedish methods and principles of interpretation are general and quite vague in nature, secondly, that the interpretation is much dependant on the actual circumstances of the case in question – wherefore it is naturally difficult to arrive at any definite conclusion on how a complex contractual issue would be adjudged under either of the legal systems. Nevertheless, some comments can be made on the salient features, the differences and similarities, which may be useful to bear in mind when formulating a contract making provisions for English or Swedish jurisdiction respectively.

Starting with the basis or foundation for interpretation, in English law, this has traditionally been quite narrow, considering the parol evidence-rule and the written contract as the primary source. However, through the Lord Hoffman-restatement, the significance of the principle has decreased and the foundation for interpretation has been widened. Within Swedish law, considering the free submission of evidence, the foundation for interpretation is in comparison broader; as not only the contract or written evidence may be considered, but also oral statements, as well as the actions of the parties pre and post formation of contract.[177]

Further, in English law, great weight is given to the wording used by the parties, in literal interpretation, although this too has shifted to a more contextual approach through the Lord Hoffman-restatement, towards a view which is more similar to the one in Swedish law; that the literal meaning of the wording is not crucial to ascertaining the intention of the parties, but this may also be found elsewhere, through e.g. viewing the contract as a whole or taking into consideration trade usage and custom.[178]

[177] See 3.2.2 and 3.3.2 above. See further Rosengren (2010), p 18 et seq.
[178] See 3.2.2 and 3.3.2 above. See further Hedwall (2004), p 61 et seq.

In addition, although English law does not recognise a general loyalty-principle, there are other ways in which this principle may be expressed, such as for example through implication of terms or extensive interpretation, resulting in a similar approach as in Swedish law.[179]

Further differences can be seen with regards to e.g. considerations of reasonableness and restitution. In English law, there is little possibility of setting aside unreasonable contract terms, although the Unfair Contract Terms Act 1977 gives some room to interfere with for example exemption clauses; while in Swedish law, considerations of reasonableness may be made in accordance with §36 of the Contracts Act, in setting aside a clause or agreement partly or wholly.[180] The concept of restitution (or unjustified enrichment) is firmly established in English law and plays an important role, however in Swedish law, it has little practical significance and has limited support through case law and doctrine.[181]

The traditionally more formal and strict view on interpretation of commercial contracts in English law has been held to confer a high degree of predictability; something which is also often pointed out as the main advantage of using English law.[182]
However, through the Lord Hoffman-restatement and subsequent development, this might not be entirely true today, as it can be said that the gradual changes or shifts in English law have brought it somewhat closer towards an interpretation process more similar to the one expressed through Swedish and international law. Still, there are different views among English legal experts on exactly how radical the changes really are, and also on the direction in which the law will develop; as the perceived expansion of the foundation for interpretation is feared to be too uncertain, leaving too much discretion to the judges.[183]

To summarise; it can be said that when contemplating jurisdiction and contract structure – in order to achieve a desired legal result or avoid a legal hazard – the basic view in English law may entail that the parties have to look after their own interests to a greater extent than under Swedish law.

5.2 Marketing practices under EU and Swedish law

In some essential aspects, Sweden can be seen as a leading country in the area of market law; early on Sweden had legislation with the aim of protecting consumers against unfair marketing practices, and this legislation

[179] See 3.3.2 above. See further Goode (2009), p 105 et seq., Rosengren (2010), p 16.
[180] See 3.2.4 and 3.3.2 above. See further Rosengren (2010), p 12 et seq.
[181] See 3.2.3 above. See further Ramberg (2010), p 255.
[182] Rosengren (2010), p 1.
[183] Poole (2008), p 206, Rosengren (2010), p 22.

has to a certain extent served as a source of inspiration to the EU in modelling and harmonising EU law in the same area.[184]
Thus, the implementation of the Unfair Commercial Practises Directive has not necessitated any greater changes to the Swedish Marketing Practices Act in terms of its purpose and effects. The objective of the Marketing Practices Act coincides with the aim of the directive of protecting consumers against unfair commercial practices – and in addition, the Swedish act also aims to protect companies against unfair marketing practices.[185]

As for the efficiency of Swedish market law and the Marketing Practices Act, although largely fulfilling its purpose, deficiencies could be noted in the reoccurrence of some particular (lucrative) marketing practices that the regulation apparently cannot suppress; it could even be said that the industry in this area practises civil disobedience.[186]
It remains to be seen what effect the Unfair Commercial Practices Directive and the "new" Marketing Practices Act will have on marketing practices within the EU and in Sweden.

