CORPORATE GOVERNANCE: THE OECD PRINCIPLES, THE SCOPE FOR A "MODEL OF THE SUCCESSFUL COMPANY", AND A NEW CHALLENGE FOR THE COMPANY LAW AGENDA AND THE BROADER REGULATORY AGENDA

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The OECD Principles of Corporate Governance, and the Methodology for assessing their implementation, seem to support those academic contributions which overcome the classic distinction between the shareholders primacy and the stakeholders' models of companies; they also appear to require a re-conceptualisation of the interests involved and not simply a model of company, but a model of the successful company. This paper proposes such a model, and asserts its validity from a property rights perspective and from a human rights perspective. It subsequently argues that shaping of a corporate governance framework based on this model would raise a key challenge for company law legislators and for the broader regulatory agenda, and that satisfactory responses to this challenge – for which some first hypothesis are proposed - would be fully compatible with the increasingly global corporate social responsibility concern, while opening new themes for academic research and for decision-makers choices.

Introduction

The corporate collapses which have taken place in the USA and within the EU in the recent years (2001-2004), and their disastrous consequences, have been generating far-reaching effects at governmental level and at an academic level.

On the one hand, the corporate collapses have brought corporate governance at the top of the reform agenda of Governments all over the world. Not surprisingly, the aftermath of these collapses, the OECD published in 2004 a revised version of its Principles of Corporate Governance, first published in 1999 and which represent "a common basis that OECD member countries consider essential for the development of good corporate practices", and issued in December 2006 a "Methodology for assessing the implementation of the OECD Principle of Corporate Governance" (hereinafter: the Methodology). These Principles evidence, as the overriding concern that should guide the development of the corporate governance framework, its impact on overall economic performance, irrespective of the legal environment in which companies operate (common law or civil law) and irrespective of the company's ownership structure.

On the other hand, these collapses have been generating a twofold consequence on the academic literature, in particular on the Anglo-American literature: a significant part of contributions have been increasingly calling into discussion the classic distinction between the 'shareholder model' (whereby companies are to be run in the interest of the shareholders) and the 'stakeholders model' (whereby companies are to be run also in the interest of other constituency groups) and proposing new frameworks for understanding corporations, whereas another part of this literature has been either reaffirming its adherence to a shareholders-centred view of corporate governance or proposing minor variations to the shareholders primacy approach. The two approaches, in turn, rely on different theories of the firm, i.e. on different theoretical frameworks for understanding companies and their operation.

In this context, some broad questions, subsequent to each others, emerge:

a) which one, amongst the two approaches that can be identified in the literature, can be regarded as the most appropriate one in light of the revised OECD Principles and of the Methodology ? In other words, can there really be a difference in terms of the interests to be promoted by company's directors in the fulfilment of their duties, between the so-called "shareholder model" and the so-called "stakeholder model", *if paying the necessary attention to the overall economic performance* which the OECD Principles in the revised version indicate as the ultimate goal ?

b) in case of a negative response, is there the scope for a "theory of the successful firm" rather than simply for a "theory of the firm", and shouldn't a model of corporate governance based on this theory be regarded as the one best capable of achieving the outcomes indicated by the OECD Principles and thus more consistent with these Principles ?

c) if so, could this model of the successful firm be supported from the two perspectives that appear to have drawn attention, in recent years, in the literature on the nature and on the operation of companies, namely from the property rights perspective and from the human rights perspective, and how could this model inspire a corporate governance framework ?

The article, which attempts at offering a response to these questions, is structured in three Sections. Section 1, after briefly summarising the state-of-art in the legal and management-oriented literature, argues that the aspects highlighted by the various positions criticising the usefulness of the distinction between shareholders and stakeholders theory are complementary to each others. Section 2 aims at demonstrating that, although the OECD Principles are intended to encompass the different models that exist, the best achievement of their objectives would imply a framework based not on the classic models, but on a different understanding of company's activities which would need to be build up on the complementarities between the positions that criticise the classic theoretical distinction. Accordingly, Section 3 proposes such an understanding, develops it into a "refined theory of the successful firm", tests the model from a property rights perspective and from a human rights perspective; the Section formulates, eventually, hypothesis for a corporate governance framework inspired by this model. Lastly, some final remarks intend to present the implications that the model proposed could have on future research and debates.

1. The current state of art in the recent academic literature: overview

1.1. Overview of the recent positions criticising the shareholders vs. stakeholders alternative

Good part of the academic literature, both *before* and *after* the corporate collapses, has been submitting that corporate governance practices throughout the world have been profoundly affected by the recent dominance of a shareholder-centred ideology of corporate law among the businesses, governments, and legal elites in key commercial jurisdictions, and that the resulting convergence is marking the "end of the history" for company law and, ultimately, for corporate governance related debates[1]. This "history", in the form it has been assuming over a long period of debate at an academic and legislatures' level, is to be intended as (international) contraposition between alternative and competing views about the role of companies, the interests to be pursued by directors and their accountability in fulfilment of their duties. On the one hand, the "shareholders' model" which affirms that companies are to be run in the interests of shareholders and directors are accountable only to shareholders, although it recognises that, in order to promote the interests of shareholders, it is necessary to effectively manage to relationships with stakeholders[2]. On the other hand, the 'stakeholders' model according to which the interests to be pursued include not only those of shareholders but also those of employees, clients, suppliers and in general the wider community which is generally referred to as "stakeholders". As the enhancement of shareholders wealth is, at present, the overriding criterion in many countries, and the question is being raised what would be the criterion if shareholders wealth were not[3], the "history" would seem at a first sight to be over. After the collapses in recent years, one of the strongest positions advocating the shareholders primacy approach, to which it refers to as 'Anglo-American' system, defended this model with even greater emphasis, stating that "what Enron did show about corporate governance, was that the Anglo-American system works"[4]. This would be so, in such view, on the grounds that the standard to assess systems is their ability to reduce the frequency and severity of misdeeds, as well as their ability to detect and correct the problems that arise, and that Enron's wrongdoing was in fact detected by the market[5], where companies compete for attracting shareholders[6]. This conception, which refers "corporate governance" exclusively to "ways of ensuring that corporate actions, agents and assets are directed at achieving the corporate objectives established by the corporation's shareholders"[7], stresses that corporations are the property of the shareholders in aggregate[8] and that stakeholders are to be regarded as means towards the ultimate end of achieving shareholders' goals[9].

This kind of conceptions, which lead to the prioritisation of shareholders' interests over stakeholders' interests, is in turn criticised by an increasing part of the Anglo-American literature which has, in recent years, attempted to shift the emphasis away from the classic shareholders vs. stakeholders alternative.

On the one hand, this literature has proposed *alternative frameworks for understanding corporations* or *called into discussions the asserted contrast between the theoretical frameworks underpinning the shareholders model and the stakeholders model.* The "shareholder primacy" approach, which relies on the "nexus of contracts" assumption that the shareholders are the sole residual claimants and risk bearer, and which holds that directors ought to be accountable only to shareholders for maximising their wealth, has been convincingly criticised from both viewpoints.

[1] H. Hansmann & R. Kraakman, "The end of history for corporate law", in "Convergence and persistence in corporate governance", ed. by J.N.Gordon and M.J.Roe, 2004, pp. 33-68
[2] E.g., Hampbel Report 1998; the Hermes Principles 2002; the International Corporate Governance Network, ICGN Approach to OECD Principles, A Working Kit Statement of Corporate Governance Criteria, 1. Corporate Governance.
[3] C. Mallin, Corporate Governance, 2004, Oxford University Press, at 50.
[4] E. Sternberg, Corporate Governance, Accountability in the Marketplace, IEA, 2nd edition, 2004, at 17.
[5] Id.
[6] Id, p. 178.
[7] Id, p. 28
[8] Id, p. 29.
[9] Id, p. 30

One kind of criticism highlights that other categories of constituencies, such as employees and creditors, also bear significant residual risk, and it proposes a 'team production' approach for understanding the role of directors and the nature of corporations[10] . This approach argues that, whenever a group of individuals agree to work together on a complex production task, the difficulty of agreeing in advance what everyone is supposed to contribute and can expect to get out of the joint effort gives rise to a "team production" problem: each team member will make 'firm-specific' investments in the joint enterprise in terms of time, ideas, efforts, and money, by performing non separable tasks, and these investments may be sunk in the business and not recoverable except by carrying out the enterprise and sharing the income it generates. Because this commitment of resources – the reasoning follows – makes each team member vulnerable to rent-seeking on the part of others, who could try to get a larger share of the proceeds deriving from the joint effort, an institutional arrangement such as the incorporation facilitates cooperation among team members and provide a unique solution to the contracting problems in team production. In this conception, the corporation, as a legal person with its own rights, is not the property of the shareholders, but is separated from each of the participants; the participants, by forming a corporation and selecting directors, avoid the problems of contracting with each others and agree to give up control rights over their firm-specific investments and over the output from the joint enterprise to directors, who are given the legal responsibility to act for the corporation and who, for this purpose, must act as a "mediating hierarchs". In this capacity, directors' role is to settle any dispute that may arise amongst team members over enterprise strategy or over the division of the enterprise proceeds; in turn, to fulfil this role and ensure the long term health and prosperity of the enterprise, the board of directors must be viewed as fair and trustworthy by all team members. The board trustworthiness thus makes the corporation the mechanism for fostering, amongst the participants in a vast business enterprise – shareholders, managers, employees – the trust that is essential in order for the team production to continue. Directors are thus conceived as "fiduciaries" of the corporation, with a task of balancing interests, and not as "agents" of the shareholders (with a task of ranking interests) as in the shareholders primacy approach, and their incentive to act as a trustworthy mediating hierarchs would need to be provided by a framework of social norms that value trustworthiness and mutual reliability.

This team production approach, which was proposed both as a framework for understanding corporations and as an explanation of some features of US corporate law that largely insulate directors from shareholders influence, effectively manages to explain the downsides in the relationships between "team members", and in directors' poor performance in their role, that led to corporate collapses such as Enron and WorldCom, and it also puts forward a satisfactory criticism of the key assumption - shareholders as the only risk-bearer and residual claimants - underlying the shareholders primacy approach. Nonetheless, it has been in turn criticised by a literature which has proposed a partly different model: a "directors' primacy approach"[11] . In this model, which expressly aims at providing responses to the two questions concerning who controls corporations ("means of corporate governance") and whose interests should prevail when decision-making is presenting with a zero-

[10] M. Blair and L. A. Stouts, A Team production theory of corporate law, Virginia Law Review, Vol. 85, No. 2, March 1999, pp. 248-328; M.Blair, Shareholder Value, Corporate Governance and Corporate Performance, A Post-Enron Reassessment of the Convention Wisdom, 2002, pp 53-73

[11] S. M. Bainbridge; Director primacy: the means and ends of corporate governance, Northwestern University Law Review, Winter 2003

sum game ("ends of corporate governance"), the firm is not a nexus of contracts, but has a nexus of contracts with agents which are hired by a central decision-making body, the board of directors. Unlike the shareholder primacy approach, the board of directors would not generally be hired by shareholders, but would hire factors of productions, amongst which investors and thus shareholders; however, in order to successfully hire shareholders, the board of directors needs to commit themselves to maximise shareholders wealth, as shareholders would be the most vulnerable corporate constituency and the interests of other stakeholders would be protected either by contract or by the law. The critics this model addresses to the team production model consists, on the one hand, in its conception of the role of directors – which are regarded as a central fiat authority hiring and coordinating factors of production rather than a mediating hierarchy -, and, on the other hand, in the claim that in large corporations the tasks carried out by employees, managers etc.. are separable, so that the corporation could not be seen as a production team, but, at most, as a set of separable teams. The directors primacy model thus asserts, as regards the means of corporate governance, that the boards of directors controls corporation, and, as regards the ends, that shareholders interests should be pursued; it also gives a different explanation, from that offered by the team production approach, of some features of US corporate law. Irrespective of the validity of either the team production theory or the director primacy approach as an explanation of US corporate law, the directors' primacy approach – although it differs from shareholders primacy as it puts forward a different framework explaining the relationships between shareholders and directors – shows a significant gap: it does not seem to fully demonstrate the reason why, in any circumstance, shareholders would be the most vulnerable constituency.

Another kind of criticism denies *the asserted contrast between the theoretical frameworks underpinning the shareholders model and the stakeholders model.* In this regard, this criticism has extensively argued that theoretical frameworks that suggest company's accountability only to their shareholders are not necessarily inconsistent with theoretical framework underlying stakeholder accountability, on the ground that "shareholders' interests can only be satisfied by taking into account stakeholders interests, as companies that are accountable to all of their stakeholders are over the long-term more successful and more prosperous"[12]. This position has proposed the probably most "progressive" definition of corporate governance, as "the system of checks and balance, both internal and external to companies, which ensures that companies discharge their accountability to all their stakeholders and act in a socially responsible way in all areas of their business activity"[13], and, by relying on previous literature as well as on empirical research, has emphasized the business case for the adoption of a stakeholders-oriented approach as a winding road to long-term value creation[14].

From the perspective of the yardstick which should guide the directors' choices, other part of the literature has been rejecting what has been typically presented for decades as a shareholders vs. stakeholders alternative.

One position[15], even if it rejects the classic stakeholders' model on the ground that, by avoiding to explain how to make the trade-off between competing interests, this model leaves managers unaccountable, recognises that no firm can maximise long-

[12] J.Solomon, A.Solomon, Corporate Governance and Accountability, John Wiley & Sons Ltd, 2004, at 14.

[13] Id.

[14] Id., p. 28.

[15] M.C.Jensen, Vlue Maximisation, Stakeholder Theory, and the Corporate Objective Function, European Financial Management, Vol. 7, No. 3, 2001, 297-313, at 309-310.

term value if it ignores stakeholders' interests, claims that no stakeholders could be given full satisfaction if a balance of competing interests is to be achieved, and suggests that the long-term increase in the firms' market value would provide a "balanced scorecard", an objective parameter allowing managers to make the trade-off between stakeholders' competing claims. Another position, arguing that there is a tension between shareholders' interests to profit maximisation and other social and environmental concerns, which tension may undermine company's performance, suggests that directors' duties need to be reassessed and that the focus need not be whether companies are to be managed in shareholders' or in all stakeholders' interests, but how directors can implement, within companies, proper systems to manage the risks inherent in company's activity in order to allow all concerned party to get the returns they are entitled by law from their contribution to the company[16].

