Corporate Social Responsibility: A Business Essential and Legal Imperative

ABA Section of International Law
China Committee

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CSR-Law Contexts

- The Lawyer’s (Firm’s) role in the Client’s CSR
- The Lawyer’s (Firm’s) own CSR
The Role for Legal Counsel

Risk Management (continuing role)

- Carroll’s Pyramid of CSR:
  - Philanthropic or discretionary
  - Ethical
  - Legal
  - Economic

- Compliance with domestic law (Counsel)

- Beyond Compliance
  - What’s ahead regarding compliance (Counsel)
  - The rest of the Client’s environment (economic, ethical, discretionary)
Historical Context

Regarding the Development of Economic/Social/Environmental Public Policy

- Business-Society (Social Contract) Questions regarding "value creation" ("CSR" issues fall into one or more)

1. What value (form of wealth) is created?
2. How is that value created?
   a. What inputs/costs
   b. Where to create it?
3. Who Pays for the costs to create it?
   a. Internalized
   b. Externalized
4. Who shares in the value created?
Overarching Question

In what forum (by what mediating mechanisms) are the answers to these questions determined?

- Marketplace (freedom of contract/invisible hand)
- Public Policy (compliance/government)
  - As established and implemented (enforced)
  - Process and Participants will vary by country
  - Might not be representative of society’s (or unrepresented groups’) interests, but of the interests of those in power (directly or indirectly)
Historical context, continued

**Domestic vs. Global Context**

U.S economic history:
- *laissez faire* to economic recovery acts
- responses to business or market failure (Commerce Clause adjustments)

+ Globalization (reduced barriers to trade, open markets)

= **Governance or CSR Gap** (unmet legal/ethical expectations in both the U.S. and more lenient jurisdictions)
Addressing the “GAP” (International)

Compliance Related:

- An aside regarding GATT/WTO Market Access commitments (MFN) and limitations on direct control over production processes

- International Law
  - “Hard” (treaties, conventions related to CSR-type issues)
  - “Soft” (resolutions, guidelines, guiding principles)

- Domestic US Law with extraterritorial applications

Non-compliance Related:

- NGO/Industry Action
  - Standards, Codes of Conduct, Certifications

- The Client’s Stakeholders and their expectations
Historical context, continued

**Addressing the “GAP”**

An Aside regarding Market Access (and direct regulation)

- Our duty of non-discrimination under WTO agreements
- Limitations on government ability to control access (at the border) to US markets due to “like” product provisions of Article I (requiring Most Favored Nation treatment) and Article III (requiring National Treatment) of the GATT: the US cannot regulate production “process”
  - Tuna is tuna no matter how harvested (same with shrimp)
  - A soccer ball is a soccer ball no matter whose hands have sown it.
  - A refrigerator is a refrigerator no matter what environmental damage has been caused or avoided in its manufacture
  - The same is true of trade in products facilitated by corruption, conflict diamonds, tin, tungsten, tantalum or gold.
- Exceptions for Government Procurement
International Law

Firms not subject to but may be impacted by treaty implementation

- 1919 Treaty of Versailles
- International Labour Organization Conventions
- ITO (included labor provisions, failed)
- UN Declaration on Human Rights, Conventions
- Limited GATT/WTO provisions
- OECD Antibribery Convention
- Doha “Development” Round (potential)
- Regional treaties
- Bilateral treaties
“Soft” international law

- not legally binding
- non-“treaty” though normative
- potential impact on customary law

- Intergovernmental initiatives
  - UNGA Resolutions (e.g. environment, human rights)
  - UN Global Compact: 10 Principles
  - 2000 Millennium Declaration (environment, development)
  - UN Guiding Principles on Business and Human Rights
  - WTO Doha Round Ministerial Declaration
  - OECD Guidelines for MNCs (revised 2000)
  - OECD Risk Awareness Tool for MNEs in Weak Governance Zones

- Non-Governmental /Industry Initiatives
  - ISO 26000 Guidance on Social Responsibility
  - Global Reporting Initiative
  - Fair Labor Association
Addressing the “GAP” continued

Domestic Law with extraterritorial application (U.S.)