However, it should further be remembered that, regardless of the EU and national Swedish legislation, there are no global or international regulations on marketing practices, which opens up for possibilities of circumventing any strict national regulations.[187]
There is of course the ICC, and the ICC-rules (see 4.3 above), which are widely used and accepted globally.[188] In the context of CSR, green marketing and green washing; it is interesting to note that the ICC in January 2010 adopted a new global framework "to help marketers and advertisers avoid the mistakes of vague, non-specific or misleading environmental claims".[189] The new Framework for Responsible Environmental Marketing Communications is a companion to the ICC-rules, and offers more detailed instructions as to interpretation of its environmental claims chapter. The framework may provide important guidance also for interpretation of national acts – as many regional and national regulations (like the ones of the EU and Sweden) are originally modelled largely on the ICC-rules – as well as assist in setting best practices for business.[190]

[184] See 4.3.1 above. See further Nordell (2008), p 124.
[185] See 4.2.2 and 4.3.1 above. See further Holmén (2008), p 1.
[186] Nordell (2008), p 123.
[187] Ibid., p 125.
[188] http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf, p 4, 2010-05-12.
[189] http://www.iccwbo.org/policy/marketing/index.html?id=34587, similarly, see also http://www.asa.org.uk/Media-Centre/2008/ASA-puts-greenwash-in-the-limelight.aspx, both 2010-05-12.
[190] http://www.iccwbo.org/policy/marketing/index.html?id=34587, 2010-05-12.

5.3 CSR as regulated by soft and hard law

As described under 2.1 and 2.4 above, CSR-initiatives and measures are largely voluntary; going beyond what is required by relevant legislation. As such, they carry no legal sanctions and implementation is instead based on community inclusion mechanisms as with e.g. the UNGC, or based on reporting to stakeholders, as with CCCs and sustainability reporting.[191]
This capacity of CSR could be said to be both its strength, and its weakness. Strength; as initiatives may be innovative and venture into areas where no or insufficient legislation exist and in this way contribute to improvements, without being hampered by fear of sanctions. Weakness; as the lack of sanctions may negatively affect monitoring, verification and implementation.[192]

Nevertheless, even though CSR-measures to a large extent constitute soft law, they may be brought into and activate neighbouring hard law systems, this which have been discussed above with regards to contract and market law (chapter 3 and 4). In addition to this, CSR-measures may result in civil liability claims, such as the Kasky v Nike-case, or foreign direct liability claims (such as e.g. how principles of human rights in international law apply to MNEs).[193] These types of claims are more frequent in common law systems than in civil law systems; this difference attributable partly to the role of judicial precedent in the former (as outlined in 3.2.1 above), but also largely due to the major distinction between particularly the US common law system and most European civil law systems; the general principle in the former being that each party stands their own costs, and in the latter of the loser standing the costs of both parties.[194]

There are also examples of hard law or legislation pertaining to CSR-measures, particularly regarding business ethics and adoption of CCCs. Perhaps best known is the US Sarbanes-Oxley Act (SOX) of 2002; a legislative response to the corporate scandals involving e.g. Enron. The Enron collapse resulted largely from a failure of behaviour by corporate leaders; demonstrating that a CCC is only as good as the directors and officers responsible for its implementation. The SOX aims to increase transparency with respect to CCCs, through e.g. its regulations on disclosure of adoption of CCCs and public filing of these.[195]
Another example is the Danish "Act amending the Danish Financial Statements Act (Accounting for CSR in large businesses)" of 2008. The act entered into force on 1st of January 2009 and entails that although CSR-work still is voluntary, larger businesses must take a position on CSR in

[191] See further Sahlin-Andersson in Mörth (2004), p 141.
[192] For further reading on the benefits and limitations of CSR-measures, especially CCCs, see e.g. Jenkins (2001), p 26 et seq.
[193] Ward (2003), p 7 et seq. For details of the Kasky v Nike-case, in the context of CSR and brand equity, see Collins (2004).
[194] Ward (2003), p 16.
[195] *The Good, the Bad, and their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behaviour* (2003), p 2123, 2134.