1.2. *…..and the complementarity between the various positions in creating the framework for a "refined theory of the successful firm"*

Apparently, the above positions criticise the usefulness of the distinctions between the shareholders primacy approach and the stakeholder approach – and, in so doing, criticise the shareholder primacy on its own – on different grounds.

Nevertheless, at a closer examination, it may be argued that the aspects dealt with by the different criticism are complementary to each others, in the sense that *they observe the same reality from the viewpoint of the answers to different questions*. Specifically: the criticism based on the circumstance that shareholders interests can only be satisfied by satisfying other stakeholders' interests (Solomon: business case for stakeholders approach; the goal of creating value for stakeholders is pro-shareholder) answers the general question that needs to underlie shareholders model, i.e. this question: *how* can long – term shareholders value be maximised or created. This criticism also answers another question, that appears to be neglected by the proponents of the shareholders primacy. The question is how to reconcile the maximisation of shareholders value with the "internalisation" of the concerns of other stakeholders and of the wider community in the decision making, which is known as "Corporate Social Responsibility" (CSR)[17], and with the acknowledgment that "CSR makes business more competitive, not less"[18]. The answer to this second question comes from the realisation, which is put forward by the criticism under consideration, that the internalisation of the concerns of other stakeholders is "pro-shareholders", i.e. that it helps shareholders' value. The second and consequent question cannot but be *why* the shareholders' interests can only be satisfied by protecting stakeholders'

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[16] J.Dine, Risks and Systems: A New Approach to Corporate Governance and the European Employee Consultation Structures ? in International and Comparative Corporate Law Journal, 299 to 313, Vol. 3 Issue 2, 2001

[17] The European Commission, in its Communications - COM(2001)366, "Promoting a European Framework for Corporate Social Responsibility", and COM(2002)347final, "A business contribution to Sustainable Development" and COM(2006)136final "Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility" – defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary base"; the World Business Council for Sustainable Development (WBCSD) identifies CSR as "the continuing commitment by businesses to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large." (WBCSD Report "Meeting Expectations. Corporate Social Responsibility", p. 3, available at www.wbcsd.ch, links "business role" and "corporate responsibility").

[18] As stated by the UK Government, see www.csr.gov.uk

interest, i.e. why CSR makes companies more competitive and more profitable. *The assertion that* (as stated by the team production model)[19] *if stakeholder categories* such as employees *feel that they can regard directors as a reliable mediating hierarchy* capable of ensuring that their interests be safeguarded and not subject to shirking by others, then *they make the firm-specific investments* that the company needs, *is a rational response*, and another complementary response is that, if stakeholders interests are safeguarded, the risk inherent on the company[20] is successfully managed. As a result of all this, the long – term market value[21] is maximised, and the entity's wealth is also so. The third question, that follows from accepting the answers to the first two questions, is: what do the responses imply for directors' duties? The response come, again, from the basic outputs of these positions: directors, in their position of trustworthy hierarchy, should put in place appropriate systems for decision-making, to make sure that the risk of stakeholders' dissatisfaction is minimised, so that they continue to make the best of their firm-specific investment, which allows the risk on the business activity to be minimised.

It may be noted, however, that, having demonstrated that the various criticism are complementary to each other, a question has remained unresolved: the reason why some criticism are based on the *compatibility* of interests of shareholders and other stakeholders[22] whereas other of these positions are based on the *balancing* of interests and thus, it seems, on the *contrast* between interests that have to be balanced[23]. A response can nevertheless be proposed for this issue, a response which relates directly on the *conceptualisation of the interests of the various stakeholders groups*. This response can be extrapolated from the revised OECD Principles, and, together with the complementarities between the various criticism to the distinction between stakeholders and shareholders models, it can provide a key feature in developing a conceptual model tailored to a framework that would best allow the achievement of the objectives laid down by the OECD Principles.

2. The OECD Principles of Corporate Governance

2.1. The OECD Principles and Methodology: a plausible reading of the concepts of stakeholders and of success of the company…...

If the latest (2004) version of the Principles is compared with the previous (1999) one, it can be submitted that, despite *prima facie* similarities in most of the overall document, the differences that exist between the two texts make it possible to propose a reading of the 2004 version such as to deprive of any theoretical and practical scope the debate, which has been going on for decades, as regards the question whether companies should be run solely in the interest of shareholders or in the interest of other constituencies too. This because, as it will be argued below, from the text of the 2004 version – and from its differences in comparison with the 1999 version – it is possible to extrapolate specific concepts about the "stakeholders" and the "success of

[19] Blair and Stout, supra, n. 10.
[20] Dine, supra n. 16.
[21] Jensen, supra n. 15.
[22] These are, in essence, the positions of J.Solomon, A.Solomon, cit.; R.E.Freeman, A.C. Wicks, B. Parmar, Stakeholder Theory and "The Corporate Objective Revisited", in Organisation Science, Vol. 15, No. 3, May-June 2004, pp. 364-369.
[23] This appears to be the case for the mediating hierarchy framework underlying the team production model by Blair and Stouts

the company", even if this outcome was beyond the intentions of the drafters of the latest version[24].

The Preamble to the Principles, in the 2004 version as well as it did in the previous one, rejects at the outset any claim of "superiority" of one model of corporate governance over another, by stating that there is no single model of good corporate governance[25]. However, whereas the Preamble to the 1999 version simply stated that the Principle were to serve as a "reference point", the Preamble to the 2004 version clarifies, in more specific terms, the Principle's aim is to identify *objectives* and suggest various *means* for achieving them[26]. This aim is also reflected in the Methodology, which latter, in turn, places emphasis on "functional equivalence" by indicating that "there are many different ways, institutions, laws, etc...for achieving the outcomes" set by the Principles and that the Principles implementation needs to be adapted to national circumstances[27]. The adaptation to national circumstances does not imply, however, sacrificing the intended outcomes: the Methodology clearly explains that the criteria to assess whether a principle has been implemented have to be selected in a way that implies a value judgment about the effectiveness and efficiency of current arrangements in terms of achieving the outcome. Furthermore, it specifies its intention not to rank countries against each others, but to "assess qualitatively countries against what they *could and should achieve* in relation to the Principles"[28] . The fact that the 2004 version, together with the Methodology (and unlike the 1999 version), refers to objectives to be achieved, suggests a different "value" for the statement (which was also contained in the 1999 version) that there is no single model of good corporate governance: from the 1999 version, the reader would have argued that there is no single good model because there are in any case *common elements* that underlie good corporate governance and *these elements* need to be a point of reference; from the 2004 version, as supplemented by the Methodology, the reader can infer that there is no single good model because there are in any case *common objectives* to be achieved, and that the common elements of good corporate governance, viewed against these common objectives, are only minimal *means* indicated by the Principles. In other words, in the latest version the "point of reference" can be identified in the objectives, rather than in the elements on their own: the objectives can, in essence, be identified in the long-term success of the company and in transparent and efficient markets.

The possibility of reading in this way the latest version is confirmed by another difference in comparison with the 1999 version. The Principles, in both versions, are articulated in broad areas; however, whereas the 1999 version was articulated in five areas, the latest version contains one more area, which can be attributed key importance. The areas dealt with by the earlier version, which were "the rights of

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[24] The drafting of the 2004 version was the result of a long negotiation process, during which most Governments of member countries adopted a "minimalist" approach as regards the revisions to the made to the 1999 version and only a last minute intervention by the French Government made it possible significant progress in the chapter devoted to stakeholders: see the report by the TUAC (Trade Union Advisory Committee) , The OECD Principles of Corporate Governance, An Evaluation of the 2004 Review by the TUAC Secretariat, October 2004, p. 11.

[25] "There is no single model of good corporate governance. However, work carried out in both OECD and non-OECD countries and within the Organisation has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist" (Preamble, p. 13).

[26] See OECD Principles of Corporate Governance, 1999, Preamble, p. 3 and OECD Principles of Corporate Governance, 2004, Preamble, p. 13.

[27] Methodology, p. 4

[28] Id, p. 5.

shareholders", "the equitable treatment of shareholders", the "role of stakeholders", "disclosure and transparency", and "the responsibilities of the board" are also dealt with by the later version, but this latter, before concentrating on these areas, focuses on a new concern, which is indicated as an area on its own: "ensuring the basis for an effective corporate governance framework". In explaining in details the requirements for an effective corporate governance framework, the new version clarifies the ultimate objective when, in the annotations to the Principles, it states that policy makers should remain focussed on *ultimate economic outcomes* [29]. The Methodology specifies that this means that policy makers should in essence ensure that the benefits of certain policy options outweigh the costs[30]. In turn, such an ultimate goal can be assumed to be the achieved to a greater extent the higher the degree to which certain policy options in shaping the corporate governance framework help ensuring the long-term 'success' of the corporations in terms of competitiveness and profitability, as well as the transparency and efficiency of markets within which companies operate, and which can thus help creating the framework for their long-term success. Consequently, the long term success of corporations can be seen as the essential component of the economic outcomes that, according to the Principles, should be the ultimate concern for policy-makers when shaping the corporate governance framework.

Exactly in light of the ultimate concern for the economic outcomes and of the Principles' aim of identifying objectives, it can be argued that, in each areas, the new version indicates the *objectives that need to be achieved by the corporate governance framework in order to ensure the ultimate economic outcome*. In light of each Principle, a corporate governance framework should thus have the objectives of:

- promoting transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities;
- protecting and facilitating the exercise of shareholders' rights;
- ensuring the equitable treatment of all shareholders, including minority and foreign shareholders, and providing them with the opportunity to obtain effective redress for violation of their rights;
- recognising the rights of stakeholders established by law or through mutual agreements and encouraging active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises;
- ensuring that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company;
- ensuring the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

These objectives are listed as "overarching principles" and explained, in detail, by "individual principles" which indicate how each of the objectives should be achieved. The Methodology, in dealing with the objective of "ensuring the strategic guidance of the company, the effective monitoring of management by the board, and the board's

[29] Policy makers have a responsibility to put in place a framework that is flexible enough to meet the needs of corporations operating in widely different circumstances, facilitating their development of new opportunities to create value and to determine the most efficient deployment of resources. To achieve this goal, policy makers should remain focussed on ultimate economic outcomes

[30] Methodology, p. 14

accountability to the company and the shareholders", identifies one of the individual principles as the most important of the Principles[31]. According to this individual principle, "Board members should act in a fully informed basis, in good faith, with due diligence and care and in *the best interest of the company and its shareholders*" and the Methodology states that, if this individual principles were fully implemented, there would be little need for other individual principles, as "a number of the other principles are intended to ensure that the principle is implemented as effectively as possible". If these statements, which clarify that the principles are complementary to each other, are considered together with the general objectives of ensuring the "board's accountability to the company and the shareholders" and of "encouraging active co-operation between corporations and stakeholders..", a first reading may suggest that the company's interests and the shareholders' interests are regarded as deserving priority over the stakeholders interests: this in light of the *accountability* to the company on the one hand, and of the *co-operation* with stakeholders on the other hand. Nevertheless, the Annotations complementing the Principles, and the Methodology, give the lie to this interpretation.

On the one hand, the Methodology, while it states that the judgment about whether the objective of ensuring the strategic guidance of the company, the effective monitoring of management and the board's accountability to the company and the shareholders is achieved should be based particularly on the judgment whether the Principles concerning shareholders rights, transparency and disclosure are implemented, clarifies that a favourable assessment about the implementation of the principles concerning shareholders rights and transparency should be viewed "more in the way of a *necessary* though *not sufficient* condition for implementation of the principles" at issue. On the other hand, the Principles state inter alia that the board should take into account the interest of stakeholders[32]. The Methodology, in turn, clarifies that, in discharging its accountability to the company and to its shareholders and in acting in their best interest, the board is expected to take due regard of, and deal fairly with, other stakeholders' interests[33]. The meaning of the expressions "take into account", "take due regard of" and "deal fairly with" the interests of stakeholders, in the context of the Principles, of their annotations and of the Methodology, can be deduced from the Annotations to these Principles, when these Annotations state that[34]:

"Corporate governance is concerned with *finding ways to encourage the various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and physical capital*. The competitiveness and ultimate success of a corporation is the result of *a teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors and suppliers*. Corporations should recognise that the contributions of stakeholders constitute a *valuable resource for building competitive and profitable companies*. It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operation among stakeholders. The governance framework should recognise that the *interests of the corporation are served by recognising the interests of stakeholders and their contribution to the long-term success of the corporation*".

Although these statements were, in a similar language, also contained in the 1999 version, in the 2004 version they can be read in light of the ultimate objective lying in the *economic outcomes* of which the long-term success of the company is the essential component. From this perspective, the proper meaning of the expressions "take into account", "take due regard of" and "deal fairly with" the interests of stakeholders

[31] Methodology, p. 66.
[32] Principles, p. 24
[33] Methodology, p. 65-66
[34] Principles, Annotations, p 46.

(which are intended in the Principles, in their Annotations and in the Methodology, as interchangeable amongst them) can be identified in the *protection* of the interests of stakeholders. This is because, without the *protection* of the interest of stakeholders, the meaning of the *recognition of these interests* would become difficult to identify *if one accepts that there needs to be a wealth-creating cooperation among all constituency groups*: a recognition of the interests of stakeholders without the protection of these interests would, inevitably, imply a *confrontation* between supposedly different interests, rather than the *cooperation* which is indicating as wealth-creating and which is regarded at the root of the contributions of stakeholders. Consequently, the board's *accountability to the company* can be seen, inter alia, as consisting of the board's *accountability for the safeguard of the interests of all stakeholders,* which means, ultimately, board's *accountability for the maintaining of the contributions* that all stakeholders groups give to the competitiveness and the profitability of the company, or, in other words, it means board's accountability for achieving the ultimate economic outcomes which would not be attainable without stakeholders' contributions.

If this is considered together with the key individual principle - whereby "Board members should act in a fully informed basis, in good faith, with due diligence and care and in *the best interest of the company and its shareholders*" - and with the Methodology's statement that a number of other principles are intended to ensure the implementation of this principle, it can be argued not only that the various principles are complementary to each other, but also that two conditions are *necessary* and *sufficient* for the achievement of the objectives concerning board's responsibility: the implementation of the principles on shareholders' rights and disclosure, and the protection of stakeholders interests. In other words, it can be argued that, in the Principles in general, and in the key individual principle in particular, although a separate mention of a board's responsibility to "act in the interest of stakeholders" cannot be found, the ultimate objective lying in the *economic outcomes* - laid down by the 2004 version - implies that this responsibility is implicit in the duty to act "in the best interest of the company".

