

THE EMERGENCE OF NEW CORPORATE SOCIAL RESPONSIBILITY REGIMES IN CHINA AND INDIA

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ABSTRACT

In an era of financial crises, widening income disparities, and environmental and other calamities linked to corporations, calls for greater corporate social responsibility (“CSR”) are increasing rapidly around the world. Though CSR efforts have generally been viewed as voluntary actions undertaken by corporations, a new CSR model is emerging in China and India. In a marked departure from CSR as it is known in the United States and as it has been developing through global norms, China and India are moving towards mandatory, not voluntary, CSR regimes. They are doing so not only in a time of great global economic change, but at a time when both countries are themselves undergoing massive economic and social changes as they re-orient towards more market-based economies and seek to enter the ranks of global economic superpowers.

This Article conducts a comparative analysis of the emerging CSR regimes in China and India and highlights key characteristics of these developing frameworks. This Article begins an inquiry into some of the most significant implications of the CSR regimes now unfolding in China and India, and their potential for effecting legal and societal change. It also raises questions about why China and India are moving towards mandatory CSR when other key global players are taking a largely voluntary approach. Finally, this Article seeks to add to global debates over corporate governance models by enhancing understanding

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of the corporate governance developments and innovations now arising in China and India.

TABLE OF CONTENTS

| | | |
|------|---|-----|
| I. | INTRODUCTION..... | 176 |
| II. | WHAT IS CORPORATE SOCIAL RESPONSIBILITY? | 185 |
| III. | THE EMERGING CORPORATE SOCIAL RESPONSIBILITY REGIME IN CHINA.. | 193 |
| | A. Incorporating Corporate Social Responsibility into Chinese Law.... | 195 |
| | 1. The Growth of CSR in China | 197 |
| | 2. China’s 2006 Company Law and Express Recognition of Corporate Social Responsibility | 200 |
| | 3. CSR Initiatives and the Current CSR Framework in China | 203 |
| | B. Shortcomings of the Current Chinese Corporate Social Responsibility Framework | 205 |
| IV. | INDIA’S NEW CORPORATE SOCIAL RESPONSIBILITY REGIME..... | 208 |
| | A. Incorporating Corporate Social Responsibility Into Indian Law | 210 |
| | 1. Corporate Social Responsibility Voluntary Guidelines (2009)... | 211 |
| | 2. ESG Guidelines – July 2011 | 212 |
| | 3. Corporate Social Responsibility and State-Controlled Entities... | 214 |
| | 4. Amendment of the Companies Act | 215 |
| | a. The Requirements of the Companies Act, 2013 | 217 |
| | b. The MCA’s Draft & Final Rules..... | 220 |
| | i. The MCA’s Draft Rules..... | 220 |
| | ii. The Final Rules | 221 |
| | c. Reporting and Disclosure | 222 |
| | B. Shortcomings of India’s Emerging Corporate Social Responsibility Model..... | 223 |
| V. | THE EMERGING CSR REGIMES IN CHINA AND INDIA: LESSONS AND IMPLICATIONS FOR THE FUTURE | 227 |
| VI. | CONCLUSION..... | 229 |

I. INTRODUCTION

Corporate Social Responsibility (“CSR”) has recently drawn increasing global scrutiny in the wake of financial crises, rising consumer and employee safety concerns, and natural disasters publicly linked to corporations. In the United States and Europe, for example, the recent economic crisis has led to calls for greater corporate social responsibility in an era of perceived corporate

financial excesses and recklessness.¹ Across the globe in China, demands for increased corporate social action and assistance have risen in the aftermath of natural disasters, such as the 2008 Sichuan earthquake,² as well as preventable accidents blamed on corporate and government laxity, such as the Qingdao Oil Pipe Explosion in 2013.³ In India, there has been growing unrest regarding uneven economic development and growth, which has resulted in a marked increase in corporate profits, as well as the number of millionaires (and even

