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Abstract

This article, published in Mandarin and English, defines corporate social responsibility in China. It further examines some existing problems and CSR incidents in China, and analyses the relevant legal regulations. Finally, the article provides suggestions for changes to Chinese substantive and procedural law.

Keywords

corporate social responsibility, CSR in China, corporation law of the People's Republic of China

CORPORATE SOCIAL RESPONSIBILITY IN CHINA

Jessica Jue Fang*

This article, published in Mandarin and English, defines corporate social responsibility in China. It further examines some existing problems and CSR incidents in China, and analyses the relevant legal regulations. Finally, the article provides suggestions for changes to Chinese substantive and procedural law.

The concept of corporate social responsibility (CSR) in China

There is no Chinese Supreme Court (the equivalent of the Australian High Court) authority on how and why the concept of CSR was introduced into the Corporation Law of the People's Republic of China (PRC). Scholars surmise that Chinese legislators considered the development of the corporate enterprises in China and introduced the concepts of corporate entity and limited liability from the US and Germany.¹

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¹ 李进, '构建我国公司社会责任立法研究' 2009年4月22日, 新疆财经大学, 第4页, 第7页/ Li Jin, 'Study on Building the Corporate Social Responsibility Legislative of Our Nation' (2009) *Xin Jiang University of Finance & Economics* 4,7

公司社会责任在中国的发展与现状

方珏, 吉姆。考瑞

本文界定了在中国, 公司社会责任在的定义。随后, 本文讨论了目前中国在公司社会责任领域的现存问题。其后本文列举了一些社会责任事件的实例并分析了相关法规。在本文的最后一部分, 作者依据前文的分析, 对中国的相关实体法以及程序法的法律法规提出了一些建议。

中国引进公司社会责任这一概念的沿革

在中国最高人民法院所做出的判决中, 并没有任何涉及关于为何要将公司社会责任这一概念引进中国。但中国法律学者们一贯认为, 中国立法者基于中国公司的发展现状, 认为引进这一概念势在必行, 因而将源于美国和德国的'公司社会责任'写入法律。

The definition of CSR in China

Although there are various definitions of corporate social responsibility given by scholars globally, Prof Liu Junhai, a leading Chinese scholar on corporate social responsibility, has proposed with a Chinese definition: The company should not only aim at making the maximum profits for shareholders, but also consider social welfare. This includes areas such as the welfare of employees, customers, creditors, other competitors and the environment.²

In Australia, the Corporations and Markets Advisory Committee (CAMAC) has taken a similar view. According to CAMAC, a well - managed company will have regard to a variety of risks.

Factors that impinge on its operations include relevant social and environmental risks.³ Although this view is garnered from a business perspective, in essence it is the same as the Chinese definition.

公司社会责任在中国的定义

尽管世界各地的法律学者们对‘公司社会责任’这一概念给出了多种版本的解释。刘俊海教授，中国公司社会责任方面的专家对此概念给出了最符合中国国情的解释。刘教授认为：公司不应当仅仅将追逐股东的最大利益作为自己的目标，社会责任也是它们所必须考虑的一个重要因素。该因素包括了：雇员，客户，债权人，竞争对手的福利以及对环境所造成的影响。

在澳大利亚，公司与市场建议委员会采用了与刘教授类似的解释。该委员会认为：一个管理良好的公司，应当考虑到公司经营过程中存在的各种潜在风险。

那些对公司运作造成影响的因素包括社会和环境方面的因素。尽管公司与市场建议委员会的解释是从商业角度来判断，其精髓部分与刘俊海教授所给出的中国式定义是相同的。

² 刘俊海，公司社会责任，法律出版社，第六页。/ Liu Junhai, *the Corporate Social Responsibility* (Law Press, 1999) 6.

³ Corporations and Markets Advisory Committee (CAMAC), Australian Government, *The Social Responsibility of Corporations* (2006) [45].

A Chinese company makes profit in the social context. Its manufacturing provides society with products and services that fulfill the needs of the society. In this sense, the company should be responsible for the results that its products and services produce.⁴

The scope of the responsibility

There are two views regarding the scope of responsibility. The narrow view is that corporate responsibility can be divided into corporate economic responsibility, corporate social responsibility, corporate legal responsibility and corporate ethical responsibility.⁵ Corporate social responsibility also refers to such non-profit behavior as philanthropic donations and similar investment for the benefit of the wider community.⁶

公司赚取利润是以在一个社会大环境中运作为前提的。存在于社会中的公司生产产品，提供服务来满足社会的需求。从这个层面上来说，这个公司需要对自己生产产品，提供服务过程中对社会造成的影响承担责任。

公司社会责任的范围

关于公司社会责任的范围，在中国有广义和狭义两种观点。狭义的观点认为：公司社会责任可以分为公司经济责任，公司社会责任，公司法律责任和公司道德责任。这里所指的狭义社会责任，是大的社会责任下的一个分支。从狭义上来说，公司社会责任仅仅指就是公司的非获利行为，例如：捐赠，向公益社会团体投资

⁴ 巨龙, '论公司的社会责任' 2010年第九卷第三期, 安徽电子信息职业技术学院学报, 第137页/ Ju Long, 'the Corporate Social Responsibility' (2010) 3 *Journal of Anhui Vocational College of Electronics & Information Technology* 137. <http://dlib.cnki.net/kns50/detail.aspx?QueryID=17&CurRec=2> at 17 July 2011.

⁵ 张士元, 企业法, 北京:法律出版社, 第122页。/ Zhang Shiyuan, *Enterprise Law* (Law Press, 2005) 122.