The protection of stakeholders interests should not meet exceptions, just because the interests of the corporation itself are regarded as served by recognising the interests of stakeholders. As noted above, this protection is seen as resulting from the co-operation amongst stakeholders (and, therefore, between shareholders and other stakeholders group) which is considered as mutually beneficial (wealth-creating) and as a winding road to the interests of the corporation, where these interests, ultimately, are indicated in its "long-term success"[35]. No co-operation between shareholders and other stakeholders would however be possible without the disclosure, by companies, of details on issues concerning other stakeholders, which disclosure allows other stakeholders to assess the benefit derived from the co-operation: accordingly, the Methodology recognises that a judgment about whether the interests of stakeholders have been taken into account should rely on the judgment formed about this disclosure.

In turn, the interest of the company identified in the long-term success, and the underlying *long-term perspective,* presupposes as a first condition the survival and development *over time* of the business activity run by the corporation, and requires, in consequence, that this activity be provided over time with the resources it needs for this survival and development. The category of stakeholders – whose definition has been the object of debate in the literature – is being identified by the Methodology in

[35] Principles, Annotations, p. 46

those who provide these resources, and who have the obvious and common interest in this survival and development of the business activity, which allows them to get the rewards; in fact, the Methodology states that: "the concept of stakeholders refers to resource providers to the corporation, including employees, creditors and suppliers"[36].

Although it may be argued that this statement and the required focus on economic outcomes, on their own, do not imply a preference for the stakeholder theory - for this preference would not justify the preliminary observation (in the Preamble) that there is no single good model of corporate governance - they appear to highlight two key points, one regarding the concepts of "stakeholders", the other regarding the "success of the company".

First, the clarification, by the Methodology, of the concept of stakeholders as resources providers, should be read together with the statement, in the Principles, that "boards are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities"[37], and with the definition of corporate governance according to which this involves "a set of relationships between the company's management, its board, its shareholders and other stakeholders". If all this is read together, it may be deduced that, according to the text of the Principles and the Methodology, the category of other stakeholders includes – in addition to employees, creditors and suppliers - customers and local communities *to the extent that these groups also provide resources to the company* and thus expect benefits from this provision. It also suggests that the groups that can be classified as stakeholders not only need to have a relationship with the company - which can be deduced from the definition of corporate governance – but this relationship needs to characterised by a specific quality, i.e. the provision of resources to the company. Interestingly, whereas the groups of employees, creditors and suppliers are always included within the category of stakeholders by both the Methodology and the Principles, the groups of customers and local communities are not indicated in the Methodology, and this difference, as it will be shown, makes it possible to infer that only if they have a stable relationship with the company these groups can be assumed to be resources providers.

Second, as regards the success of the company, it becomes apparent from the above indicated concepts of board's accountability and of stakeholders that, from the Principles, a concept of "success" can be extrapolated: a company is successful when managing *to secure, over time, the contributions of stakeholders under conditions ensuring the persistent satisfaction of all stakeholders' interests, i.e. under conditions that make it possible the wealth-creating cooperation among all stakeholders groups and, as a result, the profitability and competitiveness of the company*. Arguably, the profitability of the company is thus to be intended, in the context of the Principles, as related to a *quality of the profit* obtaining year by year by the company, rather than as a maximisation of shareholders' wealth unrelated to other circumstances. This interpretation appears to be plausible due to both the way in which the ultimate goal of a corporate governance framework is presented and other statements contained in the principles concerning stakeholders' role, the responsibility of the board and disclosure and transparency.

As said above, the ultimate goal that the Principles assign to a corporate governance framework, the *economic outcomes*, is mentioned within the first principle, concerning the basis for an effective corporate governance framework[38],

[36] Methodology, p. 45
[37] Principles, p. 58
[38] Principles, p. 30

and again within the principle concerning the role of stakeholders, under the terms "financially sound enterprises" and "profitability of the company" (and thus economic outcome of the company), but not within the principles concerning the rights of shareholders. It can thus be deduced that an overriding concern for the maximisation of shareholders' personal wealth on its own cannot be extrapolated from the principles.

An additional and important indication can be drawn if several other statements are considered all together. The statements at issue are the disclosure principles whereby the company should disclose the *operating* and financial results, their policies relating to business ethics, the environment and other public policy commitments[39] as well as key issues relevant to employees and other stakeholders that may materially affect the performance of the company[40], the statements whereby "The shareholding body is made up of individuals and institutions whose interests, goals, investment horizons and capabilities vary"[41]; "Together with guiding corporate strategy, the board is chiefly responsible for monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interest and balancing competing demands on the corporation" [42]; "High ethical standards are in the long-term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments"[43], and the statement according to which "it is in the long – term interest of the corporation to foster wealth – creating co-operation among stakeholders".

All these statements, taken together, *highlight the importance of both the source and the manner in which the profit is obtained*. With regard to the source, the need to disclose the *operating* profit indicates the importance of the profit obtained from the ordinary activity. As regards the manner in which the (operating) profit is obtained, the fact that:

a) there are "different interests, goals, investment horizons and capabilities" amongst shareholders, which evidently originate competing demands that have to be balanced while, at the same time, an *adequate* return must be secured to *all* shareholders, and
b) the interests of other stakeholders also need to be safeguarded to ensure their contributions,

indicates that there can be only one appropriate manner in which the (operating) profit can be obtained while maintaining the co-operation amongst all various (shareholders and) stakeholders groups, and in which, thus, the success of the company can be measured and its long-term interest satisfied. This manner lies in the ability of considering what are commonly regarded as competing interests as *competing only in appearance*, i.e. in the ability of identifying and giving priority to *what can unite* the apparently different interests *over what can divide* them. If accepting that what can unite the apparently different interests is the *desire to get benefits* from the various commitments to the company's activity, and that these benefits suppose the survival and development of the company (i.e., its "long-term" success), *competing demands to be balanced* can be seen as conceptually different from *contrasting interests*. Specifically, competing demands can be simply seen as demands which came out at the same time from different individuals or groups for

[39] Principles, Annotations, p. 50, disclosure and transparency.
[40] Principles, Annotations, p. 53.
[41] Principles, p. 32, the rights of shareholders and key ownership functions.
[42] Principles, p. 58, the responsibilities of the board.
[43] Principles, p. 60, the responsibilities of the board.

rewards or benefits *that are all being made possible by the satisfaction of the same, ultimate and common interest,* whereas contrasting interests, properly understood in the context of the statements contained in the Principles, can be regarded as *interests contrary to the survival and development of the company and leading to request for, or courses of action, that could compromise this survival and development*. Examples of contrasting interests can be found in the interests leading to misuse of assets and to other types of conduct – self dealing, etc.. – indicated by the Principles, which would damage the business' activity.

In turn, the ability of preventing contrasting interests, and *of attributing priority exactly to the ultimate and common interest in each choice regarding the satisfaction of the competing demands*, emerges as the *key feature in the success of the company*, from the Principles. This component of success of the company appears to make "obsolete" the traditionally opposite models of corporate governance, and to require a conceptual framework tailored to the *best achievement* of the objective set out in the Principles. This is because, as submitted above, in the 2004 version of these Principles the point of reference can be identified in the objective itself, rather than in the common elements of good corporate governance which are indicated by the Principles as a minimal means towards those objectives.

2.2….and the need for a conceptual framework geared to the best achievement of the objectives set by the Principles

If the different positions existing in the academic literature – i.e., the positions criticising the theoretical distinction between shareholders primacy and stakeholder theory, and the positions insisting on shareholders primacy – are now considered in light of the above arguments that are based on that the Principles and on the Methodology, a first conclusion can be drawn, and a "gap" existing in the literature can be identified.

The first conclusion is that the Principles and the Methodology can be seen as "supporting" the positions criticising the theoretical distinction between shareholders primacy and stakeholder theory.

In effect, it can be easily noted that the objective advocated by the shareholder primacy approach, i.e. the maximisation of shareholders' wealth, and the related conception whereby the interests of stakeholders are to be taken into account only to the extent that they serve to achieve this objective, so that they would be only a *means* towards the *end*, are directly called into discussion. It appears sufficient to remember that the Annotations indicate the responsibility of the board in obtaining an *adequate return* for shareholders rather than *the maximum possible return*, where adequate return is evidently to be read as the economic return obtained under conditions fostering the co-operation amongst all stakeholder groups and in following an ethical behaviour. In other words, "adequate return" appears to mean the need to obtain, year by year, a return consistent with the long-term perspective requiring the survival and development of the business activity, which would not be possible without the resource providers, i.e. without the stakeholders. Because safeguarding stakeholders' interests is *always* seen as necessary to achieve the long-term success of the business activity, it becomes evident that the conceptual distinction between the classic stakeholders theory and the shareholders primacy approach tends to disappear: if accepting that stakeholders' interests need *always* to be safeguarded, it is no longer possible to find, in the concrete courses of action to be undertaken, a difference between saying that stakeholders' interests are a *means* towards the success of the corporation and the returns to shareholders (to use the conceptualisation of shareholders primacy) and saying that stakeholders' interests are an *end* in themselves (to use the conceptualisation typical of stakeholders theory) in addition to shareholders' interests. The only difference may persist in the governance structures that may be more suitable to ensure that – to satisfy both shareholders and other stakeholders interests – the ultimate and common concern lying in the survival and development of the business activity run by the corporation is given priority in each choice. Whilst the disappearance of the reason to conceptualise in a different way shareholders and other stakeholders interests supports all the positions which call into discussions the usefulness of the distinction between shareholders and stakeholders models, the identification of an ultimate and common concern lying in the survival and development of the business activity gives the right – within the ambit of this line of though – to those positions that advocate an objective yardstick[44]. The objective yardstick that emerges from the Principles and the Methodology, and that serves to assess whether the ultimate and common concern is being satisfied, can be easily drawn from the principles, when they stress that the co-operation amongst all stakeholders serve to deliver *financially sound enterprises* and that companies need to disclose the *operating and financial results:* because the operating economic result indicates the profits coming from the company's ordinary activity ("core business") – which profit can be expected to be higher, the higher are the cooperation amongst all stakeholders group and the degree to which each group considers its needs as satisfied - and a positive economic result contributes to sound financial conditions, the yardstick cannot but be given by the *maintaining, year after year, of sound economic and financial conditions*. This should guide directors' strategic choices, and an open communication with all stakeholders[45], upon whom the business' survival and development depends, should ideally lie at the root of these choices. In consequence, *taking into consideration the distinction between competing demands and contrasting interests*, the recognition, by the Annotations to the principles, that within the shareholders group investors have different "interests, goals, time horizons and capabilities" can be seen as an expression only of competing demands - explained by the fact that different investors can have the same common interest for *a longer or shorter period of time* - not an expression of contrasting interests, and it does not give the lie to the yardstick above identified to assess whether the common interests on its own is being satisfied. Well before the publication of the Principles, a conceptual structure for characterising the interests involved in a company was proposed, and, according to this structure, the interests of each constituency involved in a company could be classified into two groups: a "derivative interest", consisting in the interest in the company's successful pursuit of its purpose, which is shared with all other constituencies; a "personal interest", consisting in an interest in maintaining and furthering their personal position, which the company is not concerned to satisfy in order to achieve its purpose[46], where the personal interest may at a time conflict with the derivative interest and where the interests of the company consists of the derivative interests of all affected parties[47]. With regard to this conceptual structure,

[44] Such as the minimisation of the risk incumbent on the company's activity (Dine, 2001) and the increase in the long-term market value (Jensen, 2001): retro, par. 1, 1.1. and 1.2.

[45] Which, in essence, was already regarded as necessary with a view to minimising the risks incumbent on the company (Dine, 2001)

[46] S. Leader, Private Property and Corporate Governance, Part I: Defining the Interests, in Perspectives on Company Law 1, Fiona Mc Millan, Patfield (eds), 1995, Kluwer Law International, 85 – 113, at 87- – 88.

[47] Id, at 88.

the arguments above submitted suggest that, in light of the Principles, the "derivative interest", the "interest of the company" and the "successful pursuit of its purpose" can all be *re - conceptualised and summarised in the ultimate and common interests in the survival and development of the business activity under sound economic and financial conditions*, whereas it can be argued that the category of "personal interests" would need to be re-conceptualised in terms of "competing demands". The introduction of the long-term perspective, and of the yardstick given by the sound economic and financial conditions generated by the co-operation amongst all stakeholders groups, needs to prevent the competing demands from conflicting with the ultimate and common interests whose satisfaction makes possible for each of these demands to exist and to be satisfied in turn. Whilst this realisation strengthens the fact that, in light of what can be deduced from the Principles, the positions advocating an objective yardstick to assess the fulfilment of directors duties represent the proper line of thinking, the express reference, in the Annotations, to the need to encourage stakeholders to undertake economically optimal levels of investment *in firm-specific human and physical capital* and to the success of a corporation as a result of *a teamwork* that embodies contributions from a range of different resource providers including investors, employees, creditors and suppliers, suggests that the team production model (Blair & Stout, 1999) can be regarded as *the proper conceptual framework* for understanding the *successful operation* of a company, and that this conceptual framework is complementary, for understanding the successful operation of a company, with the successful management, i.e. with the minimisation, of the risks incumbent on the company (Dine, 2001).

At the same time, it should be considered that the team production model, by referring to the role of directors as mediating hierarchs that prevent each team members from sharking, appears to suppose the existence of potentially conflicting interests amongst team members, and that it refers to creditors and employees. If this features of the team production model are red together with the arguments above extrapolated from the Principles and with the statement, in the Annotations, that "Corporate governance is concerned with *finding ways to encourage the various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and physical capital*", an unresolved question emerges in the literature. An unresolved question emerges because, rather than to potentially contrasting interests amongst team members, the arguments extrapolated from the principles refer only to competing demands and limit the notion of conflicting interests to interests contrary to the survival and development of the company, and *the ultimate and common interest above identified refers to all possible stakeholders groups*. In so doing, these arguments suppose that the groups that are not always listed within the category of stakeholders - i.e, customers and local communities – are also induced to *provide resources to the company,* which would turn them from groups that may potentially become stakeholders into current stakeholders that share the ultimate interest. The unresolved question that emerges is how can directors find the way to encourage *all* the possible stakeholders, *including the categories* such as customers and local communities which are not always listed amongst the resource providers, to offer long-term contributions to the company, i.e. how can directors find the way to encourage all the possible stakeholders categories to provide optimal levels of investments in firm-specific (human and physical) resources in the broadest sense, with a view to secure the long-term success of the business activity.