¹ See CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 2 (2008) (“Starting with the Enron debacle in the United States, major economies have witnessed extraordinary corporate governance controversies in the past five years that have shaken confidence—not only in the stock market, but in the very institutional foundations of market activity in these countries. Each crisis, has, in its own way, challenged the adequacy of the country’s legal system, and prompted institutional responses to repair the perceived shortcomings.”); see also WILLIAM B. WERTHER, JR. & DAVID CHANDLER, *STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT* xvii (2011) (“The recent financial crisis brought a new urgency to the question of what is the role of business in society.”); Yakup Selvi et al., *Corporate Social Responsibility in the Time of Financial Crisis: Evidence from Turkey*, 12 *ANNALES UNIVERSITATIS APULENSIS SERIES OECONOMICA* 281, 284 (2010), available at <http://www.oeconomica.uab.ro/upload/lucrari/1220101/28.pdf> (noting greater realization of the need for CSR principles following the financial crisis).

² After the Sichuan earthquake, Chinese and multinational corporations were criticized for their failure to contribute greater funds and assistance to relief efforts, and the public reaction to their perceived lack of social responsibility during that crisis is viewed as a watershed moment in the development of CSR in China. See Ariel McGinnis et al., *The Sichuan Earthquake and the Changing Landscape of CSR in China*, KNOWLEDGE@WHARTON (Apr. 20, 2009), <http://knowledge.wharton.upenn.edu/article/the-sichuan-earthquake-and-the-changing-landscape-of-csr-in-china> (noting that firms that believed that “[i]nternational CSR doctrines could be simply applied cookie-cutter style received a rude wake-up call in the aftermath of the May 12, 2008 Sichuan earthquake,” and discussing the depth of the public reaction to corporations, especially multinationals, that were perceived as “iron roosters,” birds that will not give up a single feather); see also Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 *VAND. J. TRANSNAT’L L.* 375, 400 (2013) (“The Sichuan earthquake of 2008 and the global financial crisis gave China’s leadership new cause to call for greater social responsibility from business.”).

³ In late 2013, oil pipes owned by Sinopec, a state-owned enterprise in China, exploded in Qingdao, possibility due to operator error. Public wrath subsequently rose against local companies and authorities, who allegedly failed to react promptly. After this incident, in which forty-nine people were killed, calls within China for reform of Chinese companies and government action regarding public safety increased dramatically (and, significantly, were articulated as calls for increased corporate responsibility). See Philip Wen, *Public Anger in China in the Wake of Explosion in Qingdao*, *THE SYDNEY MORNING HERALD* (Nov. 25, 2013), <http://www.smh.com.au/world/public-anger-in-china-in-the-wake-of-explosion-in-qingdao-20131124-2y3vk.html>; see also *Lack of Corporate Social Responsibility Behind Recent China Accidents*, *WORLD WATCH INST.*, <http://www.worldwatch.org/lack-corporate-social-responsibility-behind-recent-china-accidents> (last visited Feb. 7, 2014) (discussing a chemical plant explosion and a coal mine blast and stating “a key contributor to these preventable accidents remains the lack of effective social responsibility in Chinese enterprises”).

billionaires), while significant portions of the population continue to live in absolute poverty.⁴ This unrest has been exacerbated by front-page news stories about corporate corruption and corporate governance scandals such as the now infamous fall of Satyam Computer Services.⁵ These various crises have incited calls for greater CSR in China and India, and for government action promoting CSR.

What is “corporate social responsibility?” The terms “CSR, corporate strategic volunteerism, social marketing, and strategic philanthropy, have penetrated the mainstream literature and multinational practices” in the developed world.⁶ CSR can be defined as a “view of the corporation and its role in society that assumes a responsibility among firms to pursue goals in addition to profit maximization and a responsibility among a firm’s stakeholders to hold the firm accountable for its actions.”⁷ While some elements of what could be termed “corporate social responsibility” have always fallen under the rubric of the law, such as environmental or financial reporting or disclosure requirements,⁸ the