⁶ 崔汪卫, '公司社会责任的法理分析', 安庆师范学院学报(社会科学版) 2010年29卷, 第21页/Cui Wangwei, 'An Analysis of Corporate Social Responsibility' (2010) 29 *Journal of Anqing Teachers College (Social Science Edition)* 21.

<<http://epub.cnki.net/grid2008/detail.aspx?QueryID=4&CurRec=1> > at 17 July 2011.

The broad view is that corporate social responsibility includes legal responsibility and ethical responsibility. When the concept of the market economy was brought to China not long ago, Chinese companies did not have a strong sense of social responsibility. It has been seen to be more effective to stress the underlying ethical responsibility when presenting the legal responsibility.

The existing problems

A conclusive definition of corporate social responsibility is elusive and the variety of the definitions in itself makes it difficult to enforce this responsibility. In addition, Chinese companies lack the internal drive to undertake social responsibility. According to the traditional view, the company should only pursue the interest of the shareholders.⁷

从广义上来说，公司社会责任包括了公司法律责任和公司道德责任。由于‘市场经济’这个概念被引入中国时间尚短，大部分中国公司没有较强的公司社会责任感。从这个角度上来说，从广义上定义中国公司社会责任，也就是说将各种可能包含的责任都归入公司社会责任这一大的概念是一种更为行之有效的办法。

当前存在的问题

因为公司社会责任没有一个防止四海皆准的定义，过多的不同定义是的推行公司社会责任成为一个难题。更何况，大部分中国公司缺乏承担社会责任的内在动力。传统观点认为，公司所追求的，只能是股东利益的最大化。

⁷ 袁碧华, ‘公司社会责任为何如此难以实现——基于理想和现实的思考’, 2010年01期, 西南民族大学学报, 第194页/Yuan Bihua, ‘The Hardship of Corporate Social Responsibility in theory and practice’ (2010) 221 *Journal of Southwest University for Nationalities* 194. <<http://dlib.cnki.net/kns50/detail.aspx?QueryID=90&CurRec=1> > at 17 July 2011.

Corporate social responsibility and directors

Ineffective administrative structures allow companies to ignore social responsibility and focus on short-term interests only.

As the directors are directly involved in the administration of the company, they make decisions for the operation of the company; thus they theoretically undertake unavoidable responsibility.⁸

Social responsibility must be in accordance with the long-term interest of the company. Moreover, if the director has exercised the duty of honesty and loyalty, the directors will not be held liable, even if this kind of long-term interest was not achieved.⁹

公司社会责任与董事

公司行政管理结构的低效率是造成公司无视公司社会责任及追求眼前利益的主要原因。由于股东直接参与公司的行政管理，他们对公司的运营做出决策，因此，他们也应当为自己做出的决策承担不可推卸的责任。

公司社会责任时应当与公司的长远利益相一致的。而且，如果该董事已经尽到了忠诚义务，那么，尽管公司所追求的长远利益并没有达到，该董事也不需要为自己做出的决策负责。

⁸ 邹小静，公司社会责任：以规制公司董事为视角，2010年01期，华中师范大学研究生学报，第21页/Zou Xiaojing, 'Corporate Social Responsibility: the Directors' (2010) 1 *Huazhong Normal University Journal of Postgraduates* 21
<<http://epub.cnki.net/grid2008/detail.aspx?QueryID=79&CurRec=1>> at 17 July 2011.

⁹ 吴黄影，公司管理层和公司社会责任初探，企业导报2010年第2期，第181页./Wu Huangyin, 'Research on the Executive and Corporate Social Responsibility' (2010) 2 *Guide to Business* 181.
<<http://epub.cnki.net/grid2008/detail.aspx?QueryID=154&CurRec=1>> at 17 July 2011.

Problems in Chinese companies

There is still a tendency to simply ignore the separate personality of the company or give it scant respect. However, the law now holds shareholders responsible if they try to escape liability by shielding behind the legal personality of the company. This also applies to the directors in Chinese law.

The company's decision can make the directors personally responsible for lack of social responsibility, as its decisions are made by both the boards of directors and the meetings of shareholders. Managerial decisions are drafted and decided by the board of directors and it is possible to hold the directors responsible for their own decisions.

Stakeholders can bring a derivative suit to sue the directors. Stakeholders can be divided into two groups: main stakeholders and minor stakeholders. The main stake holders include shareholders, managers, employees and main creditors. They can bring the derivative suit, while the minor stakeholders can bring a suit under prescribed circumstances.

中国公司现存的问题

猖獗的忽视公司法人资格为股东们逃避公司社会责任提供了可乘之机。因此，现行法律规定，无视公司社会责任可能会导致该董事为逃避社会责任承担个人财产责任。根据这一原则，若该董事企图通过主张公司的法人地位而规避自身的财产责任，那么该董事也需要为这种滥用公司独立人格的行为负责。

公司的决策可能使该公司的董事为公司规避社会责任负责。公司的决策是由董事与以及股东大会作出。之后，再由董事会草拟和最终决定。从这个层面上来说，使董事们对自己通过董事会所作出的决策负责是可能的。

公司的利益相关者们可以提起股东派生诉讼。而公司的利息相关者可以被细分为主要利益相关者和次要利益相关者。

主要利益相关者包括股东，公司经理阶层，公司雇员以及主要债权人。主要利益相关者们享有直接提起股东派生诉讼的权利。而次要利益相关者们只要在法律有特殊规定的情况下才可以提起股东派生诉讼。

If the rule of holding directors liable for the company's breach of social responsibility can be embodied into Chinese Company law, it would be more effective than the principal duty of loyalty and honesty in s 5.¹⁰

The social responsibility committee of the board of directors

Some scholars have suggested that there be a social responsibility committee of the board of directors. This committee could ensure that consideration of social responsibility becomes an integral part of the daily decision making of the company.