To the extent that the team production model (by referring to creditors and employees) does not appear to answer directly this question, it can be seen as the *basic* conceptual structure which explains the operation of a company that may be successful, and which may be at the basis of a corporate governance framework capable of achieving the objectives laid down by the Principles. Being it a basic conceptual structure, it leaves space for a *complete* and thus *refined theory of the successful firm*, based on an attempt at answering the question by means of a refined conceptual structure intended to offer an understanding of the operation *of a successful business activity* and to be at the basis of a corporate governance framework capable of *best* achieving the objectives laid down by the Principles.

An attempt at presenting such a conceptual structure is made in the next Section, which puts forward an "enlarged/enlightened team production model" or "model of the successful firm". However, whereas the Principles, the annotations and the Methodology refer to publicly traded companies, thus to companies carrying on large scale commercial enterprises, the model presented in the next Section refers to all business activities, whether carried out by large or by smaller companies: this seems to be appropriate because a refined theory of the successful firm can, by including in its scope any business activity, explain how *whatever* company can successfully growth over time and eventually fall within the category of companies expressly covered by the Principles.

3. Property and value of the corporation vs. property and value of the business activity run by the corporation: the key distinction and the "enlarged/enlightened team production" approach or "result primacy" model

3.1. The "model of the successful firm": the conception

The view that the corporation is the property of shareholders in aggregate has been and is at the foundation of shareholders' primacy theory. Nevertheless, it has been noted that, ultimately, shareholders only own a form of financial property, the shares, and that this form of financial property, which consist of rights to future income, owes its value *neither* to their concrete properties as physical objects *nor* to the value of tangible assets own by the company: the value of this form of property " is derived…from their anticipated future earning power, from a capitalisation of the dividends which are expected to accrue to them in the future"[48]. The fact that shareholders are owners only of a form of financial property, and that this form of property would have no value without the expected future dividends, has crucial importance from a twofold viewpoint. On the one hand, from the perspective of shareholders – whose rights the shareholders primacy approach aims at promoting – it should shift the emphasis from the question "what is the corporation" to the question "what are the optimal conditions for the corporation to perform its business activity in such a way as to allow a regular flow of future income from the shares". On the other hands, from the perspective of theoretical analysis, it reveals a basic confusion, in shareholders' primacy approach, between the *investment in the capital of the corporation as a legal structure* and the *investment in the business activity* run by the corporation. With regard to corporations exercising commercial enterprise, particularly if large scale commercial enterprise, although shareholders, by definition, are the only constituency to invest in securities representing the capital of the corporation, they are not the only constituency to invest in the business activity run by

[48] P. Ireland, Property and contract in contemporary corporate theory, Legal Studies, 2003, 453 to 509, p. 493.

the corporation: the team production model[49] properly stresses that employees, suppliers, creditors are other constituencies which make "firm-specific investments", i.e. investments for the specific firm and which are not separable from the firm. Together with these constituencies, loyal customers who continue to buy over time the company's products and services, to the extent that they do so based on a trust that they placed on the company upon initial satisfaction and that is not betrayed by the company, also commit themselves to the activity of the company, either consciously or unconsciously. If the life process of any successful business activity is taken into consideration, specific phases can always be recognised: the start up; the initial growth; the consolidation in the national and international market. During these phases, the legal form of business organisation typically changes (e.g., from private limited company to public limited company, from public company to listed public company), and the contributions of any stakeholder category which commit themselves to the business with *a long term perspective* becomes increasingly important. Specifically, except for those cases of companies enjoying legal monopolies in the production and/or distribution of certain goods and services, three decisive factors can be recognised in the growth of any business activity (whatever the jurisdiction in which it is started and in which it subsequently expands its operations): *a)* the founders' commitment of a new or of an innovative "business idea" to the activity, with a view to launch it in the market and to reap the benefits arising out of market's positive reaction; *b)* employees and/ or collaborators' determination in working for and transmitting knowledge to the business activity, with a view to secure their role; *c)* customers that, at the time when they appreciate the businesses' products and/or services and continue to buy these for long periods, allow the "business reputation" or "brand name" to be established and to survive. These factors are interconnected to the point that they typically generate each others in a virtuous circle of causes and effects: customers' initial reaction, if positive, leads to the first need for enlargement/structuring of the business organisation, which latter, by means of the recruitment of (the right) directors and employees, makes it possible a further expansion/consolidation in the market. The commitment of the founders, and that of directors and employees subsequently recruited, are necessary to each others in securing the consolidation of the business' position in the market: however, no business can consolidate in the market without *customers' durable satisfaction,* at a base of a lasting relationship.

Accordingly, though the founders/initial shareholders provide the "starting input", the possibility for any business to survive, and to grow up to the point of becoming a publicly held company would be minimised – and the risk of failure or at least of failing in achieving growth would be maximised – if the business were based only on a series of short-term and occasional relationships. The situation would be that of a business activity with only occasional "una tantum" clients, and which do not manage to retain employees. At best, such a business remains a small one, where the founders/shareholders have to combine the roles of capital provider and of workers even if they may lack the skills of doing everything.

It appears however reasonable to assume that individuals would like any source of satisfaction – as far as possible - to continue over time. Company's employees satisfied about the current job and the treatment that they perceive, as well as customers satisfied about the quality – or about the relationship between quality and price – of the products and services that they buy, are reasonably unlikely to seek alternatives at least in the short run; in other words, they are likely to be willing to

[49] Blair and Stouts, supra n. 10.

ensure a long-term contribution to the life of the business activity. This is because, ultimately, the long-term survival and development of the business ensures the continuation of their own satisfaction. Moreover, at least in the case of customers, they might make "good publicity" to the business, which may result in the acquisition of new customers. Admittedly, in contemporary reality, where the corporate collapses at the start of this new millennium[50], together with earlier cases of trading in potentially harmful products[51], have drawn public attention on the conduct of businesses in several countries, customers, as well as employees and other stakeholders, can reasonably be assumed to be increasingly "analytical" in collecting the information through which to assess their own satisfaction. The more "analytical" the various categories of stakeholders are, the more they may find alternatives: accordingly, in the current context of market's globalisation, which entails increasing competition between companies on a global scale, the task of retaining e.g. employees (particularly the most qualified and skilled ones) and customers is deemed to become increasingly difficult. For this reason, the success in doing so – in other words, the success in ensuring on a lasting base the satisfaction of all these "critical" groups - ends up being the secure "foundation" for maximising the chances of business' prosperity over time.

The "rationale" that is commonly put forward, in the various theories of the firm, for the hiring of directors – that is, greater expertise, specialisation etc.. - can thus be accepted, but one more reason can be added: the skills that directors, or, more accurately, the rights directors, need to have to minimise the risk of business failure and to maximise the possibilities of business growth. This equals to turning what can be the initial relationships with clients or employees into *long – term commitments* of the various stakeholder categories, which, in turn, is possible to an higher extent the higher the degree to which these categories consider their own interests as protected by the choices made by directors. In other words, directors would need to regard any constituency group as part of the "team" that would contribute to the business' activity growth.

This holds true not only for businesses in the growth stage, but also for large commercial companies, which need to maintain their market position. This market position would, in fact, be threatened – to the advantage of competitors – at the time when customers and/or employees become no longer satisfied.

Such a conception of the firm would suit well with the notion of CSR, which – in the widely accepted definitions - requires business to internalise the concerns of the wider community in their decision-making[52]. Implicitly, the academic contributions that emphasize the "business case" for CSR, by stressing that socially responsible companies are also more successful in the long run, already indicate a theory of the successful firm, and support this theory through some empirical evidence[53]. The same theory, in essence, is put forward by the literature which has submitted, again with empirical support, that firms are rewarded, in terms of market value, if they take economic as well as environmental and social concerns into their development strategies[54], and in particular by the stakeholders view of the corporation which has

[50] Such as the Enron collapse (2001) and the Parmalat scandal (2004)

[51] Such as the notorious "mad cow" case of trading in dangerous meat (revealed in 1996) which attracted much public concern.

[52] See retro, part 1, 1.2.

[53] J.Solomon, A.Solomon, Corporate Governance and Accountability, J. Wiley &Sons Ltd, 2004, at 28-29 and 192-196.

[54] S-Fang Lo and H.-Jiun Sheu, Is Corporate Sustainability a Value-Increasing Strategy for Business ? Corporate Governance: An International Review, Volume 15 Number 2, March 2007, p. 345-356, at

highlighted the importance of those "relational assets" created by stable relationships (based on mutual trust) with critical stakeholders in increasing the "organizational wealth" of the corporation, defined as the capacity to create value over the long-term[55]. This stakeholder view has also been supported by case studies concerning three major international companies[56].

The theory of the successful firm underlying this literature is, in this work, "refined" by means of a suggestion of *how* it could be possible to internalise all stakeholders concern and obtain the long-term commitments of all stakeholders groups (although in various forms depending on the group type) which are at the basis of the long-term success of the company.

As previously indicated, the conceptual framework of directors as "mediating hierarchy", at the basis of the team production model[57], holds that directors are in the role of mediators amongst members of the team – which, in that conception, are shareholders, managers and employees - to prevent each of them from behaving opportunistically in such a way as to damage the team on the whole, and ultimately to compromise its survival. In light of the distinction, that was extrapolated from the Principles in the previous part, between *competing demands* and *contrasting interests*, and also in light of the *ultimate and common interest for the survival and development of the business activity that, in the interest of the long-term success of the company, should be shared also by customers and local communities*, two adaptations can be made to the conception of the role of directors. One adaptation would need to be on the "membership" of the team: here, the team conception can be adapted to include, in additions to shareholders, managers and employees, all other constituencies, thus also customers and local communities, that can contribute to the survival and development of the business activity. In other words, *all those who can contribute to the success of the business would need to be treated as part of the team*: a distinction could, in consequence, be drawn between "internal or insider members of the team", i.e. shareholders, managers and employees, which belong only to the particular business, and "external or outsider members of the team", i.e. creditors, suppliers, consumers who enter into long term relationships with the company and local communities that, on a lasting base, can provide each of the other class of team members if satisfied with the company's business activity. Unlike the internal members of the team, the external members do not belong exclusively to the particular business; however, once accepted that their contributions is as necessary as that of the internal members of the team, directors would need to design such strategies as to ensure a continuous *flow of causes and effects* between the role and satisfaction of the internal members of the team and the role and satisfaction of external members of the team, so that the latter could confirm their satisfaction over time and, eventually, ensure a stronger contribution to the business activity at issue than to its possible competitors.

Another, and related, adaptation would need to be on the hierarchy conception: rather than only a "mediating hierarchy", directors would need to operate as a mediating, intended as *conciliating*, and *cultural* hierarchy. Specifically, the mediation would need to be seen as mediation between competing demands all of which can be, in the end, satisfied over time by choices pursuing the ultimate and

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[55] J.E.Post, L.E. Preston, S. Sachs, REDEFINING THE CORPORATION, Stakeholder Management and Organizational Wealth, Stanford University Press, 2002, p. 46-56.

[56] Idem previous note.

[57] Blair and Stouts, supra n. 10, par. 1.

common concern: this mediation would need to be made by ensuring an "equilibrium in satisfactions" of the competing demands, in the sense that the competing demand of (group/individual) A would need be satisfied with priority at one occasion and another competing demand, expressed by (group/individual) B, would need to be satisfied with priority at another occasion, but, in both occasions, the competing demands of A and B would need to be *conciliated* by transmitting to the individual/group whose competing demand is not given priority the message that a choice not giving priority to its demand *on that particular occasion* is the best one to satisfy *its ultimate interest to get continuous returns over time.* To manage to induce the concerned individual/group to give priority not to a demand that it may have at a particular time, but to its *interest to get continuous benefits over time*, directors would certainly need to be the trustworthy authority already advocated by the team production model, and they should use the trust placed on them to act as the "guardians of the business survival and development" entrusted with seeking and pursuing *the result* that unites the interests of both internal and external members of the team when choosing, in the various occasions, between the competing demands. In acting as "guardians of the business survival and development", the "equilibrium in satisfactions" would be intended to ensure the continuous contributions of all stakeholders categories by making convenient for each group a lasting relationship. In this role, to seek and pursue the ultimate result of common interest, directors would also need to act as a *cultural* hierarchy in the sense that their strategy would need to transmit each team member *a long-term perspective for the assessment of its own interests, and, with this, a culture of looking beyond the immediate perceptions*. As already highlighted, in this long term perspective, the primary concern should be the benefits, over time, that the survival and the developments of the business bring to both internal and external team members.

This conceptual structure could thus be considered as a refined theory of the successful firm, and be described as an enlarged and thus "enlightened team production model" of firm, or alternatively as a "result primacy approach".

According to this model, which could be adopted to maximise the chances of business success on stable basis, the successful firm could be defined as a "*business activity with the ability of surviving and growing over time on a solid foundation, based on a nexus of (long-term) commitments on the part of all those who can contribute to its success and who thus need to be treated as part of a team*".

Conceptually, the difference between the "nexus of long-term commitments" and the "nexus of contract" vision characterising the theories of companies underlying the shareholders primacy approach is of key importance: a nexus of long-term commitments implies not whatever nexus of contract, but a nexus of contract *with well defined features* in terms of both *quality* and *length*. The quality is given by the commitment in ensuring a common objective – the getting of benefits over time – and the length in the long-term, which is an essential component in the commitment. Conversely, a nexus of contract, if referred to generically, does not necessarily imply a nexus of long term commitments.