⁴ See CONFEDERATION OF INDIAN INDUS. (CII), HANDBOOK ON CORPORATE SOCIAL RESPONSIBILITY IN INDIA 5 (2013), available at http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf; ARPAN SHETH & MADHUR SINGHAL, INDIA PHILANTHROPY REPORT 2011 2 (2011), available at http://www.bain.com/Images/Bain_Philanthropy_Report_2011.pdf; 2% CSR Spend on Cards for India Inc., INDIAN EXPRESS (Feb. 9, 2011), <http://www.indianexpress.com/news/2-csr-spend-on-cards-for-india-inc/747860/0> (“India Inc [sic] may not be able to shy away from their responsibility towards the society any more.”); see also Aneel Karnani, *Mandatory CSR in India: A Bad Proposal*, STAN. SOC. INNOVATION REV. BLOG (May 20, 2013), http://www.ssireview.org/blog/entry/mandatory_csr_in_india_a_bad_proposal (“While India has experienced rapid economic growth, the benefits of this growth have not been distributed equitably. Inequality, which was already high, has increased even more. India’s Gini coefficient, the official measure of income inequality, has gone up from 0.32 to 0.38 in the last two decades. For example, about 50% of children in India are malnourished due to pervasive poverty. Trickle-down economics are not working.”).

⁵ See Afra Afsharipour, *The Promise and Challenges of India’s Corporate Governance Reforms*, 1 INDIAN J. L. & ECON. 33, 45 (2010) (“India’s corporate community experienced a significant shock in January 2009 with damaging revelations about colossal fraud in the financials of Satyam Computer Services.”); see also ERNST & YOUNG & FICCI, BRIBERY AND CORRUPTION: GROUND REALITY IN INDIA (2013), <http://www.ficci.com/Sedocument/20254/FICCI-EY-Report-Bribery-corruption.pdf> (describing strains on Indian economy as a result of corruption).

⁶ Christoph Lattemann et al., *CSR Communication Intensity in Chinese and Indian Multinational Companies*, 17 CORP. GOVERNANCE: AN INT’L REV. 426, 427 (2009) (discussing gaps in research on CSR across countries).

⁷ See Werther & Chandler, *supra* note 1, at 5.

⁸ See, e.g., Ho, *supra* note 2, at 384 (noting that CSR and the law are intertwined and mutually influencing, as regulation, policymaking, and other government action can blur the lines between voluntary and mandatory CSR). Also, for example, U.S. law contains mandatory disclosure rules, particularly in the financial arena, resulting from public outcry after the Enron and other related scandals. See generally 15 U.S.C. §§ 7201-7266 (2014). These disclosure rules are viewed as legal requirements, rather than mandatory CSR, as they directly affect corporate liability. See also Jingchen Zhao, *Promoting More Socially Responsible Corporations Through UK Company Law*

concept of CSR we discuss here refers to the broader vision espoused by advocates who view CSR as “the continuing commitment by business 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.”⁹

A plethora of definitions, codes of conduct and CSR principles have arisen in the global context, most intended to be voluntarily adopted by companies.¹⁰ In the United States and Europe, CSR is usually viewed as a set of voluntary and non-enforceable standards—principles, pledges, or programs by which companies seek to operate in a socially responsible manner.¹¹ Indeed, one

After the 2008 Financial Crisis: The Turning of the Crisis Compass, 22 INT’L COMPANY & COM. L. REV. 275, 275 (2011) (“[I]n spite of the voluntary nature of CSR, legal responsibilities under company law, employment law, consumer protection law, environmental law and insolvency law are playing an increasingly important role in enforcing ‘voluntary’ CSR policies”).

⁹ See CSR: MEETING CHANGING EXPECTATIONS, WORLD BUS. COUNCIL FOR SUSTAINABLE DEV. (WBCSD) 3 (1999), <http://www.wbcd.org/pages/edocument/edocumentdetails.aspx?id=82&nosearchcontextkey=true>; see also GREEN PAPER: PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY, COMM’N OF THE EUROPEAN COMMUNITIES 4 (2001), http://europa.eu/rapi_d/press-release_DOC-01-9_en.pdf (defining CSR as “a concept whereby companies decide voluntarily to contribute to a better society . . .”).