Although the directors are professional company operators, they may not be competent in analysis of the social influence of the company behaviors. The committee may also help to make the evaluation of corporate social responsibility more professional. The directors would not be responsible for the decision on social responsibility if they do not need to evaluate it.¹¹

在公司违法社会责任的情况下，追求董事的个人责任这一原则是应当写入中国公司法的。这种法律责任，事实上应当比在中国公司法第五条规定董事的忠诚义务更加行之有效。

公司董事会社会责任委员会

部分中国法律学者建议，公司应当设立一种社会责任委员会。该委员会可保证在公司做出决策的过程中，对于社会责任的考量成为其中不可或缺的一环。

尽管董事们是专业的公司运营者，他们却不是分析公司行为对社会可能造成的影响方面的专家。公司社会责任委员会还可以帮助董事们对公司社会责任的估量达到一个更加专业化的水平。如果董事们不需要评估公司行为的社会责任影响，那么他们就不需要为此负责。因为对此作出评估的是社会责任委员会。

¹⁰ Above n 6.

¹¹ 蒋大兴，公司社会责任如何成为“有牙的老虎”——董事会社会责任委员会之设计，2009年第4期，清华法学，第28页。/ Jiang Daxin, 'The Design of social responsibility committee

of the board of directors' (2009) 4 *Law Journal of Tsinghua University* 28
<<http://epub.cnki.net/grid2008/detail.aspx?QueryID=231&CurRec=1>> at 17 July 2011.

CSR lawsuits in China

I. Sanlu (SL) milk power

SL Group Company was a Sino-foreign jointly funded company. Its controlling shareholder was a company in China. The other main shareholder was a New Zealand company. SL, set up in 1956, was the biggest milk powder manufacturer in China. By 2008, its sales volume had ranked No 1 in China for 15 years. It was ranked first in the Chinese dairy product industry by *Forbes Magazine* in 2006, but went bankrupt in 2009.

On March 2008, it was discovered that SL had added a poisonous chemical, which will cause kidney stones, to their milk powder to improve its taste. Up to 5 September 2008, 341 children who drank SL milk were diagnosed with kidney stones and three of them had died. Consumer complaints in March 2008 had received a blank assertion that the milk powder was safe to use.

The chairman of the board of directors of SL was convicted of 'employing dangerous means to endanger public

中国的公司社会责任诉讼

1. 三鹿奶粉事件

三鹿集团在破产前为一中外合资公司。该公司的控股股东为一个中国公司。另一主要股东为一个新西兰公司。

三鹿集团于 1956 年建厂，是中国最大的奶粉制造商。至 2008 年，三鹿集团的奶粉销售量在中国已连续 15 年排名第一。2006 年，福布斯杂志将三鹿集团评为中国乳制品产业部分的第一名。该集团于 2009 年破产。

在 2008 年 3 月，三鹿集团被发现在奶粉中添加一种可导致肾结石有毒化学物质。该化学物质的功效是使奶制品口味更加醇厚。至 2008 年 9 月，已经有 5341 例婴幼儿因为引用三鹿奶制品而引发肾结石，其中三例死亡。三鹿集团于 2008 年 3 月起开始收到消费者投诉。但该集团坚称他们已对乳制品坐车测试并未发现任何问题。

三鹿集团董事长根据中华人民共和国刑法被判'以其他危险方式危害公共安全'并被判处终身监禁以及判交罚金。两名向三鹿提供该有毒物质的供货商被判处'以其他危险方式危害公共安全'并被判处死刑。

security'.¹² She was sentenced to life imprisonment and a fine. Two suppliers who had provided the poisonous chemical to SL were also convicted of convicted of 'employing dangerous means to endanger public security' and sentenced to death. Three other senior executives, who were convicted of 'produce, sell foods that are mixed with poisonous or harmful non-food materials'¹³ and were sentenced to 5 to 15 yrs imprisonment. All of the convictions were appealed and the Higher Court of Hebei Province upheld the trial judgment. Eight government officers who had been involved in the incident were dismissed or demoted.¹⁴ By 2009, 95% of the victims had received compensation.

II. Haagen-Dazs

In 2005, Haagen-Dazs (Shen Zhen) was found to be manufacturing its ice cream and cake products in a dirty environment. However, they were not sued.

本案的其他三名三鹿高层被判'生产,销售有毒有害食品罪'并判处 5 至 15 年有期徒刑。本案所有被告均提出上诉。河北省高级人民法院驳回了他们的上诉并维持原判。8 名涉案政府官员均被撤职或者受到降级处分。至 2009 年,三鹿时间 95%的受害者都获得了不同程度的赔偿

2. 哈根达斯事件

2005 年,深圳哈根达斯被举报在无证照的'三无'黑作坊内生产冰激凌及蛋糕。关于该事件无人提起诉讼。深圳哈根达斯向当地工商部分缴纳了 5 万元人民币的行政处罚金。深圳哈根达斯于该事件后继续照常营业。该店生产经营并未受到产品质量低下的影响。事实上,在中国大部分公司社会责任事件都没有提起诉讼,而是代之以适当的罚金。

¹² *Criminal Law of the People's Republic of China* 1997 (PRC) s 114.

¹³ *Ibid* s 144.