These commitments, together with those of shareholders, make it possible the business activity and the production of profits: even if each specific contribution were *identifiable* on its own, the various contributions would not be *separable* from each others in allowing the business activity to survive over time under the best conditions and in generating a value which is far greater than the sum of the values of each individual contributions: the firm's valuation methods elaborated by the financial literature, particularly in continental Europe, teach that *an essential component in the* *overall firm value*, even more than the value of the assets, is the "goodwill", which indicates the business activity's ability to generate profits from its ordinary activity over time, which ability needs to be estimated to assess the overall firm value[58]. The higher the coordination amongst all contributors, including both shareholders and all other stakeholders, and the commitment of stakeholders such as employees, customers, suppliers and creditors, the higher the business' activity chances to consolidate its position and to have an high "goodwill" that, in turn, raises the value of the business activity. Coordination and commitment require, in turn, a long term view. Without a long-term view on the part of directors and skilled employees, based on the benefits that they can get from a relationship with the business activity over time, it would become more difficult for the businesses to secure the satisfaction over time of their customers. In turn, without the satisfaction of customers over time – i.e. without the "loyalty" of a customer base – it would be extremely problematic to estimate a "goodwill" for the business activity. This because the goodwill, in the most popular methods of determination of the firm's value, is calculated by predicting the profits from the *ordinary business activity*, or the cash-flows generated by this activity, that can be expected during a number of future years, and by discounting these predictions at an interest rate that is supposed to reflect a degree of risk[59]. The prediction of profits or cash flows from the ordinary business activity, in turn, often assumes as a starting point *those profits or cash flow* obtained in the last financial years[60]. Accordingly, the greater the stability of the customer base and, in general, the greater the continuing satisfaction of all constituencies that have allowed the business activity to obtain those profits/cash flows in the last years, the lower would be the uncertainty for the future and the greater would be the possibility of projecting those profits/cash flows in the future, thus to estimate the goodwill. On the contrary, in the situation of a business relying on short-term and occasional relationships, the profits/cash flows from the ordinary activity obtained over the last years cannot be reasonably supposed, ex ante, to be obtained again in the future. It would thus become problematic to estimate the goodwill. Either the projection of these results would be impossible or the calculation would need to use such a high interest rate as to reflect the high degree of risk, which would result in a low goodwill. In turn, a business without a perceived goodwill or with a low goodwill is unlikely to manage to secure the cooperation of other stakeholders, such as creditors and other financiers, because its ability to generate profits over time (and, in the case of creditors and other financiers, to repay the debits) would be called into question, or regarded altogether as inexistent..

In other words, the crucial factor which shareholder primacy appear to neglect, as regards shareholders' position, is that the key element is not shareholders' investment in the capital of the corporation, but *shareholders' investment in the business activity* run by the corporation. This investment is made *by means of the investment in the corporation,* but is only one of the necessary contributions and would certainly not be able to generate the "goodwill" – and thus the dividends for the shareholders themselves - on its own. As noted above, popular methods of determination of the goodwill elaborated by the financial literature and used in the financial practice, in turn, indicate that, in determining the value of the goodwill, the key component can be found in the profits coming from the ordinary business activity.

[58] See L. Guatri, La valutazione delle aziende, 1990 (L.Guatri, Valuation of firms, 1994), pp. 125-152.

[59] Ib. n. 17, in in particular p. 131-148 where the Author explains the role of the profits of the more recent years in the predictions of future profits, and p. 183-191.

[60] Id. n. 18., at p. 131-132.

The ability to obtain profits from this source indicates *sound economic conditions* and, by allowing the generation of financial resources to be in part distributed to shareholders, in part retained in the company to increase its "reserves", turns out increasing the amount of its own permanent resources and thus contributing to *sound financial conditions* too. The sound economic and financial conditions over time are the essential requirements for any business to continue being a going concern.

Ultimately, this is also the "lesson" to be drawn from a comparative examination of the two major corporate collapses of recent years, Enron and Parmalat: the difference in the legal system (Enron in a common law system, the US; Parmalat in a civil law system, Italy) and in the underlying ownership structures (dispersed ownership in Enron, controlling shareholder in Parmalat) cannot conceal the realisation that both Enron and Parmalat had their economic and financial conditions jeopardised, and that in both cases the trading margin – thus the profit from the ordinary business activity – had been strongly declining prior to the collapse.

The criticism, addressed to the team production model by the proponents of the director primacy approach (Bainbridge, 2003) [61] claims that in a large firm the tasks performed by the firms' various constituencies are separable and that thus to call the entire firm a team is inappropriate (so that the modern corporation would be a hierarchy of teams): nevertheless, what this criticism neglects to consider is that, exactly when the various contributions do not interact properly with each others and become not only identifiable but also separable, the business' ability to generate a goodwill is being put at risk and, earlier or later, the possibility for shareholders to keep obtaining dividends is compromised. To the extent that the goodwill – and, with it, the value itself of the business activity – can only be created by the "nexus of (long-term) commitments" and that the contribution of these is necessary, the "firm-specific investment" – as the team production model claims – are inseparable.

As a result of all this, the "enlightened" team production model" makes it possible to identify an "interest of the company" relating not to a particular category of stakeholders (shareholders or other stakeholders), but to the business activity on its own: *the interest to create and maintain the goodwill in the most effective manner,* i.e., to achieve and maintain sound economic and financial conditions reflecting the satisfaction, and the long-term commitment, of all those involved in the company's business life. In other words, the interest of the company can be identified as the interest *to maintain the contribution of all stakeholders*, and therefore to ensure the *best conditions* for these contributions, and the underlying long-term commitments, to be maintained. Consequently, in this conception the business activity can be regarded as successful when managing to maintain these contributions, and to increase over time the underlying long-term commitments.

The long-term commitment would certainly be not conceivable without a long-term view by each party of the benefits arising out of the relationship with the business: accordingly, in this model any short term choices by directors should be aimed at achieving the result above indicated, i.e. the survival and development of the business activity, which is in the common interest of all those who give a stable contribution to the business activity and which therefore, for this reason, needs to be regarded as the interest of the company. In this model of the successful firm, to the extent that any choices is motivated by the achievement of this result, any choice automatically satisfies all interests. Ultimately, this implies that, from the conceptual and practical viewpoints, there is no space for the ranking of the interest of one category above those of another.

[61] Retro, par. 1, 1.2.

These observations also invalidate a conclusion, reached by the proponents of "directors primacy", that directors' authority and directors' accountability are not compatible on the ground that a greater degree of control over directors' activity, and thus of accountability, would undermine their authority and thus their role as a central decision-making power, so that, in the trade-off between authority and accountability, authority and fiat power should prevail. Directors' independent role, be it described in terms of "mediators" or in terms of "central decision-makers with fiat power", is certainly compatible with accountability if accepting the "result primacy" approach here proposed as a theory of the successful firm, which would make directors accountable for a result. Once again this accountability can be described, simply, as accountability for the creation, and over time sustainability (maintaining and increasing) of the firm's "goodwill", which finds the best chances in the acceptance of an enlarged/enlightened team production conception embracing all those that contribute to that result.

Furthermore, the enlarged/enlightened team production model, by identifying the role of directors in the building and in the maintaining of long-term commitments on the part of the various stakeholders, and by recognising the importance of these commitments for the creation and the sustainability of the goodwill, reflects the Principles' required focus on the ultimate economic outcomes. The economic outcomes of a business activity find, in the goodwill and its maintaining over time, the best condition.

To put it differently: the long-term contributions of all resources providers (stakeholders), by interacting with each other (e.g., satisfied clients continuing to buy goods and/or services and thus providing the financial resources for the company to assume new skilled employees and undertake new investments), make it possible the creation and consolidation of the goodwill. The latter is going to be higher, the greater the number of resources providers who wish to get, from their contribution to the company, continuous returns over time: directors' key task, in their capacity as "fiduciaries" of the company and "guardians of businesses survival and development", should thus be that of acquiring an increasing number of resource providers to the company.

It may also be said that the "enlarged/enlightened team production model", by emphasizing the result, offers some indication about the meaning of the expression "*long-term*". This is because the emphasis on the result implies that the commitment of each stakeholders group should, at least, last a sufficiently long period to ensure a contribution to the result given by the creation and the maintaining of the goodwill. This time could be different from company to company, but should in any case be such that the satisfaction offered to a stakeholder indices him or her, even after the end of the relationship with the company, to sustain the reputation of the company in their socio-economic relationships, and thus to attract new stakeholders offering the same kind and quality of contribution.

Ultimately, it can be argued that the enlarged team production offers a reply to a question which was raised by one of the position which supports shareholders primacy: this position highlighted that "..the reality of day-to-day managerial decision making is one which is replete with trade-offs and competing claims to resources and outcomes. Thus, the issue to address head on is: Faced with the task of mediating conflicting shareholders interests, what decision criterion should a manager adopt as a guideline?" [62]. The enlarged team production approach would reply: the guiding

[62] A.K. Sundaram, A.C. Inkpen, Stakeholder Theory and "The Corporate Objective Revisited": A Reply", *Organization Science*, Vol. 15, No. 3, May-June 2004, pp 370-371.

decision criterion to adopt by a manager in reconciling (not contrasting interests but) competing demands is the maintaining of sound economic and financial conditions, reflected in the sustainability of the goodwill over time. The purpose of a corporation running a business activity would be to contribute to the satisfaction of all stakeholders group, and corporations would be accountable, ultimately, for the creation and the maintaining of the conditions in order for all stakeholders to cooperate towards a common, ultimate purpose.

3.2. The model of the successful firm: the working

The running of a company according to the enlarged team production model, or, in other words, the working of the model and its underlying assumptions, could be illustrated as follows.

Consumers and, in general, individuals acts and take decisions under conditions of “bounded rationality” – i.e., they tend to take what they consider rational decisions, on the bases of a limited range of information available – and thus under information asymmetries. Exactly for this reason, and in an era (such as the current one) of global uncertainty and global insecurity, it appears reasonable to assume that clients, and in general all those upon which the life of a business activity depend, tend to trust what they know or what they feel that they can easily know. The assumption can thus be made that transparency is an increasingly important element for a business activity in maintaining the satisfaction of stakeholders, including customers’ satisfaction. Recent empirical research suggest, in fact, that perceived transparency of products and services may positively influence the customers’ perception of the value provided by the company and, in consequence, may lead to increased customer loyalty[63]. Thus, customers would trust a company and would enter into a long-term relationship with it if they feel that they know, and agree with, the decision-making process behind the strategies of the companies supplying the products or services that they would buy. However, the greater the possibilities for clients to know the decision-making process, the greater the possibility that they wish to offer their view into the process and that they would like this view to be an element of the decision-making; on the other hand, it can also be expected that, the greater the extent to which the decision-making process accepts clients’ input, the greater the extent to which clients can trust the company. The same can be expected to apply to all other stakeholder categories, as transparency fosters trust.

The question would thus become in what way the open and transparent approach towards stakeholders, which would need to be at the basis of the enlarged team production model, can be implemented. New consultative organs, representing the view of the various categories of stakeholders, including thus the views of the “external team members”, might be a workable hypothesis. Unlike the typical organs that are compulsory in company’s structures devised by the current legal systems – the shareholder’s meeting, the board of directors and in some jurisdictions the supervisory board – the new consultative organs could take the form of *optional committees,* such as e.g. a “customers’ committee”, “investors committee” or “creditors committee”, whose view should be searched by directors before taking the strategic decisions which are deemed to be at the base of day-to-day choices. After receiving the initial inputs (views) from the committees, directors would need to identify the aspects unifying the various views, and the choices that would persuade

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[63] J. Eskildsen, K. Kristensen, Customer Satisfaction – The Role of Transparency, *Total Quality Management & Business Excellence,* Vol. 18, No. 1-2, pp. 39 – 47, January – March 2007, at 43 to 45.

each committee representing a particular constituency that its view has contributed to the final output of the decision-making process; they would also need to transmit to the committee the message that this output allows the constituency group to get continuous benefits over time from its contribution to the survival and development of the business activity. A permanent communication with each committee would be necessary, i.e. a communication at regular time intervals, before the making of the key strategic choices and, subsequently, at the time when the results of these choices are examined in order either to confirm or to reconsider the choices themselves. In turn, the committee would need to be formed at the outset, i.e. when directors of a company, by assumption, adopt the enlarged team production approach, and the company, at that time, could publish an "advertisement" on the formation of the committee and calling for memberships. In an era of uncertainty and increasing suspect about business conducts, the company following this course of action, and transmitting the message that it wishes to start a permanent dialogue with stakeholders for the mutual benefit, could not but be expected to attract or increase stakeholders' interest and thus could reasonably expect a positive reply, leading to the formation of the committee. The functioning of a decision-making process inspired by the enlarged team production approach would, ultimately, determine a "democratisation" of the decision-making process within companies, and would do so for the purpose of fostering the trust of all groups about their positive returns from the business activity.

It might apparently be objected that, in the current reality when business decisions need to be taken quickly in rapidly changing scenarios, a decision-making process based on a permanent dialogue with these committees representing the various constituencies would risk slowing down the decisions and lead to complications concerning, e.g., the procedures that would need to be set up to demonstrate to each committee that his view has contributed to the decisions taken.

Nevertheless, the objection can easily be rejected if accepting that the mutual trust created and maintained by this decision-making process "..fosters the circulation and production of knowledge…spreads autonomy and responsibility…lessens the needs for controls….*speeds up* the decision-making processes"[64]. In effect, the time spent in dialogue with each committee representing particular stakeholders groups, and the reduction of the degree of uncertainty in the future scenarios (and thus of the degree of risk on the business activity) that this would make it possible, would well compensate the risks that would otherwise be taken by deciding under conditions of uncertainty. The time so spent can also be expected to offset the time which, otherwise, would in any case be required by a decision-making process giving consideration to several factors. It would thus be fully justified, a priori, as part of the strategy intended to safeguard the goodwill.

3.3. The model of the successful firm and the associative model

A decade ago, an "associative model" of the company was developed (Dine, 1998). According to this model, when certain groups which are in contractual relationship with the company enter into a particularly close relationship with it (such as employees or suppliers), an "associative relationship" with the company would need to arise, and would give such groups a corporate governance role[65]. Certain persons

[64] C.Baccarani, Discovering the Business Soul, in Total Quality Management & Business Excellence, Vol. 18, Nos. 1-2, 67-76, January-March 2007, at 70-71

[65] J.Dine, Models of companies and the regulation of groups, Ch. 15, p. 287-301, at 291-292, in Barry A.K. Rider (eds), The Corporate Dimension, Jordans, 1998.

or groups, in this model, would have corporate governance rights *when* they can show that their interests should be considered as part of the company's interests rather than because they belong to a certain group: specifically, corporate governance rights will only be available to those who can prove that, *in that moment in the interest of the company*, their own interests should be an important element to be taken into account by management when determining the interest of the company. The persons or groups under consideration, by virtue of their associative rights, would be able to challenge management decisions on the ground that the best interest of the company is not being pursued because their own interests, and thus their "associative rights", are being disregarded, and this challenge would take place by means of a "derivative action" whose eventual winner would always be the company itself[66].