- Title VII (discrimination in labor)
- Foreign Corrupt Practices Act (bribery)
- Alien Tort Claims Act (human rights?) (Kiobel)
- Pushing the GATT/WTO envelope (“dolphin safe” tuna); Sanders Amendment (products of "forced or indentured child labor") and other “trade-related” measures
- Generalized System of Preferences (conditions)
- SEC “materiality” disclosures (e.g. on impacts of global warming)
- Human trafficking (Federal, State)
- Burma
- Conflict Minerals
- Resource Extractive Industries
Compliance (as distinguished from Ethics/CSR)

- Approaches:

1. Disclosure/reporting, promoting consequences of transparency
2. Substantive action (other than disclosure)
   - Prescriptive
   - Proscriptive

Some firms are directly subject to various requirements, others will be impacted as supply chain partners, who are expected to report to customers subject to the Acts.
The Client’s Broader CSR Picture

NGO/Industry Action

- Standards, Codes of Conduct (e.g. Equator Principles)
- Certifications (e.g. FSC or SFI for forestry; Free-Trade goods/services...)

The Client’s Stakeholders’ Expectations

- Internal and External
- Direct and Indirect
A firm that can identify stakeholder expectations and determine, evaluate and execute its strategic choices in light of those expectations is more likely to be sustainable.
Conclusions on Legal Counsel’s Role

- Compliance and Risk (International awareness; OECD Tool)
- Looking towards future compliance
- Managing Client’s legal relationships with Stakeholders (including alliances, e.g. supply chain, strategic philanthropy relationships) for sustainability
- Counseling to avoid the need for responsive public policy
- All in light of understanding impacts on Client’s broader (non-compliance) stakeholder interests (ISO 26000)
CSR in China

Philanthropy

- Tainted milk
- Tainted meat
- “gutter” Oil
- Lead paint
- Pet food
- Fake drugs
- Toxic baijiu
- Charity fraud? (Red Cross)
- 6,000 dead pigs
- Corruption

Ethical

Legal

Economic
Leadership’s aspirations/slogans

- Jiang Zemin’s “Three Represents” (#3: The Party represents the “fundamental interests of the majority”)
- Hu Jintao’s “Scientific Development Concept” and “harmonious society”
- Wen Jiabao” “We should solve the problems (environment, health) and give the people hope through our action.”
- Xi Jinping”s “Chinese dream” (any sustainability aspects?)
- Li Keqiang’s “Government’s three main tasks” (#3: safeguarding social justice”)
Substantive Legal Changes (illustrative)

- Company Law 2005 revisions
  - “a company must... observe social morals and business ethics... and fulfill social responsibilities” [“demonstrating an entirely new legal principle and a value objective in regulating business behaviors” [CTAI report]]
- Labor Contract Law of 2007 (age, hours, overtime)
- Employment Promotion Law of 2007
- Cooperation with OECD on “Encouraging Responsible Business Conduct “
- CSC9000T – Textile Industry (voluntary, CSR Management System for responsible supply chain)
- Numerous environmental regulations
- “Social Risk” assessments for major projects (in place?) (Environment Minister Zhou Shengxian, Nov. 2012)
- Proposed “Charity Law” that could allow public fundraising for NGOs and other recognition of legitimacy
Other drivers

- Half a billion legally registered civil society groups
- 1000+ foreign NGOs
- GRI Focal Point China (sustainability reporting)
  - Shanghai Stock Exchange policy encouraging CSR Reports (351 companies in 2011; over half referencing GRI Guidelines)
  - SSE CSR Index and SSE analysis report on disclosure performance of listed companies
Supply Chain Scrutiny

- China Labor Watch (New York based) on Samsung (overtime and basic labor rights)
- Foxconn reforms (overtime, [mixed blessing?] wages, worker safety, internship practices, legal compliance (New York Times)
- Fair Labor Association (Auditing Foxconn and others; Encouraging purchaser, e.g. Apple, engagement with workers, advocacy groups – Apple tripled social responsibility division, joined Sustainable Trade Initiative, began publishing summaries of supplier compliance on overtime)
- H-P and Quanta (worker retention initiatives)
Conclusions regarding China

- A Primary driver is Chinese Communist Party’s legitimacy
- Many in China still see CSR as philanthropy
- Advances in supply chain management
- Government seems serious about CSR education and implementation (stability and harmoniousness)
- Still primarily a “regulatory” approach
- Still huge failures in business compliance
- Businesses have much to learn about strategic competitiveness and sustainability aspects of CSR (opportunities here!)
- Some are learning fast (CSR is huge buzz phrase)
- Most progressive where you have a strong business case and an absence of political or national security conflicting interests
- Still a lot of disconnect between interests of CSR and reality on the ground