their annual reports.[196] Companies covered by the act must report on i) their social responsibility policies, including any standards, guidelines or principles, ii) how these policies are translated into action, including any systems or procedures used, and iii) the evaluation of what has been achieved through social responsibility initiatives during the financial year, including any expectations it has regarding future initiatives. Further, if the company has not formulated any social responsibility policies, this too must be reported.[197] The aim of the act is to inspire companies to take an active position on CSR and to communicate this. The act is part of the Danish Government's action plan for CSR, presented in 2008, with the objective of "promoting CSR and helping Danish businesses reap more benefits from being at the global vanguard of CSR. At the same time, the plan aims at strengthening the efforts to ensure that Denmark and Danish businesses are generally associated with responsible growth."[198]

5.4 Thoughts on the road ahead for the legal status of CSR within the shipping business

Judging from what has transpired above on CSR-measures, as soft law, as activating neighbouring legal frameworks, as hard law; it could be said that the apprehended voluntary versus legal divide is somewhat false, CSR already having legal implications in various areas. Still, there is much debate on the future legal status of CSR; in the following this will be discussed particularly in the context of the shipping business.

Focus has been put on green marketing and on related green washing; the latter being observed and attended to by e.g. the Unfair Commercial Practices Directive (4.2.2 above) and the new ICC framework (5.2 above). Regarding the UNGC (2.2.1 above), there is even the term "blue washing", criticizing the initiative as being merely window dressing, largely due to its main selling point of not being legally binding.[199] This focus is of course relevant and indeed necessary, however, recent development of CSR suggest that corporations are indeed becoming more comfortable or perhaps familiar with the concept, showing serious commitment. For example, despite the economic recession, companies have not been cutting back on CSR-measures; or to quote the CEO of BSR, who in January 2009 noted that: "This recession is wiping away a lot of things, but so far, corporate responsibility seems to be a survivor", further stating that members of BSR's board, such as IKEA, had indicated that CSR-budgets had been

[196] http://www.csrgov.dk/sw51190.asp, 2010-05-12. See also same source regarding which companies (size and revenue) that are covered by the act.
[197] http://www.csrgov.dk/sw51190.asp, 2010-05-12.
[198] http://www.csrgov.dk/sw49167.asp, 2010-05-12.
[199] Regarding green washing, for the consumer awareness-aspect, see http://www.greenwashingindex.com/, 2010-05-12. Regarding blue washing, see further *NGOs Criticize "Blue Washing" by the Global Compact* (2007), p 1 and Sahlin-Andersson in Mörth (2004), p 139.

sustained for the time being.[200] Another example is the conference held in London in May 2009 on Maritime Corporate Social Responsibility. Hosted by Navigate and DNV, the aim of the conference was: " … to focus exclusively on the maritime industry and … demonstrate that CSR is no longer a giant green smoke screen. The agenda is designed to update delegates on the latest CSR thinking and equip them with the knowledge required to begin creating an effective CSR policy for their own business."[201]
Another aspect, as also expressed by Ms Ödefors (above in 2.3), is that the level of commitment or how strongly companies feel about CSR, depend largely on how it is viewed as a part of the core business.[202]
Today, as MNE-carriers have dedicated functions or departments for environmental and legal issues, as they carefully review transportation framework agreements before signing, as they are aware of most legal implications,[203] it could be argued that the step towards binding CSR-regulations is not that far, indeed, it is almost binding today – knowing that the expressed commitments are in the public eye.

Considering the different approaches to CSR and the varying level of commitment between industries and MNEs, there is much debate on the future approach to this concept, especially in terms of legal status.

Some argue that there is no need for direct legislation, and that instead, transparency and third party verification should be increased. In theory, e.g. public filing of codes will begin a gradual process through which stakeholders will be able to evaluate CCCs and distinguish among them, and that once stakeholders "… achieve an adequate level of sophistication regarding codes of ethics and can demonstrate their preferences by rewarding companies that have effective codes … companies will have incentives to write codes with teeth."[204]
Nevertheless, verification is costly and has significant limitations, often acting mainly as assurance of the process that a company followed in arriving at a report, not that the information presented in the report is complete and accurate.[205]