This associative model, by indicating that the corporate governance rights will be available to certain persons, irrespective of the group to whom they belong, provided they can prove the importance of their interests in the particular time, marks a decisive departure from the shareholders primacy approach. This because, unlike the shareholder primacy, it does not attribute priority to a particular group as such, and thus would have the merit of offering the management an advantage, in terms of flexibility, that is denied by the prioritisation of the shareholders group in the shareholder primacy approach. At the same time, the associative model, in the phase of elaboration it reached, would seem to refer to the interests of the company in *a given moment* and to require the search of which groups interests, in *that given moment*, would be of utmost importance for the interest of the company.

Taking into consideration the distinction here drawn between competing demands and contrasting interests, the notion (extrapolated from the proposed interpretation of the OECD principles) of 'interests of the company' as the *interest of business survival and development under sound economic and financial conditions*, and of all (shareholders and other) stakeholders ultimate interest as the *interest to get continuous benefits over time*, an observation can be formulated in light of the associative model.

The conceptualisation which is central to the enlarged team production approach, i.e. the conception of the successful business activity as a business activity based on the *conditions under which the profit is obtained* and, namely, on a nexus of long-term commitments on the part of satisfied stakeholders and thus on the quality of profit, would be compatible with the notion, put forward by the associative model, of "associative rights" to be recognised to those who have a close relationship with the company. On the other hand, the "model of the successful firm" here proposed implies that, in order to ensure the maintain and the consolidation of the goodwill, *an increasing quantity of long-term and close relationships* should be developed and that, *at whatever time*, those who have these close relationships should be attributed "associative rights". This because their *ultimate and common interest in getting continuous returns over time*, and thus *in securing their contributions* to the company, should always be an element – the key element – to be taken into account by management, as the interest of the company is exactly that of obtaining these contributions (as inferred from the Principles). The enlarged team production model could thus be characterised as a "*co*-associative model", in which the corporate governance role would be attributed to all stakeholders to the extent that all stakeholders, in trusting the directors and in taking the long-term perspective, would assess their own interest in the same way. Specifically, they all would assess this interest in the survival and development of the company under sound economic and

[66] Id, p. 292.

financial conditions, so that any stakeholder group would, thanks to the maintaining of the “equilibrium in satisfactions”, not oppose directors’ choices aimed at satisfying, at a particular point in time, competing demands other than its own *when these choices are the optimal ones to satisfy the ultimate interest of the group concerned* (in getting continuous returns over time) and this group can trust that its own competing demands can be satisfied at another point in time.

The “derivative action” to challenge management choices would, thus, be exercised by any stakeholder groups and at whatever time, *provided they can prove that these choices compromise the sound economic and financial conditions* and, with these conditions, that they compromise the maintaining of the goodwill. Specifically, the ground for the derivative action, to be brought *ex post*, could be that directors should have known, *ex ante*, that certain choices would compromise the sound economic and financial conditions (and thus the possibility for each stakeholders group the get its continuous rewards). Nonetheless, the permanent dialogue with the committees representing those (the stakeholders) upon whom the maintaining of the sound economic and financial conditions ultimately depends, would serve to minimise, *ex ante*, the risk of derivative actions: any stakeholders would only be able to bring the derivative action, *ex post*, when either their representing committee has not been set up or the committee could claim that his input was disregarded and that, had this input been accepted in the decision-making process, the sound economic and financial conditions would had been better safeguarded. If the cases of possible derivative actions were so circumscribed, the risk of derivative actions would be minimised, because the enlarged team production approach philosophy would, by definition, generate no interest in disregarding the inputs of any stakeholders in the decision-making.

The possibility for any stakeholder groups to have this corporate governance role would, of course, presuppose sufficient information available to stakeholders both as regards the effects of past choices and as regards the planned future actions. In this respect, it could however be noted that not only the committees representing the various stakeholders groups, but also the disclosure of information provided for by the principles could well form the basis for this stakeholders’ corporate governance role. This applies in particular, on the one hand, to the disclosure of the financial and operating results of the company, which indicate the effects of past choices, and, on the other hand, to the disclosure of foreseeable risk factors, and of issues regarding employees and other stakeholders, which may help the understanding of the effects of future planned actions. The disclosure of information on future planned actions, in turn, is well compatible with the principles, which require that disclosure includes, *but is not limited to*, the elements which are expressly listed.

3.3. The model of the successful firm vs. property rights

The classic shareholders primacy approach would probably criticise the enlarged team production model on the ground that (in its view) this model would prevent shareholders from enjoying their property rights.

There is no doubt that, together with the rights of all other stakeholders groups involved in the business activity, also the property rights of shareholders need to be protected: in addition to property protection provided by a national legal system, the need for this protection follows, ultimately, from Art. 17 of the Universal Declaration of Human Rights (“Everyone has the right to own property alone….No one shall be arbitrary deprived of his property”). Nonetheless, as highlighted in the previous paragraph, the property rights of shareholders only consist of a form of *rights to future income flows*, and, without the future income flows, the financial property represented by shares would have no value for shareholders. In effect, it can be noted that, in addition to income flows in the form of dividends, shares do attribute other rights, such as the voting rights – and, in systems characterised by concentrated ownership – they also attribute the power to decide directly corporate policies, but these other rights need to be seen as instrumental to the rights to future income flows. Without concrete prospects of future income flows, in turn, no future increase in the market value of shares would be possible.

Consequently, the only way to effectively protect shareholders rights is to secure *the best conditions in order for these future income flows to continue over time*, or, in other words, in order for the "income rights" to be of value to the owner. If accepting that the income flows would be threatened without all stakeholders' continuing satisfaction, it follows that *stakeholders' corporate governance role* – due to the fact that it would be aimed at preserving for their own satisfaction the business survival under sound economic and financial conditions - *would also, be definition, protect the income rights of financial investors, i.e. of shareholders*. To put it differently, a corporate governance system inspired by a co-associative model would ensure the optimal conditions for the financial property (represented by shares) to be of value to its owners (whether these owners are controlling shareholders or minority shareholders).

The enlightened team production approach would thus protect the property rights of shareholders, but would recognise that *this protection actually lies in the conditions under which the profit from the core business is obtained*. It also suggests a definition of the concept of protection of financial investor, which represents a *first and necessary level of protection* and without which the concepts of protection typically identified by the legal literature and offered in national legal systems (such as the protection of minority shareholders against possible abuses by controlling shareholders in systems characterised by concentrated ownerships, or the protection by means of transparency and financial disclosure) would risk being incomplete and of limited use to shareholders/ investors.

Specifically, the concept of protection of property rights of financial investors suggested by the enlarged team production could be defined as follows: "protection of the rights to future income flows (and/or to future increase in value) acquired by shareholders, by means of the *safeguard of the most durable conditions* in order for these income flows *to derive from solid foundations* lying in long-term relationships with satisfied stakeholders, and thus *to continue over time*". This definition indicates that, with regard to the value of the financial property represented by the shares as "income rights", this value is a consequence of the *goodwill acquired and maintained by the business activity* and of the *quality of the relationships,* with all constituencies*, which are at the basis of that goodwill*: the immediate implication is that the value of shares – if these are properly understood as "rights to future earnings" - is higher the lower is the uncertainty in the future ability to generate profits over time, i.e. the value of shares is higher the wider is the nexus of long-terms commitments on which the business activity can rely.

The open and transparent decision-making process relying on a permanent dialogue with committees representing the various stakeholders groups, to the extent that it would manage to maintain stakeholders' satisfaction, would also manage to secure the protection of property rights of financial investors according to this definition.

This definition, in turn, applies to investors in companies of whatever size, including the biggest multinational companies: it follows that these companies, according to the enlarged team production conception, would need to secure the satisfaction of stakeholders *in all countries* in which, through subsidiaries or branches, they operate. However, it must be recalled that stakeholders' satisfaction implies, ultimately, a positive assessment by stakeholders of the output of companies' decision-making, i.e. an assessment according to which directors' choices are perceived by stakeholders as protecting their own interest. In this respect, the theme of the interrelationships between the *operations of multinational companies and the advancement of human rights* – which has attracted increasing interest in the literature over the last few years[67] – comes directly into play.

3.2. The model of the successful firm vs. human rights: business sustainability and global sustainability

The enlarged team production approach would, obviously, generate or increase the awareness that stakeholders' satisfaction could not be achieved without the respect of stakeholders' human rights. From this viewpoint, the kinds of conduct towards the different groups of stakeholders which was indicated by the UN Norms concerning companies' responsibilities with regard to human rights[68] can be regarded as the *necessary precondition* for that satisfaction: this applies to the provision to workers of a safe and health working environment and the payment to them of a remuneration capable of ensuring adequate living conditions[69] , to the offer of safe and quality goods and services[70], to environmental protection etc.. Although recent developments at the UN level have challenged the relevance of these Norms as a standard setting instrument[71], the enlarged team production approach would consider the conducts indicated by that document as the *precondition* for the *sustainability of the goodwill*, by means of the widening of the base of satisfied stakeholders, *in all countries in which the company operates*. This implies that, even in less developed countries, a multinational whose strategy were guided by the enlightened team production approach would identify *local population* (not as resources to exploit thanks to cheap labour costs in order to obtain products to be sold in the markets of richer countries, but) *as new communities which would be capable of providing* – if their standard of living were increased – *an additional base of satisfied stakeholders*, e.g., new (local) customers which would open up new markets and boost the global goodwill of the business activity (and thus, ultimately, increase the value of the business activity).

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[67] On the problematic aspects involved on this theme, J.Dine, Companies, International Trade and Human Rights, Cambridge, Cambridge Univ. Press, 2005; J.Dine and A.Fagan (ed), Human Rights and Capitalism, Cheltenham, EE, 2006.

[68] Norms on the Responsibilities of Trans-national Corporations and Other Business Enterprises with Regard to Human Rights, U.N.Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)

[69] Id., point D

[70] Id, point F

[71] Report of the United Nations High Commissioner on Human Rights on the Responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005, UNdocE/CN.4/2005/91; the criticism against the Norms, and the possible responses to this criticism, are addressed in O. De Schutter (ed), Transnational Corporations and Human Rights, Studies in International Law, Vol. 12, p. 18-21

This strategy would, in the end, turn up being particularly profitable, as *markets in richer countries* may risk a gradual saturation and tend to grow at a *much slower pace than markets in less developed countries entering a booming phase*. It would ultimately lead the company's strategic decision-making to identify the increasing in the standard of living of less developed countries as being in the interest of the company itself. In other words, *business sustainability in the long-run* and *global sustainability* of the market-based economic system would need to be regarded as the cause and the effect of each others in a virtuous circle, which would ultimately generate a more balanced development of the world economy.

For these reasons, a conception inspired by the enlarged team production would bring a new dimension to the theme of multinational companies and human rights. The issue would be not only the one which has been central in the current literature – i.e., how to hold multinational corporations to respect human rights when they fail to do so[72] – but also a new issue: how to shape a legal environment that could induce multinational corporations to consider *in their own interest* the respect and the advancement of human rights. The analytical approach would thus need to be not only *taking for granted the non respect of human rights* by trans-national corporations and investigating whether there are sanctions and remedies, but also investigating possible manners of *encouraging the respect and the promotion of human rights* by means of positive legislative action. This would be a key challenge for the corporate governance and company law related debates and for the global political agenda.

3.3. The model of the successful firm and the shape of the corporate governance legal framework: first basic hypothesis on the response to the key challenge

It follows from the arguments expressed above that the shape of a corporate governance legislative framework inspired by the enlarged team production approach would face a twofold challenge: on the one hand, the classic imposition of duties on directors and the provision of sanctions for not compliance (which is typical of all current frameworks); on the other hand and even more important, the design of a *system of incentives* that would need to stimulate directors and the whole company's organisation structure to "internalise" the enlarged team production philosophy, i.e. the design of a system of incentives that would stimulate the spontaneous adoption of the conduct required by the legal environment and possibly of an even higher standard of socially responsible and stakeholders' engagement - based conduct (which would lead to the promotion of human rights).

As regards the imposition of duties and the sanctions for non-compliance, it may be inferred, from the OECD Principles, that the duty of care and the duty of loyalty commonly provided for in the current legal frameworks would certainly need to be maintained and strengthened. As previously argued, the duty of loyalty – i.e. the duty to act in the best interest of the company and the shareholders - would need to be intended in the sense that the best interest of the company implies the safeguard of interests of existing stakeholders to continue to provide the company with the resources that are needed for the business activity survival and development[73]. With regard to multinational companies, it may be added that the best interest of the company would also imply, as part of the duty of loyalty, the consolidation of a base of satisfied stakeholders in all countries where the company operates, in order to

[72] Which issue has been the subject of much debate: see supra, notes 67 and 71.

[73] Retro, par. 2, 2.1.

ensure the best conditions for the sustainability of the global goodwill: arguably, the respect of the OECD Guidelines for Multinational Enterprises[74] could be assumed, for this purpose, as a *minimum* standard to be complied with. In fact, the Guidelines, which provide voluntary principles for responsible business conduct - and in so doing, indicate standards of behaviour by multinationals as regards their general policies[75], their disclosure of comprehensive information[76], their employment and industrial relations[77], their contribution to the protection of environment, public health and safety[78], their refusing bribery practices[79], their protecting consumers interests in the safety and quality of the goods and services they provide[80], their conducting the businesses in a manner compatible with science and technology policies and plans of the countries where they operate[81], their carrying on the activity in a competitive manner[82] and their compliance with tax obligations[83] - are, ultimately, aimed at fostering complementarities between the activities of multinational enterprises and sustainable development[84]. The Guidelines intend to do so by encouraging multinationals to *respect* human rights, not only in their dealings with employees but also with respect to others affected by their activities, and, in the context of this general objective, they recognise the importance of the development and effective application of self-regulatory practices and management systems that *foster a relationship of mutual trust between enterprises and society*[85]. Because this relationship is an essential condition for the sustainability of the goodwill, and because the *respect* of human rights which underpins the Guidelines is the first condition for the *promotion* of human rights, a first step in shaping an international corporate governance framework inspired by the co-associative model could be that of ensuring, by each individual State, that *all* its internal laws concerning the regulation of companies and their relationships with third parties reflect exactly the Guidelines, and that a breach of these laws by directors be *always* treated as a breach of the duty of loyalty, which should give rise to directors' liability towards the company, the shareholders and the stakeholders. Specifically, directors' liability towards the company could be based on the fact that directors, by failing to comply with the rules reflecting the Guidelines and thus by compromising the mutual trust between the business and society, have failed to pursue the best interest of the company. In turn, directors' liability towards shareholders could be based on the fact that this failure to pursue the best interest of the company, by resulting in a failure to pursue the sustainability of the goodwill, has compromised shareholders' rights to obtain continuing income from their shares, and – because the expectations about future dividends determine the increase in share values – has also compromised the possibility of increase in share value. Lastly, directors' liability towards stakeholders could be articulated in a liability towards the category of stakeholders which has been directly affected, in a negative way, by directors' failure to comply with the relevant rules (e.g., directors' liability towards consumers for a company's failure to guarantee

[74] The OECD Guidelines for Multinational Enterprises, 2000 (hereinafter: the Guidelines).
[75] Guidelines, p. 19
[76] Guidelines, p. 20
[77] Guidelines, p. 21
[78] Guidelines, p. 22
[79] Guidelines, p. 24
[80] Guidelines, p. 25
[81] Guidelines, p. 26
[82] Guidelines, p. 26
[83] Guidelines, p. 27
[84] Guidelines, Commentary, p. 41.
[85] Guidelines, p. 19 and Commentary, p. 42.

the quality and safety of products), and in a "derivative" liability towards other categories of stakeholders. This latter liability would derive from the fact that, by failing to comply with rules intended to safeguard one category of stakeholders and thus by compromising the continuation of this category's contribution, directors have compromised the possibility for all other categories of stakeholders to get continuous returns over time.