¹⁰ See Johan Graafland & Lei Zhang, *Corporate Social Responsibility in China: Implementation and Challenges*, 23 BUS. ETHICS: A EUROPEAN REV. 34, 35 (2014) (discussing the variety of definitions of CSR and explaining that CSR is often viewed as encompassing five dimensions (economic, social and environmental value creation, stakeholder relations and voluntariness), and that the three dimensions of value creation that companies should consider are often referred to as the “Triple P bottom line: Profit, People and the Planet”). A variety of institutions have promulgated influential corporate codes of conduct or definitions of CSR, including the Organisation for Economic Co-operation and Development (OECD), UN, and a number of civil society organizations. See also Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 91 (2008) (discussing the related concept of “social entrepreneurship” where “profit is not a motive, it is a means to an end”); OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, ORG. FOR ECON. CO-OPERATION AND DEV. 9-14 (2008), <http://www.OECD.org/dataoecd/56/36/1922428.pdf> (declaration of guidelines for international investment by OECD members); *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (search in “Human Rights,” “Labour,” “Environment,” or “Anticorruption” for relevant “Principle”). See generally *infra* Part I for a more in-depth discussion of CSR as a voluntary model.

¹¹ See Ho, *supra* note 2, at 388-91 (noting and discussing how governments in both the U.S. and Europe “generally emphasize voluntary CSR commitments”). For purposes of this article, we do not explore in detail whether CSR *should* be voluntary or mandatory. For an overview of this debate in both the United States and Europe, see generally OLUFEMI AMAO, *CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW* 55-66 (2011). We also note that the lines between voluntary and mandatory CSR are often both fuzzy and mutually reinforcing; for example, Zhao notes that “[N]ew Legal developments are directly and indirectly fostering voluntary CSR and market pressures, while new legal tools are being evolved, and old ones used creatively, to make what businesses have perceived as voluntary, or beyond law, in fact legally enforceable.” Zhao, *supra* note 8, at 277. We do not delve into this distinct, though highly relevant and rich debate, as

of the defining aspects of CSR under the so-called “Western” model¹² is that it refers to corporate action that is voluntary and self-regulatory; that is, CSR is aimed at convincing “companies to conduct business beyond compliance with the law and beyond shareholder wealth maximization.”¹³ Similarly, much scholarly work and some civil society efforts have been based on the assumption that CSR is a voluntary mechanism of corporate change.¹⁴

But the debate over CSR has taken a decidedly different turn in China and India, two of the world’s emerging superpowers seeking to challenge the economic and political authority of the United States and Europe.¹⁵ Now one of the U.S.’s largest trading partners,¹⁶ China is attempting to develop a new, legal,

it is outside the scope of this paper, but wish to highlight that along with the debate over whether CSR should be mandatory or voluntary, there is a related debate over how much, and how, voluntary CSR can be re-formulated as mandatory CSR or mandatory legal requirements. See generally MICHAEL KERR, RICHARD JANDA & CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 2-3, 93-104, 471-93 (2009) (arguing that “the law now weighs in to give substance, meaning, and accountability to CSR undertakings”).

¹² See Michael T. Ewing & Lydia E. Windisch, *Contemporary Corporate Social Responsibility in China: An Extension of Confucian Philosophy?* 2 (Asian Bus. and Econ. Research Unit Discussion Paper No. 44, 2007), available at <http://www.buseco.monash.edu.au/units/dru/papers/working-papers-07/p4407contemporaryewingwindisch.pdf> (“The bulk of CSR literature has focused on Western-Centric (European/US) conceptualizations and implementations of CSR”).

¹³ Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Social Change?*, 28 BERKELEY J. INT’L L. 64, 64 (2010).