¹⁴ 杨守勇,朱峰,三鹿系列刑事案:河北高院维持对田文华等人一审判决,2009年3月27日,中国法院网。/ Yang Shouyong, Zhu Feng, *The SanLu Criminal cases series: The Higher Court of Hu Bei Province affirmed the trial judgment* (27 March 2009) The Supreme People's Court of the People's Republic of China <<http://www.chinacourt.org/html/article/200903/27/350446.shtml>> at 7 July 2011.

Instead, they paid a fine of RMB 50,000 (\$ 7142) as an administrative penalty.¹⁵ Haagen-Dazs has continued to operate as usual after the incident. Their business was not influenced by the low quality of their product.¹⁶ Most of the other CSR incidents were not brought to court and ended up with a moderate penalty.

The CSR policy of the Chinese Government

According to the 10th five - year plan¹⁷ (valid from 2001 to 2005), the Chinese government announced its intent to

中国政府的公司社会责任相关政策

根据中国中央政府制定的“第十个五年计划”（有效期为 2001 年至 2005 年），政府设定的降低污染物排放比例为 10%。而实际上降低的比例少于 10%。在“第十一个五年计划”（有效期为 2006 年至 2010 年）中，政府制订了再减少 10% 的污染物排放量的目标。根据“第十二个五年计划”中对“第十一个五年计划”的总结中指出，在 2006 年至 2010 年期间，实际减少排放量为 14.29%。

¹⁵ 每周法治热点，深圳哈根达斯被罚 5 万元，2005 年 6 月 27 日，人民法院网。/Weekly legal issues, *Haagen-Dazs (Shen Zhen) was fined RMB 50,000*, (27 June 2005) The Supreme People's Court of the People's Republic of China <<http://www.chinacourt.org/html/article/200506/27/167004.shtml>> at 7 July 2011.

¹⁶ 信息时报，广州“哈根达斯”销售未受到深圳事件影响，2005 年 6 月 19 日，新浪网。/China Info Times, *Haagen-Dazs (Guang Zhou)'s business was not influenced by the Shen Zhen Branch* (19 June 2005) Sina Guang Dong <<http://news.gd.sina.com.cn/local/2005-06-19/1411368.html>> at 7 July 2011.

¹⁷ The Chinese five – year plans are guidance plans drafted by the Chinese state council, which are subsequently approved by the National People's Congress and then released through official medias. These plans are objectives for the development of China for the next five years since the plan is released. China has made a 12th five-year plan until 2011. The first five –year plan was drafted in 1953. The most recent one was formally released in 2011.

reduce pollution emissions by 10% but only achieved less than 10%.¹⁸ An objective to reduce emissions by another 10% has been set in the 11th five year – plan (valid from 2006 - 2010). With the 12th five – year plan, the actual reduction was 14.29%.¹⁹ Some scholars though this figure was achieved because of direct orders to close down businesses by local governments.²⁰ In the 12th five – year plan, no general objective was given. Instead, there are objectives for various kinds of polluting items, such as to reduce CO₂ by 8%.²¹ However, plans are not rules. If no corresponding laws are made to regulate the emission, the plan alone will be unable to solve this CSR problem in China.

但是，部分学者认为该目标的达成是建立在地方政府直接下令关闭某些产业的基础上的。在“第十二个五年计划”中，政府制定了更为详细的降低排污指标，比如减少二氧化碳排放量为 8%。但是，计划仅仅具有指导意义。如果没有相应的法规来将这些计划付诸实践，计划本身并不足以解决中国的公司社会责任问题。

¹⁸ 授权发布：中华人民共和国国民经济和社会发展第十一个五年规划纲要（全文），2006 年 3 月 16 日，新华网/ *Authorised to publish: the 11th five – year plan of PRC*, (2006) Xinhuanet <http://news.xinhuanet.com/misc/2006-03/16/content_4309517_1.html> at 17 July 2011.

¹⁹ 授权发布：中华人民共和国国民经济和社会发展第十二个五年规划纲要，2011 年 3 月 16 日，新华网/ *Authorised to publish: the 12th five – year plan of PRC* (2011) Xinhuanet <http://news.xinhuanet.com/politics/2011-03/16/c_121193916_3.htm> at 17 July 2011.

²⁰ Tang Hao, *Relic of a planned Economy* (2010) Chinadialogue <<http://www.chinadialogue.net/article/show/single/en/4008-Relic-of-a-planned-economy>> at 17 July 2011.

²¹ Above n 17.

The Chinese legislation on CSR

The relevant laws

Although Chinese scholars have researched corporate social responsibility, their focus is on the theory itself rather than its application or its practice. Corporate social responsibility was first introduced into China by way of the *Chinese Company Law 2005*. Section 5 says: 'In conducting its business, a company must abide by laws and administrative rules and regulations, observe social morals and business ethics, conduct businesses in good faith, subject itself to the supervision of the government and the public and fulfill social responsibilities'.²² In addition, the *Chinese Company Law* (2005) has also legislated in sections 17, 18, 45, 52, 71, 109 and 118 to protect the rights of employees.²³

Similarly, in the United Kingdom (UK), which is a Common Law jurisdiction, s 172 (1) of the *UK Companies Act 2006* has defined SCR as having similar characteristics as s 5 of the *Chinese Company Law 2005*. Both the UK and

中国公司社会责任相关法律法规

相关法律

尽管中国法律学者们对公司社会责任进行了大量的研究，但研究主要是集中在理论研究方面，而不是法律实践方面。在 2005 年新公司法中，首先引入了公司社会责任这一概念。该法律第五条规定：“公司从事经营活动，必须遵守法律、行政法规，遵守社会公德、商业道德，诚实守信，接受政府和社会公众的监督，承担社会责任”。