Once directors' duty of loyalty were conceived in this way, directors' duty of care, which is commonly understood as the duty "..to act on a fully informed basis, in good faith, with due diligence and care"[86], should also be conceived in a consistent way. As noted in the Principles' annotations, in some jurisdictions there is a standard of reference which is the behaviour that a reasonably prudent person would exercise in similar circumstances and, in nearly all jurisdictions, this duty does not extend to errors of business judgment, so long as board members are not grossly negligent and a decision is made with due diligence etc..[87]. The non-extension of the duty to errors of business judgement, generally known in several jurisdictions as "business judgment rule", is intended to safeguard the margin for managerial discretion. Once *all* internal laws concerning the regulation of companies and their relationships with third parties reflected, in each State, exactly the contents of the current Guidelines, the duty of care could be conceived as implying that acting on a fully informed bases and with the behaviour of a reasonably prudent person, or, in other words, avoiding gross negligence on the part of directors, would always make it necessary to develop and to effectively apply self-regulatory practices and management systems that *foster a relationship of mutual trust between enterprises and society*. This on the ground that, without this mutual trust, the survival and development of the business activity would be put at risk and it would not be possible to foresee the responses by stakeholders to company's choices, so that whatever action could not be taken on a fully informed basis. Consequently, the margins of managerial discretion could remain, but this managerial discretion, and the protection offered by the business judgment rule, would need to be circumscribed, *ex ante* (i.e, before the making of strategic decisions), to the choice of the self-regulatory practices and self management systems that foster the relationship of mutual trust between the business and society. The lack of a choice for any of these possible management systems would need to indicate a breach of the duty of care.

Amongst the several possible practices and management systems to be adopted for this purpose, the second challenge for a corporate governance framework inspired by the co-associative model would thus become how to encourage companies to opt for the creation of the consultative stakeholders committees that would make the model work.

The question would thus become which system of incentives could be designed, and within which legal framework. It was said that corporate governance 'embraces the entire framework within which companies operate'[88]: ultimately, all areas of law compose this framework, and do so by including national legislation, supranational legislation, i.e. EC legislation, and international law. The question concerning the framework within which the incentives could be designed includes both within which area of law, and at which level (national, supranational, international).

[86] OECD Principles, Annotations, p. 59

[87] Id. Previous note.

[88] A. Cadbury, Highlights of the Proposal of the Committee on Financial Aspects of Corporate Governance, in D Prentice and P Holland (eds), Contemporary Issues in Corporate Governance Oxford, Clarendon Press, 1993, p. 46.

Because the enlarged team production conception would value the building up and the maintaining of stable relationships with stakeholders based on a continuous satisfaction, which allow the survival and development of the business activity on a solid foundation and thus its long-term success, the key feature of this system lies in the fact that it would need to *encourage* the building and the maintaining of these relationships.

Hypothesis for this purpose could be designed both in the company law context and in the broader regulatory environment. With regard to the use of company law-related incentives, it must be noted that the purpose of some fulfilments that are typically required by company law in any jurisdiction – such as the requirements whereby the contributions in kind needs appraisal by expert professionals, or whereby the annual accounts of companies whose size exceed certain thresholds need to be subject to external auditors - can be found exactly in the protection of third parties dealing with companies. Their protection would, however, also be ensured by the adoption of the enlightened team production approach: therefore, a first kind of incentive for companies adopting this approach could lie in some requirements being made *less onerous* or *relaxed altogether* when their *ultimate purpose would be satisfied in any case by the spontaneous adoption, by the company concerned, of the enlarged team production model*. An example could be offered by the choice which was made, by the EC legislator, through the introduction of Directive 2006/68/EC on the simplification of the requirements that were laid down by the Second Company Law Directive on the formation and alteration of capital of public limited companies[89]. The underlying philosophy was, as stated in the Preamble of that Directive, to make more flexible the formation of capital of public limiting companies without decreasing the protection offered to members of the company and to the category of stakeholders which was regarded as directly affected, i.e., in that case the category of creditors[90]. The philosophy underlying that choice could be generalised to other requirements which, in the past experience, have not proven to be effective towards their purpose, such as the external auditing requirements[91] and others to be identified by an in-depth analysis of their effectiveness: the greater the protection *spontaneously* offered by a company to all stakeholders groups, the greater the degree of flexibility that could be introduced in these requirements. This because the protection of stakeholders, that the requirements under consideration aim to offer, would *already be offered* by the adoption of the enlarged team production approach.

A second kind of incentives, to be introduced in the broader regulatory framework, could lie in systems of tax reductions and/or financial incentives for companies adopting the enlarged team production approach in their operations at national and world-wide levels: in the case of multinational companies operating in less developed countries, the system could work as follows. Tax reductions and/or financial incentives in the form of non-refundable grants could be offered by the State of the parent company and the State of the local subsidiary to those multinationals that, in their operations in the less developed country, internalise the enlarged team production philosophy and aim at turning local population into new satisfied stakeholders groups by spontaneously promoting the human rights and increasing the standard of life of local population. The time from which the tax reductions and/or the non-refundable grants would be available could coincide with the time from which the company, by advertising its intention to form committees representing local workers,

[89] Directive 2006/68/EC of 6 September 2006, in 2006 OJEC L 264/32

[90] See Directive in previous note, Preamble, recital 2.

[91] Certainly ineffective, e.g., in the Enron case.

local consumers etc…, makes it clear its adoption of the co-associative model; the incentives would then need be confirmed, year by year, upon a satisfactory performance indicated by the committee to public authorities.

These incentive mechanisms, and the underlying strategy, are not new. This strategy is, in fact, already adopted by the EC's 'Competitiveness' program introduced for the period 2007 to 2013[92]. As known, this program offers grants to businesses which undertake responsible and sustainable development initiatives. Thus, the grant of tax reliefs and/or financial subsidies to businesses adopting the enlarged team production model, if these incentives were granted by the EC, could be seen as an extension of this program. Moreover, it may be argued that, if these incentives were granted by individual States, EC Member States would find that the subsidies and/or tax relief would be compatible with the EC objectives, and both these States and non-EC Member States would find that the incentives would contrast *neither* with the wider WTO system *nor* with the OECD constitutional framework.

Specifically, the compatibility between tax and/or grants incentives to companies adopting the enlarged team production approach and the EC legal order can be deduced, in addition to the fact that these incentives could be seen as an extension of the 'Competitiveness' program if they were granted by the EC, from the fact that the incentives would not fall within the prohibition of State aids to enterprises under Art. 87 of the EC Treaty if they were granted by Member States. This is because the adoption of the enlarged team production approach, and thus of the availability of the incentives, would be opened to *all* businesses: this implies that the incentives would lack the characteristic of being 'selective' in favour of some businesses, which feature is essential to the very definition of State aid[93]. Thus, they would not fall within the State aid concept, and this would apply to incentives addressed to EC companies operating within the Community. As regards EC companies operating in third countries and in particular in less developed countries, the incentives (in addition to not falling within the prohibition of State aids and to not affecting the trade as between Member States) would be consistent with the agreements entered into by the Community and third (less developed) countries, for these agreements are, ultimately, aimed at helping the improvement in the standards of living of the third countries concerned and this improvement would be also brought about by the adoption of the co-associative model and the consequent advancement of CSR on a global scale, thus by the advancement of human rights of local population.

In turn, the compatibility between the granting by individual States of the incentives under consideration and the WTO rules would derive from the fact that these incentives would cause no distortion to trade and no discrimination, and would help promoting the constitutional purposes of the WTO itself. The lack of distortion to trade and of discrimination would depend on the fact that, whatever the sector of activity and the markets in which the recipient companies export, the incentives could not (be expected to) favour domestic companies and productions in their competition with foreign companies. This is because such incentives would be equally available in any State *to whatever company*, either domestic or foreign, *adopts the socially responsible behaviour* inspired by the enlarged team production conception, and in so doing increases the standard of living of local population and promotes human rights. In turn, the increasing in the standard of living is, together with the promotion of

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[92] For details on this program, www.cipprogram.com

[93] ECJ 15 July 2004, Case 6/64, Flaminio Costa v. ENEL 1964 E.C.R. 585, Para. "On the interpretation of Art. 93".

employment and of sustainable development, an objective indicated amongst the WTO general goals, as well as amongst the constitutional purposes of the OECD Convention which refers to an healthy economic expansion in member countries as well as in non member countries (Art. 1 OECD Convention).

Ultimately, a business conduct reflecting the enlarged team production conception would, due to the internalisation of stakeholders' concerns in the decision-making and to the search of mutually beneficial relationships, enhance CSR well *beyond* the internationally accepted point of reference given by the universally known SA8000 standards (which is a global social accountability standards for decent working conditions)[94], and would be an effective response to the appeal launched to businesses of whatever size by the 2007 Dresden meeting of G8 Ministers of Labour who invited the adoption, by businesses, of socially responsible conduct.

3.4. The model of the successful firm: possible criticism and counter-arguments

The model of the successful firm can meet several objections.

First, it might be submitted that the fact that the Principles and their annotations, in recognising that the competitiveness and ultimate success of a corporation is the result of a teamwork that embodies contribution from a range of different resource providers, includes, in the list of resource providers, investors, employees, creditors and suppliers, but not the clients and local communities, implies that the model of the successful firm here proposed goes beyond the Principles and cannot be taken as a base for the development of a corporate governance framework applying those Principles.

Nevertheless, this objection would be unfounded for at least two reasons. First, the Principles only provide for *minimum standards,* and, in so doing, they suggest means to achieve the objectives that they identify. As a result, any theory of the operation of successful companies which suggest a conceptual structure which is more "tailored", than the general theories of the operation of a firm, to a successful firm, can better form the basis for a corporate governance framework to achieve the objectives identified by those Principles and is also consistent with the Principles themselves. Second, the fact that - unlike employees, creditors and suppliers - customers, together with local communities, are not always indicated amongst the resources providers/stakeholders, offers a clear indication about the case *when* these groups can also be assumed to be resources providers: arguably, they can be assumed to be resources providers, and thus stakeholders, when they have a *lasting relationship* with the company, i.e. a continuous provision of (financial and human) resources over time that, ultimately, brings them within the "team" of those interested in the success of the company (together with employees, creditors and suppliers which are always assumed, by the principles, to belong to that team). Again, the example of the turning of "occasional customers" into "stable customers" illustrates why this category can become part of the "team", and when customers provide the essential financial resources, and the base for the survival in the market, without which the resources provided by the other stakeholders would be purposeless and without which the success of the company, highlighted by the Principle, would be impossible. The same

[94] SA 8000, which is based on the UN Universal Declaration of Human Rights, Convention on the Right of the Child and various International Labour Organisation Conventions, is developed and overseen by Social Accountability International: see http://www.sa-intl.org/index.cfm?&stopRedirect=1

applies to local communities, when perceive positive effects from company's activities and they provide the company with the other kind of stakeholders (employees, creditors, customers etc..).

Second, it may be objected that the validity of whatever model lies in its capacity to predict what may occur in the real world and, in this connection, in the ability of the assumptions on which the model is based to reflect the behaviour of agents in the real world. On this base, the criticism may be that, in the real world, it is difficult to identify when directors' strategy aims at maintaining long-term relationships with the various categories. In addition, it might be said that, in case of public companies carrying out large scale commercial enterprises, such as listed companies with thousands of employees and of clients, the model could not work because it would be impossible or difficult even to monitor or to establish whether the company is maintaining long-term relationships with individual employees or individual customers, and in any case that, if directors perceive that long-term relationship were not important for profitability, they would not attach importance to them. Nonetheless, this objection would neglect the very purpose of the model and, with this, the purpose of Principles themselves. The Principles have been elaborated to indicate not what occur or may occur in the real business world in the way in which publicly listed companies operate, but what *should occur*; in other words, they do not aim to predict possible situations, but – as above indicated – to set objectives. The same holds true for the enlarged/enlightened team production model, which intends to indicate how, in terms of approach by directors in the fulfilment of their duties, the objectives set out by the Principles could be *best* achieved: unlike economic models, the purpose of the conceptual structure here proposed is to suggest what *should* occur (and it could not be otherwise, in order for this model to be consistent with the principles). In addition, because the Annotations - which concern exactly publicly listed companies – stress the need for high ethical standards, in the long term interests of the company, to make the company credible and trustworthy not only in day-to-day operations but also with respect to *longer term commitments* (p. 60), it can be argued that all long-term relationships, without which long-term commitments could not be conceived, are important for large scale commercial enterprises too, and thus should be fostered by the strategies designed by directors.

Third, it may be submitted that the Principles – contrary to what was argued above - cannot give the lie to the shareholders primacy model on its entirety, but rather reflect a compromise, because they state that there is no good single model of corporate governance and because they were agreed also by countries embracing the shareholders primacy. The response to the objection is, however, implicit in the arguments formulated in the previous pragraph: specifically, even though the principles may reflect a compromise that lead to common elements, the achievement of the compromise inevitably determines the giving up, by some negotiating parties (States), of their own original positions (position given, by assumption, by a vision of the shareholder primacy model as the only good one) in the negotiation process, and it makes important the search of the *best* way in which the outcomes advocated by the compromise (in this case, the objectives advocated by the principles) can be achieved. Exactly this search lies behind the proposal for the co-associative model.