In an area entailing large investments but which lack sanctions, it may be tempting to slide a bit on the requirements; wherefore demands have been raised for an international, binding regulation of CSR.[206] However, bearing in mind voluntariness as one of the principal strengths of CSR (see 5.3 above), regulators would need to think carefully about how to model such a regulation in a fashion that would enable the vibrancy and innovation inherent in CSR to be sustained. Legislation in this area may in that sense

[200] Delevingne (2009), p 1.
[201] *Maritime Corporate Social Responsibility* (2009), p 2.
[202] Delevingne (2009), p 1.
[203] E.g. Ödefors, April 2010.
[204] *The Good, the Bad, and their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behaviour* (2003), p 2135.
[205] Ward (2003), p 20.
[206] See e.g. *NGOs Criticize "Blue Washing" by the Global Compact* (2007), p 1.

become counterproductive, as "when companies are over-regulated, they begin to gear the system to comply with the regulations in such a way that they are adhering to the letter of the law but the actual spirit of it has totally evaporated."[207]
In addition such a regulation would, for the shipping industry, confer large costs for companies who do not already engage, or have limited engagement, in the environmental area of CSR. Measuring up to high environmental standards means huge investments in e.g. upgrading or renewing fleets, wherefore such a transition would be tough for the industry, especially for the minor operators – and such investments would surely make transportation more expensive.[208]

Still, as stated by Ms Ödefors, in order to successfully bring CSR into the future, especially with regards to environmental concerns; commitment cannot be entirely voluntary, there is no need to look any further than to the UN Climate Change Conference in Copenhagen[209] in 2009 to see that there is no complete agreement on the objectives.[210]
Thus, considering the time, effort and resources which would go in to formulating and implementing legislation, national and international, around CSR and specific measurements, and also the risk of "over-regulation", while at the same time acknowledging that there may be a need for supervision and sanctions, another option would be to integrate CSR-legislation with current legislation, or to update and tighten current legislation.
There are some fundamental values and rights that should be universally valid, i.e. in all contexts and environments; which entails that MNEs just as all other operators in society have a responsibility to respect these values. Today, the development of CSR and the increased awareness of stakeholders have led to MNEs acting on the premise that CSR is not merely the "right thing to do" but also "the smart thing to do".[211] Although this may seem slightly cynical, it still has positive effects – and, although MNEs may regard themselves as corporate citizens in society, "the business of business is business" (see 2.1 above) and MNEs should not be trusted to act out of philanthropic reasons alone. MNEs do not and shall not, have the same responsibilities as, or take over the role of, states and governments.[212]
Further, CSR is today largely a concept of the Western world, in the sense that it is the consumers, shippers and carriers of the industrialised countries that can afford to worry about CSR.[213] Indeed, the international shipping business has significant problems concerning environmental commitments and standards, however, the problems lie not so much with the large MNE

[207] *The Good, the Bad, and their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behaviour* (2003), p 2141.
[208] E.g. Ödefors, April 2010.
[209] United Nations Climate Change Conference in Copenhagen 2009, official website: www.unfccc.int/meetings/ cop_15/items/5257.php, 2010-05-12.
[210] Ödefors, April 2010.
[211] Bhattacharya (2006), p 1.
[212] See further e.g. Magnusson (2003), p 9 et seq.
[213] E.g. Ödefors, April 2010.

carriers, as with the motley crew of minor operators that trade e.g. in parts of the world with a more lax approach to legislation.
This disparity and the complexity of unifying values and standards globally would suggest that it would be more fruitful to address implementation of ethics and sustainability on national and international level; by enforcing current legislation on for example labour and environment, and enhancing cooperation within already existing forums and organs. Paired with individual initiatives by MNEs or organisations on transparency and verification, this would lead to common guidance on concepts and methods of implementation, without unnecessarily hampering innovation and development – at the same time removing uncertainty as to legal status.

Supplement A: United Nations Global Compact – The Ten Principles

Human Rights

• Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
• Principle 2: make sure that they are not complicit in human rights abuses.

Labour Standards

• Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
• Principle 4: the elimination of all forms of forced and compulsory labour;
• Principle 5: the effective abolition of child labour; and
• Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

• Principle 7: Businesses should support a precautionary approach to environmental challenges;
• Principle 8: undertake initiatives to promote greater environmental responsibility; and
• Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

• Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

Source: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/ index.html**, 2010-05-12.**

Supplement B: The Maersk Principles of Conduct

***Supporting and respecting internationally proclaimed* human rights**
• We respect human rights and endeavour to ensure that we do not contribute to human rights violations.