此外，2005 年新公司法还在该法律的第 17 条，18 条，45 条，52 条，71 条以及 109 和 118 条作出了对社会责任的衍生性规定，以保护公司雇员的利益。

与中国公司法相似的情况也在 2006 年英国公司法中得到体现。该法的第 172 (1) 条对公司社会责任做出了与中国 2005 年新公司法类似的定义。英国和中国公司法都将公司社会责任与公司的道德义务相关联，并强调了公司对社会大众的责任。尽管 2006 年英国公司法的第 172 (1) 条并没有适用“公司社会责任”这一明确概念，但是该条的主要内容是说公司董事承担用对所有公司利益相关者均有利的的方式推动公司的发展的责任。甚至社会也包括在需要考虑的范围中。

²² *Company Law of the People's Republic of China* 2005 (PRC) s 5.

²³ *Ibid* ss 7, 18, 45, 52, 71, 109, 118.

Chinese definitions refer to the ethics of the company and emphasise the company's duty to the public. Although s 127(1) of the *UK Companies Act 2006* does not use the actual term CSR, the section itself talks about the director's duty to promote the company in a way that is beneficial to all stakeholders of the company, including the community.

However, unlike its Chinese equivalent, s 127 (1) UK defines CSR in detail.²⁴ Australia, although close to UK law, does not have a CSR provision in its *Corporations Act*.²⁵

但是，与中国 2005 年新公司法所不同的是，第 172（1）条的规定更加详细。但是，尽管澳大利亚公司法在很大程度上继承了英国公司法，却没有任何关于公司社会责任的规定。

在与中国同样属于大陆法系国家的越南，与中国 2005 公司法第五条，以及 2006 年英国公司法第 172(1)条类似的越南公司法条款，第 119（1）条涉及了公司股东的勤勉义务却没有涉及注意义务。第 119（1）（b）条仅要求公司股东以公司以及股东的利益最大化为出发点。因此，越南公司法中的第 119（1）（b）并不是严格意义上与中国 2005 公司法第五条，以及 2006 年英国公司法第 172（1）条相类似的公司社会责任条款。因为其他的公司利益相关者们，比如社会，就没有被列入保护范围

²⁴ Section 127: Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

²⁵ *Corporations Act 2001* (Cth).

In Vietnam, which is also a Civil Law jurisdiction country, the equivalent section to s 5 of the *Chinese Company Law 2005* and s 172 (1) of the *UK Companies Act 2006* refers only to director's duty of diligence and does not mention care or skill.²⁶ In addition, article 119(1) (b) of the Vietnamese *Law on Enterprises (2005)* only requires the directors to act in the best interest company and shareholders of the company. Therefore, article 119(1) (b) is not technically an equivalent section of CSR sections in China and UK, because other stakeholders of the company, such as community, are not mentioned in this section.²⁷

According to Mr. Ren Hongyan, the director of the pollution section of the Ministry of Environmental Protection of PRC, China may impose a pollution tax on vehicle carbon emissions in 2015. However, this tax has not been scheduled

中国环保部任红岩防污司大气处处长任红岩指出，中国可能从 2015 年开始对机动车征收污染税。但目前此税种尚未被中央政府提上日程。车主们也对污染税的征收表示了焦虑，因为污染税是直接对机动车车主进行征收，而不是对机动车制造商征收。假设污染税是向制造商征收的话，他们也会通过提高制造商售价来将该负担转嫁给消费者。事实上，在中国，机动车车主们已经要缴纳四十余种机动车相关税费，以至于有些学者认为对车主开征污染税只不过是帮助政府增加税收。

²⁶ JS Pearce, *Director's Powers and Duties in Vietnam* (LexisNexis 2010) 104.

²⁷ Article 119(1) (b) - The board of Management, the director or general director and other managers shall ... exercise their delegated powers and perform their delegated duties honestly, diligently to their best in the interests of the company and of shareholders or the company.

by the central government.²⁸ Vehicle owners also expressed concern because the tax will be imposed on owners instead of the vehicle manufacturers. Even if the tax were imposed on manufacturers, they would compensate and pass on the tax by raising the price of vehicles.

In addition, there are more than 40 kinds of tax imposed on vehicle owners in China. Some scholars think the pollution tax will be ineffective and only help to increase the revenue of the government.²⁹

Mr Zhu Guangyao, assistant minister of the Ministry of Finance (MOF), mentioned that China may levy an environmental tax at the Copenhagen Climate Change conference in 2009. This environmental tax has been included in the 12th five – year

中国财政部副部长朱光耀在 2009 年哥本哈根气候变化峰会上指出中国可能会开征环保税。在“第十二个五年计划”中，也涉及了环保税的开征。初步设想为，先以四个大型偏远省份湖北，湖南，江西和甘肃为试点开始征收。但是，中国出口业者对此税种表示了担忧。由于污染性较大的产业如电子业和纺织业占了中国出口产品总量的 80%，如果环保税真的开征，那么这些出口产业将会受到较大影响。

²⁸ 环保部官员：未来或将征收机动车污染防治税，2009 年 9 月 7 日，新华网/ environmental protection officer: the possibility of levy vehicle pollution in the future (2009) Xinhuanet

<http://news.xinhuanet.com/politics/2009-09/07/content_12009631_1.htm> at 17 July 2011.

²⁹ 征收机动车污染税的前提，晏扬，贵阳日报，2009 年 9 月 11 日，第 A07 版./ Yan Yang, 'The Premise of levy vehicle pollution', *Gui Yang Daily*, 11 September 2009, A07.