Fourth, it may be objected that the enlarged/enlightened team production model, by emphasizing a result, is not so different from the shareholders primacy model: specifically, it may be submitted that the shareholders primacy model – by requiring the maximisation of shareholders wealth – also uses an objective yardstick, where shareholders wealth is measured by shares value. This objection might be strengthened by saying that share value can be easily read from the market, whereas the economic and financial conditions may not be properly assessed in the event of accounting manipulations.

Nevertheless, the reply to the objection appears to be easy. First, the event of accounting manipulations falls exactly within the category of behaviours inspired by a contrasting interest – i.e., by an interest to conceal the true economic and financial conditions, and thus an interest in contrast with the survival and development of the company – that a conduct guided by an enlarged team production model would aim at avoiding and would actually avoid. It would do so, exactly because the conduct inspired by the enlarged team production model, in seeking the truest illustration of the economic and financial conditions of the company, would have no incentive to accounting manipulations, and would not need to do so because the persistent satisfaction of stakeholders groups would lead to the maintaining of the wealth-creating cooperation that is at the basis of sound economic and financial conditions that can last over time. In addition, a framework leaving still space for accounting manipulations would be in contrast not only with the enlarged team production model, but with the OECD Principles in themselves. Second, the criticism against the share value parameter already put forward by the position advocating the team production model – i.e., the realisation that the share value is only one indicator, and that many other indicators are equally if not even more important - holds fully valid also in the enlarged team production model. Third, and most importantly, it may be noted that the shareholders primacy model, when indicating as a key concern the "maximisation" of shareholders' wealth, fails to consider the fact that, due to information asymmetries, *it is not even possible* to know whether the profits or the share value are actually maximised during any given financial year: if "maximisation" is measured according to what is known by them, directors may believe, e.g., that the profits is maximised in a given period because all opportunities *known to them* have been exploited. Nonetheless, *what is known* to directors could well be different from *what would have been actually possible* to achieve, at least to the extent that what would have been actually possible to achieve to the company, in terms of profits, depends on what would have been stakeholders' responses to company's choices if these choices had been different. Consequently, it may well be argued that the "maximisation" advocated by shareholders primacy ultimately ends up relying on the *subjective perception of what is maximised*, whereas the fact in itself of the *continuation* of the business activity over time would be an *objective* yardstick. In this regard, the model here proposed would indicate that "maximisation" can refer to the survival of the business activity in itself (i.e., the benefits brought about by the business activity to shareholders and to other stakeholders would be maximised because the business activity survives).

3.5. Potential directions for future research

At least four potential directions for future research appear to be opened by the conception of the successful company as a company whose corporate governance approach would be based on the co-associative model and by the shape of a corporate governance system based on this approach.

A first direction for research would of course lie in the deepening of the study on the optimal features of a corporate governance framework that would be based on the enlarged team production model and would encourage companies to promote the advancement of human rights. Within this line of research, the modalities of stakeholders' participation by means of the optional committees, namely the composition of the committees, their renewal, the internal working and so on, are all issues which appear to deserve to be dealt with by in-depth proposals. Within this research direction, a research issue would be how to avoid that the working of the enlarged team production model would risk being threatened by "free-riders" or by opportunistic behaviours. E.g., it may be said that it could be threatened by individuals that may express an interest in membership of the committees, but that, at the same time, may have an interest in competing businesses and may disclose "sensitive" information to competitors. A legislative corporate governance framework inspired by the enlarged team production approach would need to find the way to avoid this risk: the hypothesis on the composition of the committees, on their renewal and on their internal working would need to put forward solutions in this respect. Moreover, the fact that the permanent dialogue between the company and the stakeholders' committee would serve to consolidate long-term relationships, to transmit stakeholders the message that their concerns are internalised in the decision-making and thus to achieve stakeholders' satisfaction, would raise the issue of how to monitor this satisfaction and the company's ability to attract an increasing stakeholders base over time. The response could lie in the identification of a set of non-economic and non-financial parameters which could indicate, within an appropriate length of time, the degree of satisfaction needed for all current stakeholders, and the company's ability of turning potential stakeholders into actual stakeholders. Because this ability would correspond to the business' ability of maintaining and increasing the goodwill, nationally as well as internationally, and because in the enlarged team production model this maintaining and increasing of the goodwill would correspond to the promotion of CSR and to the advancement of human rights, these parameters could serve three purposes. One would be to provide a measure to assess satisfactory performance of directors' duties. The second would be to offer a 'score' through which to monitor the company's performance in terms of CSR and advancement of human rights. The third, and consequent, purpose would be to offer a contribution to the discussions on corporations and human rights which have highlighted the importance of learning, capacity-building and the prevention of disputes in the relationships between corporations and stakeholders. These discussions have indicated that, at the corporate level, capacity building and learning could take place through the transfer of learning from one site of operations to another[95]. Consequently, it may be argued that, because the assessment of their own interest under a long term perspective should be part of the learning under the enlarged team production approach, the parameters could also serve to assess the effectiveness of the transfer of learning in each period of measurement and the areas where improvement may be needed.

A second direction could relate specifically the model here proposed with EC law. In a preliminary work, it was argued that each of the key elements of the most widely accepted definition of corporate governance, which can be extrapolated from the OECD Principles, could be red as implicitly dealt with in the acquis communautaire, and that, by reassembling all indications, corporate governance as implied in EC law could be read as "the system by which companies are directed and controlled, through a set of relationships between the management, the board, the controlling

[95] Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes, Report of Multi-Stakeholder Workshop report, Harvard Business School, 11-12 April 2007, p. 13

shareholders and other stakeholders, in such a way as to pursue the ultimate objective of development of the business activity under sound economic and financial conditions"[96]. Because this work suggests that the co-associative model could offer, ex ante, the optimal conditions for making it possible the development of the business activity under sound economic and financial conditions, proposes how the model could work and formulates first hypothesis on how a corporate governance framework based on this model could be shaped, a research direction could be which pieces of the acquis communautaire would *already* be *not only compatible*, but also *geared* to the working of the co-associative model. Here, the attention would need to be paid not only on EC company law, but also on EC labour, social, consumer and contract law, to identify where the acquis communautaire would favour the building of long-term relationships valued by the co-associative model as essential for the long-term business survival. It was stated by the Commission that "CSR mirrors the core values of the EU itself"[97]: because the co-associative model would explain why business success would be related to CSR and why it could go hand in hand with the promotion of CSR itself, a research line aimed at finding which pieces of the acquis communautaire would already be geared to the working of the co-associative model would also indicate which pieces of the acquis communautaire could be regarded as being more directly linked to CSR.

A third direction could lie in the proposition of a partially new approach to assess the protection of investors in comparative corporate governance literature. Prior to the corporate collapses at the start of the century, a comparative literature had already construed an 'investor protection index', based on a pre-defined set of shareholders' rights and had found that common law countries perform better than civil law countries; the rights included in the index were: proxy by mail; the block of shares before shareholders' meetings; cumulative voting or proportional representation; judicial avenues to challenge decisions of either management or the assembly, or the right to require the company to purchase their shares; pre-emptive rights, i.e. the right to buy new issues of stock; right of shareholders holding a certain percentage of the share capital to call on extraordinary meeting[98]. Nevertheless, this index and the related findings have been widely criticised by the subsequent literature, which has pointed out the ability of different legal systems to achieve comparable outcomes in terms of investors' protection by using different instruments[99], the omission in the construction of the index of fundamental elements relating to corporate law on the whole, which elements have been considered in constructing a new shareholder protection index[100], and the importance of the allocation of power in corporations[101]. On the basis of the enlarged team production approach, or in other words of the co-associative model proposed in this work, it could be argued that a 'refined' investors'

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[96] L.Cerioni, 'Corporate governance in the European Community: A (proposal for a) re-reading of the key defining elements in light of EC law, and the scope for a slightly "refined" definition' available at: http://hdl.handle.net/2438/1566

[97] COM (2006) 136 final, "Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility"

[98] R. La Porta, F. Lopez de Silanes, A. Sheifer, and R. Vishny, Law and Finance, 106 J.Pol.Econ. 1113 (1998)

[99] E.g.: U.C. Braendle, Shareholder protection in the USA and Germany: - "Law and Finance" Revisited, 2006 German Law Journal 257

[100] P.P.Lele, M.M.Siems, Shareholder protection, A Leximetric Approach, 2007 Journal of Corporate Law Studies 17

[101] S. Cool, The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers, 2005 Delaware Journal of Corporate Law 697

protection index could include, in addition to the various shareholders' rights, a new dimension. This new dimension, which would be necessary for assessing the safeguard of shareholders' fundamental right, the right to future income - without which the aspects of protection identified by the literature just mentioned would be of limited usefulness - would be given by the *degree of co-operation* between the company and its stakeholders. This co-operation could in fact be seen as the best condition, *ex ante*, for ensuring the goodwill and the shareholders' rights to future income, and a greater degree of co-operation encouraged by the legal system and culture of co-operation could correspond to an higher ranking in this refined investors protection index. On this bases, comparative corporate governance research may use new benchmarks in assessing the quality of corporate governance systems and of the surrounding frameworks in several countries, both within the EC and outside the EC.

A fourth direction could bring corporate governance research at the intersection with the 'global governance' research, which explores the ways in which the actors, the institutions, the processes interact to ensure accountability in decision-making processes and global democracy. The literature on global governance, in pointing out that to a substantial and growing extent rule making directly affecting the freedom of actions of individuals and firms, as well as of nation states, is taking place in global settings created by states but no longer under their effective control, has addressed the question of what happens to accountability when there is no principal and no antecedent well defined standard[102]. It has found a reply whereby accountability in this context is no longer a matter of compliance with the rule set down by the principal, but rather provisions of good reasons – offered by "agents" to *each others* – for choosing, in light of fresh knowledge, one way of *advancing a common project*, and has referred to this kind of dynamic accountability as 'deliberative polyarchy'[103]. Deliberative polyarchy would be shaped by mutually re-enforcing moral and practical concerns, and the decision-making would work through mutual reason-giving, with the aim of finding solutions that others can reasonably be expected to support as well.

The convergence between this global governance research and corporate governance research would be brought about by the enlarged team production model. This because an enlarged team production model working by means of a permanent dialogue between the directors of corporations and the committee representing stakeholders groups, and a corporate governance legislative framework aimed at encouraging the adoption of such a model by means of incentives, would bring about *nexus of reciprocal accountabilities*: accountability of the company towards the representative committees, for taking their inputs into the decision-making process; accountability of the representative committees towards the company, for presenting to the company the real concerns of stakeholders; accountability of the representative committees towards the stakeholders, for presenting their concerns to the company; accountability of the company towards the regulator, for implementing the model (and thus advancing CSR and human rights) and thus for "deserving" the incentives; accountability of the regulator (national, international, EU) towards the company and the stakeholders, for granting and maintaining the incentives. This accountability of agents towards each others is the precondition for directors' *ultimate accountability* not towards someone in particular, but *for a result which is in the common interest*: once the nexus of reciprocal accountabilities, intended as mutual reason-giving, works well and allows the building and maintaining of long-term relationships based on

[102] J.Cohen and C. Sabel, 2006, Norms and Global Institution, Prepared for Princeton Global Governance Workshop, Princeton University, 16-18 April 2007.
[103] Id. previous note.

transparency and trust, it makes possible the objective result (business survival and development under sound economic and financial conditions, thus the maintaining of the goodwill) which is in the common interest, and for which directors would be accountable.

Therefore, the intersection between the corporate governance research and the global governance research could be as follows: the corporate governance research could 'borrow' from the global governance literature the concept of 'deliberative cooperation' to explore the most efficient and effective ways in which the nexus of mutual accountabilities can last over time, as it needs to do in order to ensure the accountability of directors for a result (the survival and development of the business activity, thus the maintaining of the necessary contributions by stakeholders). In turn, the 'global governance' literature above indicated could find, in the interrelationships (between shareholders, directors, committees representatives of stakeholders and national and/or supranational authorities granting incentives) that would be fostered by a corporate governance framework inspired by the enlarged team production approach, the settings to propose 'deliberative polyarchy' mechanisms.

Conclusion

The international corporate governance literature has long been dominated by discussions concerning the separation between ownership and control, the issues of accountability of directors to shareholders, the dispute between the theories whereby companies are to be run in the interests of shareholders and the stakeholders' theories, with the prevalence of the former over the latter, and the identification of the corporate objective as the objective established by shareholders or as the maximization of shareholders' wealth or of the "long-term shareholders' value", which found their roots in the Anglo-Saxon context of corporations characterized by dispersed ownership.

Nevertheless, along with the aspects highlighted by the part of the Anglo-American literature which has been trying to shift the emphasis away from the classic shareholders vs. stakeholders alternative, this work has suggested that the best achievement of the long-term success of the company, which emerges as the ultimate goal from the OECD Principles in their 2004 version, and from the accompanying Methodology, would make it appropriate a new framework of the understanding of the operation of a successful company. This framework, by drawing a conceptual distinction between *competing demands* of the various constituencies and *contrasting interests*, identifies the interest of the company in the survival and development of the business activity under sound economic and financial conditions, and, for this purpose, it specifies that the most solid foundation to achieve this goal is the building of long-term relationships with all stakeholders groups, intended as groups of stable resource providers who are interested in getting continuous returns over time. The approach suggested to achieve this result, which result would minimise the general risk of withdrawal of stakeholders' contributions which is incumbent on any business activity, has been defined in terms of "enlarged team production" model or "co-associative" model. It overcomes the classic distinction between shareholders' models and stakeholders' model, by indicating that the interests of any constituency are effectively protected *as a consequence of the achievement of a result* which concerns the business activity on its own, and which would be consistent with the increasingly global demand for a socially responsible business behaviour.

The co-associative model – as this work has attempted to demonstrate – would "pass" the test under a property rights perspective, and would bring a seemingly new dimension into the research theme involving multinational corporations and human rights, and the shape of a corporate governance framework based on this model would arguably be compatible with the wider international legal order as well as with EC law. Consequently, the new start in corporate governance research, debates and related legislative policy options advocated by this model, as well as the issues that it raises and that have been indicated as directions for future research, would represent (maybe a difficult but) a major challenge at a time, such as the current one, when businesses behaviour and the global impact of their operations have become a world-wide concern for preventing the market-based economic system for threatening its own long term sustainability.