***Responsible* business behaviour**
• We conduct our business in an ethical and lawful manner, and we will promote the same business behaviour within our sphere of influence.
• We work against all forms of corrupt practices, including bribery and extortion.
• We compete fairly everywhere we do business.
• We are committed to promoting sustainable business practices in our supply chain.

A good place to work
• We treat every employee with respect and dignity and are committed to creating a working environment free from discrimination and harassment, and one in which diversity is encouraged.
• We respect our employees' rights to associate freely – to form and to join, or not to join, trade unions – and to bargain collectively.
• We do not tolerate any form of forced or compulsory labour.
• We prohibit the use of child labour.

***Protecting* health and safety**
• We are committed to providing all people working under our direction with a healthy and safe work environment, and continuously strive to improve our performance.

***Maintaining* high security standards**
• We endeavour to take all precautions necessary to maintain high security standards and security awareness within our organisation at all times.

***Supporting* our customers**
• We wish to be recognised as a reliable, trusted and engaged partner in all our business dealings.

***Protecting* the environment**
• We protect the environment by exercising constant care and optimising our operations, and endeavour to use natural resources responsibly and reduce our environmental impact.
• We are committed to countering climate change by striving to minimise greenhouse gas emissions from our business activities.

***Engaging* with society**
• We strive to improve the ways in which we contribute directly or indirectly to the sustainable development of the communities in which we work and society at large.
• We are committed to being accountable to our stakeholders and report publicly on our performance.

Source: http://www.maersk.com/Documents/Maersk%20Principles%20of%20Conduct_final%2025%20February%202010.pdf**, 2010-05-12.**

Supplement C: Interview Questions, CMA CGM

Interview with Birna Ödefors, Managing Director, CMA CGM Scandinavia, 2010-04-21.

On the role of Multinational Enterprises in society

1) How do you believe the role of multinational enterprises in society will change in the future? Will corporations venture to take more or less social responsibility, especially in terms of environmental considerations?

2) Do you believe that the creation of voluntary international CSR-related codes (e.g. OECD Guidelines for Multinational Enterprises, the UN Global Compact) has had an impact on CMA CGM's view of CSR? How?

On CSR-measures and their significance within the shipping business

3) At CMA CGM, what voluntary CSR-measures have you implemented in the environmental area? (Exemplify)

4) Are they monitored and reviewed? How?

5) Have you defined a Corporate Code of Conduct, Guiding Principles or similar?

- Where is this available? (E.g., website? Publication/folder?)
- Does it contain environmental considerations?
- Is the code monitored and reviewed? How?

6) Is CMA CGM a member of the UN Global Compact or similar?

7) When did CMA CGM start working with CSR-measures, and what was/is the motive for taking these measures? Stakeholders?

8) Are there any of your CSR-measures/initiatives that are developed in cooperation with these stakeholders?

9) Do you see any competitive advantages with your CSR-measures?

10) How do you believe CMA CGM's view of CSR and implemented CSR-measures compare to the ones of your competitors? Are you affected by your competitors work with these measures?

11) Do your customers/shippers inquire about or request CSR-measures? In what area, and for what type of measures?

12) As for your top or key accounts, are CSR-measures (e.g. in terms of environmental considerations) sometimes posed as requirements for a contract of carriage?

13) Are CSR-measures like environmental performance/requirements sometimes incorporated into contracts, such as transportation framework agreements?

14) Do you market your code of conduct or other CSR-measures towards your customers? How?

On the current and future legal status of CSR

15) What do you think about voluntary versus binding regulations in the CSR-area? (Strengths/weaknesses respectively?)

16) How would CMA CGM pose itself towards a binding international regulation for CSR-measures?

17) If such a regulation would be realized, how do you believe it would influence the shipping business?

18) Although CSR-measures today are largely voluntary, have you considered that they still might have legal implications? (Through contracts, marketing efforts or otherwise)

19) Have any such implications been discussed, e.g. before formulating a code/principles or otherwise?

20) Upon the completion of a transportation service, have you ever experienced any questions or evaluations from your customers regarding your promised level of environmental standard?

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