<http://epub.cnki.net/grid2008/Detail.aspx?dbn=CCND2009&filename=GYRB20090911A071&filetitle=%e5%be%81%e6%94%b6%e6%9c%ba%e5%8a%a8%e8%bd%a6%e6%b1%a1%e6%9f%93%e7%a8%8e%e7%9a%84%e5%89%8d%e6%8f%90>> at 17 July 2011

plan.³⁰ Initially, the tax would be tested in four largely rural provinces, Hubei, Hunan, Jiangxi and Gansu.³¹ However, the Chinese export industry has expressed concern about this environmental tax. As polluting industries such as electronic products and textiles constitute more than 80% of the export products in China, these industries may face difficulties with such a tax.³²

The Australian Prime Minister Julia Gillard had ruled out a carbon tax during the election campaign. She then announced that circumstances had changed.³³ She is currently attempting to allay opposition to her government's

巧合的是，澳大利亚现任总理茱莉亚·杰拉德在总统竞选期间提到了一项二氧化碳排放税。尽管她当时承诺在竞选期间不会在澳大利亚开征这一新税种，但现在她认为情况已经发生了变化因此开征二氧化碳排放税已经势在必行。尽管杰拉德政府的二氧化碳排放税提议遭到了很多反对，她仍在努力将该税种付诸实践。反对该项税收的人认为开征该税会影响经济增长，他们还认为政府事实上已经开征了很多与二氧化碳排放相关的税种了。而该税种的支持者们则认为该税也已仅仅针对能够产生二氧化碳的矿产的开采征收，并且在必要的时候可以停止征收。

³⁰ 授权发布：中华人民共和国国民经济和社会发展第十二个五年规划纲要，2011年3月16日，新华网/ *Authorised to publish: the 12th five – year plan of PRC* (2011), Xinhuanet <http://news.xinhuanet.com/politics/2011-03/16/c_121193916_3.htm> at 17 July 2011

³¹ Agencies, 'China may launch environmental tax trial', *ChinaDaily*, 5 August 2010 <http://www.chinadaily.com.cn/bizchina/2010-08/05/content_11104264.htm> at 17 July 2011.

³² 唐夏韵，环境税对我国对外贸易的影响初探，中国证券期货 2011年05期，第117页/ Tang Xiayun, 'Research of the Impact of Environmental Tax on Export of China' (2011) 5 *Security & Futures China* 117, <http://dlib.cnki.net/kns50/detail.aspx?dbname=CJFDTEMP&filename=ZQQH201105087> at 17 July 2011

³³ AAP, 'Yes, I vowed no carbon tax - Julia Gillard' (2011) News.com.au <<http://www.news.com.au/national/yes-i-vowed-no-carbon-tax-julia-gillard/story-e6frfkvr-1226012683197#ixzz1SLukqN5u>> at 17 July 2011.

unpopular carbon tax legislation.³⁴ Those against the tax think the taxation churn will undermine the efficiency of the economy and complain that the governments have introduced de facto taxes on carbon already.³⁵ Supporters think the tax can deter carbon pollution and can just be imposed on mining of carbon products - and the tax can be removed when necessary.³⁶

Problems with the current law on CSR

1. The rules are too vague.

Although the *Chinese Company Law* (2005) has affirmed corporate social responsibility, there is no legal definition of it. In other parts of the *Chinese Company Law* (2005), there are some rules that call for social responsibility. However, without a definition, it is difficult for the court to enforce corporate social responsibility.³⁷

现行公司社会责任法律的问题

1. 法律规定空泛

尽管中国 2005 年新公司法肯定了公司社会责任的存在，却没有给该责任下一个法律定义。尽管在 2005 公司法的某些条款中对公司社会责任有所涉及，但是在缺乏对公司社会责任的法律界定的情况下，审判实践中很难将该责任付诸实施。

2. 缺乏相应处罚机制

尽管公司法已经违反公司社会责任定义为一种法律责任，但是在该法的第十二章却没有对违反该种责任规定处罚机制。在缺乏相应处罚机制的情况下，对公司社会责任的规定只是流于形式。诸如公司管理结构薄弱等问题也是导致公司社会责任法律难实施的原因。

³⁴ Peter Smith, 'Australian PM fights to calm carbon tax' (2011) *Financial Times* <<http://www.ft.com/intl/cms/s/0/93072d56-b1f3-11e0-a06c-00144feabdc0.html#axzz1T7GKD2bk>> at 25 July 2011.

³⁵ Alan Moran, 'Government Warming to a Carbon Tax' (2010) 62 *IPA Review* 41.

³⁶ Jim Corkery and Anthea Gerrard, 'A Carbon Tax - Onwards' (2009) 19 *Revenue Law Journal* iii, iv

³⁷ 王文钦, 公司治理结构之研究, 中国人民大学出版社, 2005. Wang Wenqin, *a Research on the Administration Structure of Companies*(China Renmin University Press, 2005)

2. The lack of relevant sanctions.

There are no sanctions for breaches of corporate social responsibility provisions in chapter 12 of the *Chinese Company Law* (2005), which makes CSR a 'legal responsibility'. Without relevant sanctions, the responsibility is virtually meaningless. Other problems such as poor administrative structure of the companies also contribute to the ineffectiveness of legislation on CSR.

Suggestions for the amendment of Chinese legislation

Suggestions on substantive law:

Firstly, scholars have suggested setting up a domestic 'Environmental Taxation Code'. Environmental law could involve various kinds of taxes. To avoid overlap, the 'Environmental Taxation Code' should firstly define all these types of taxes and distinguish them from other existing taxes such as resources tax and consumption tax. The 'Environmental Taxation Code' can also introduce new taxes, for example, air-pollution tax, water-pollution tax and

对法律修改的建议

实体法的修改建议

首先，法律学者们建议可以设立一部中国环境税法典。这部法律应当包括多种税种。为了避免与其他已经由其他法律规范的税种重复，环境税法典应当首先定义由它所规范的税种并与其他诸如资源税和消费税税种相区别。此外，环境税法典还应当引入其他税种。比如，空气污染水，水污染税以及噪音税。尽管在澳大利亚有学者呼吁设立规范全世界所有国家的环境税，但由于各国发展水平以及国情不同，此种规范并不适宜在中国实施。

其次，公司法需要定义公司社会责任。为了适应中国国情，公司法需要界定包括雇员，债权人，消费者以及会受到环境影响的其他人。此外，公司法还应当对公司社会责任的实施细则做出规定。

noise tax.³⁸ Although there is an interesting suggestion to make the carbon tax a global tax,³⁹ this suggestion is unlikely to be adopted in China because of its relatively lower development level.

Secondly, Chinese company law needs to define the subject of social responsibility.

To suit the situation in China, the law should define the subject to include employees, creditors, consumers and environmental related persons.⁴⁰ Further rules on social responsibility also need to be embodied into the Chinese Company Law.

Thirdly, the legislators should set up a company donating law. As some other countries have established this system, it is necessary for China to follow this trend that could both encourage the company

第三，立法者应当设立公司捐赠法律。世界上部分其他国家已经设立了规范公司捐赠的法律，中国借鉴此种方法也是可行的。设立公司捐赠法律不但可以激励公司进行公益捐赠还可以惠及社会。设立捐赠法有两种方式。第一是由法律界定捐赠主体和其权利。另一种方法就是只规定公司捐赠的基本原则，由公司章程去设立实施细则。由于后者在保障公司自主权的同时也确保了法律的决定性地位，因此在中国实施更加适宜。

³⁸ 李涛：我国开征环境税之立法研究，中国矿业，2011年6月，第20卷第六期，第51页/Li Tao, 'Research on laws of Environmental Tax' (2011) 20 *China Mining Magazine* 51 <<http://dlib.cnki.net/kns50/detail.aspx?dbname=CJFDTEMP&filename=ZGKA201106015>> at 17 July 2011.

³⁹ Above n 30, v.

⁴⁰ 颜运秋，公司利益相关者派生诉讼的理论逻辑和制度构建，法商研究，2005年第6期，第351页。/ Yan Yunqiu, 'Research on the Derivative Action' (2005) 6 *Studies in Law and Business* 351 <<http://epub.cnki.net/grid2008/detail.aspx?QueryID=326&CurRec=1>> at 17 July 2011.

and benefit society. There are two ways of establishing this principle. The first is to let the law define the donating subject and its authority. The other is to let the law only make principal rules and allow the company constitution to make detailed regulations. The latter one is more appropriate in China as it allows the company some autonomy while retaining the decisive power within the legislature.⁴¹

In addition, the law can also affirm the social responsibility information disclosure system. Due to the imbalance in access to information, the company can warehouse or conceal information and escape social responsibility. However, to avoid harm to the company, the law should prescribe the content and form of disclosure of information.⁴²

Last, but not least, Chinese tax law should also make special regulations for public welfare donations of the company.

Although s 9 of *The Law of the People's*

此外，公司法还可以设立一个社会责任信息公开机制。由于公司以及其他利益相关者掌握信息的能力相差巨大，公司可以利用其掌握的信息资源来规避社会责任。为将对公司的损害保持在最小范围内，法律应该严格限制公开的内容及形式。

最后，税法也应当对公司的公益捐赠做出特殊规定。尽管《中华人民共和国企业所得税法》第九条已作出了对公益捐赠的减免税收，但是该条款规定复杂，且只适用于有限的情况。因此，该条款应当被简化，并且扩大适用以便激励公司进行公益捐赠。

⁴¹ 张忠军,金融监管法论-以银行法为中心的研究,法律出版社,1998,第141页。/Zhang Zhongjun, *the Supervising Law of Financial Institution* (1998) 141

⁴² 魏文斌,现在西方管理学理论,上海人民出版社,2004,第1281页。/Wei Wenbin, *The theory of Modern Western Management* (Shanghai People's Press, 2004) 1281.

Republic of China on Enterprise Income Tax allows for deductibility of public welfare donations,⁴³ the regulation is complicated and limited to specific aspects. The rule needs to be simplified and broadened to encourage companies to make public welfare donations.

Suggestions on procedural law

1. Set up a 'Public Welfare lawsuit' system

China should also set up Public Welfare lawsuit system. Besides government prosecutors, community and non-profit social welfare organizations should also be granted the right to bring social responsibility lawsuits. To encourage the protection of public welfare, the court should reduce the expense of social welfare litigation and the government may support those who bring the lawsuit. To ensure equality, the company should bear the burden of proving that they have not breached social responsibility, as they have more access to information. UK law and Australian *Corporations Act 2001* all have derivative actions section.⁴⁴ However, the Australian *Corporations Act*

程序法的修改建议

1. 设立“公益诉讼”机制

中国应当设立公益诉讼机制。此外，社区和非营利性机构也应当被赋予提起社会责任的资格。为了保障社会公共利益，法院应当酌情减免公益诉讼费，政府也可以对提起公益诉讼的机构予以嘉许。为了保障双方权益的平等，由于被告公司掌握有更多的相关信息，因此公司需要承担证明该公司未违反社会责任的义务。与此类似的是，英国与澳大利亚公司法都对派生诉讼做出了规定。但澳大利亚公司法并没有将提起派生诉讼的权利赋予社会及非营利性公益团体。

⁴³ *The Law of the People's Republic of China on Enterprise Income Tax 2007* (PRC).

⁴⁴ *Corporations Act 2001* (Cth) s 237

2001 does not extend the right to bring a derivative action to community and non-profit social welfare organizations.⁴⁵

2. Facilitate derivative actions in Chinese Company Law

The current derivative action in China only entitles the shareholders to sue the company. To ensure the protection of other stakeholders, this rule could expand to allow creditors, consumers, organizations and Workers' Unions to bring CSR actions.⁴⁶

Conclusion

In economies around the world, corporate governance improves and encourages continued investment and economic development where there is the most competent legal protection for the stakeholders of the company.⁴⁷

2. 改善中国公司法对派生诉讼的规定

目前中国的派生诉讼仅仅只赋予了公司股东提起该项诉讼的权益。因此，在中国，派生诉讼被称为“股东派生诉讼”。

为了确保公司的其他利益相关者的利益，诸如债权人，消费者，社会团体和工会组织也应当被赋予该项权利。

结论

在遍布全世界的经济体中，凡是所有利益相关者权益都得到法律的有力保护的情况下，都会有持续的投资注入以及经济稳健发展的情况出现。

⁴⁵ Ibid, s 236

⁴⁶ 侯延彬 李进，论我国公司社会责任的立法完善，湖南财经高等财经专科学校学报，2010年01期，第1123页。/Hou Yanbin and Li Jin, 'an Analysis of the Law on Corporate Social Responsibility' (2010) 126 *Journal of Hunan Financial and Economic College* 1123. <<http://epub.cnki.net/grid2008/detail.aspx?QueryID=475&CurRec=1>>at 17 July 2011.

⁴⁷ JF Corkery and Bruce Welling, *Principles of Corporate Law in Australia* (Scribblers Publishing, 2008) 317, fn 913, citing Haggard, (1999) 93 *Northwestern ULR* 641.

While it originated in medieval Europe, the notion of the modern company only emerged in China in 1984.

It is not an easy task for Chinese legislators, in such a rapidly developing country as China, to produce advanced legal solutions to regulate companies and enforce CSR in the short term. Chinese companies must also improve their internal administration structures. In addition, the Ministry of Commerce of China and local Trade and Industry Bureau should introduce standard rules and regulations.

Chinese law schools should focus more on teaching the elements of company law. Unlike Australian law schools which regard company law as a very important subject, Chinese law schools do not rank company law as a core subject. Even the Chinese bar exam does not cover much company law. Without raising the awareness of company law, it is hard to promote the concept of CSR.

Australia could also learn from Chinese experience and set up separate specialized sectors in the courts. In the Chinese court

现在公司的雏形源自中欧，但在 1984 年的中国才出现现代意义上的公司。中国发展迅速，立法者们要想制定出一套完美的法律体系来规范公司行为以及确保其社会责任绝非易事。除去文中所提及的方法之外，中国公司应该同时加强其内部治理结构。此外，中华人民共和国商务部也可以引入适当的标准化法律法规。

而中国大学法学院也应当加强对中国公司法的教育。澳大利亚大学法学院都将公司法作为重要的基本法进行教学，而大部分中国法学院校则将其作为非核心课程。而公司法在司法考试中所占比重也不大。如果没有对公司法加以足够重视，那么推进公司社会责任也容易流于形式。

澳大利亚也可以从中国司法实践中借鉴将法庭分为不同专门法庭的做法。在中国司法系统中，各级法院都被分为刑事庭，民事庭，行政庭以及经济法庭等。各庭由在该法律方向较为专业的法官审判。

system, the courts are divided into criminal courts, civil courts, administrative courts and economic courts.

The respective courts are run by judges specialized in relevant areas of law. By doing this, Australian judges might be relieved of the burden of hearing cases in all areas and may be able to dispense more expert judgments. However, one should be aware that China has a more opaque process and different criteria for appointing judges than Australia.

On the other hand, in China, there is currently more focus on CSR. An environmental tax has been listed in China's 12th five – year plan. Australia has just enacted its carbon tax, for application in 2012. The Chinese environmental tax should be levied by 2015, as it has been incorporated into the 12th five-year plan. This is public legislation, but private groups also tend to focus more on CSR. Recently, a company whose business is to

如果澳大利亚法院系统可以借鉴该种做法，那么法官们就可以从庞大数量的案件中争取到时间来做出对专门案件更加审慎的判决。但是，我们需要注意的一点是，澳大利亚法官的选择标准比中国更加严格。

另一方面，近期公司社会责任在中国已经得到了更多的重视。比如，中央政府已经将环境税列入了“第十二个五年计划”。澳大利亚的二氧化碳排放税或许可以推迟施行，但是根据“第十二个五年计划”，中国在 2015 年之前一定会对环境税采取措施。私人团体也对公司社会责任采取了更多关注，一家注重推动公司社会责任的公司已经在背景设立了办公室。在政府，私人组织以及学者的推动下，公司社会责任在中国必将得到更多发展。

focus on promoting CSR in China has opened an office in Beijing.⁴⁸ With such efforts from government, private organizations and scholars, Corporate Social Responsibility in China is improving rapidly.

⁴⁸ Syn Tao, *About Syn Tao*, Syn Tao
www.syntao.com/SyntaoService_E.asp at 17
July 2011.