¹⁴ See generally Tim Baines, *Integration of Corporate Social Responsibility Through International Voluntary Initiatives*, 16 IND. J. GLOBAL LEGAL STUD. 223 (2009); Arvind Ganesan, *Is 2007 the End for Voluntary Standards?*, HUMAN RIGHTS WATCH (Dec. 12, 2006), <http://www.hrw.org/news/2006/12/11/2007-end-voluntary-standards> (noting that if voluntary initiatives fail then relationships between corporations, NGOs, and governments could deteriorate). Undoubtedly, many NGOs and some noted scholars have advocated for mandatory CSR and even argued that many aspects of an expansive view of CSR are already mandatory. See KERR, JANDA & PITTS, *supra* note 11, at 2-3, 570. Similarly, some scholars have argued that the “voluntary/ mandatory distinction is overblown and misleading on many levels. ‘Voluntary’ commitments made by corporations . . . are still commitments that in many ways can take on the character of ‘law’ viewed more expansively. Sanctions of various sorts accompany such commitments, often lending them equal or greater normative force than law as a practical matter.” Joe (Chip) W. Pitts III, *Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 BERKELEY J. INT’L L. 479, 485 (2008).

¹⁵ See Charles Kenny, Op-Ed., *America is Slipping to Number Two. Don’t Panic.*, WASH. POST (Jan. 17, 2014), http://www.washingtonpost.com/opinions/america-is-no-2-and-thats-great-news/2014/01/17/09c10f50-7c97-11e3-9556-4a4bf7bcbd84_story.html (predicting world will have four major economic players by 2030, in order: China, the United States, the European Union and India); see also Shruti Rana, *The Emergence of the New Chinese Banking System: Implications for Global Politics and the Future of Financial Reform*, 27 MD. J. INT’L L. 215, 217-18 (2012) (describing ways that China is seeking to challenge the U.S.’s global economic and political dominance).

¹⁶ See Kenny, *supra* note 15.

not voluntary, CSR system “with Chinese Characteristics.”¹⁷ Meanwhile, one of the world’s largest economies and a driving force in the global marketplace,¹⁸ India appears to be the first nation to require CSR considerations as part of a company’s corporate governance and the first nation to move toward mandatory CSR spending across the board for all publicly traded companies.¹⁹ At a time when many scholars, corporate actors, and commentators view CSR as “voluntary by nature”²⁰ or vehemently oppose mandatory CSR,²¹ China’s and India’s moves toward mandatory CSR appear decidedly unorthodox and represent a significant shift in their corporate governance reform efforts, as well as a departure from global norms.

In this light, it is important to ask why China and India are now choosing to take a mandatory approach to CSR, whereas other major players in the global

¹⁷ See Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L.J. 1, 13 (2011) (describing “Chinese exceptionalism” as follows: “China takes the strictest line on sovereignty and contests the use of military force against independent states. China also believes that international law should impose less burdensome obligations on poor countries. According to China, economic growth should take precedence over human rights (at least, in poor countries).”).

¹⁸ Vanson Bourne, *India 2nd Best in Rapid Growth Among Emerging Markets: Survey*, ECONOMIC TIMES (Mar. 22, 2012, 4:37 PM), http://articles.economicstimes.indiatimes.com/2012-03-22/news/31225139_1_economies-markets-global-respondents. After the United States, China is the world’s second largest economy by GDP and India is the tenth largest economy by GDP and the third largest economy in Asia. THE WORLD BANK, GDP RANKINGS, <http://data.worldbank.org/data-catalog/GDP-ranking-table> (last visited Dec. 18, 2013).

¹⁹ See Caroline Van Zile, Comment, *India’s Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 ASIAN-PAC. L. & POL’Y J. 269, 271 (2012). There are significant precedents for India’s move to apply CSR requirements to all listed companies. For example, in 2007 Indonesia enacted a law that requires companies in the field of and/or in relation to natural resources to engage in community investment. See KERR, JANDA & PITTS, *supra* note 11, at 515.

²⁰ Van Zile, *supra* note 19, at 272.

²¹ James M. Roberts & Andrew W. Markley, *Why the U.S. Should Oppose International Corporate Social Responsibility (CSR) Mandates* (The Heritage Foundation BackGrounder No. 2685, May 4, 2012), <http://www.heritage.org/research/reports/2012/05/why-the-us-should-oppose-international-corporate-social-responsibility-csr-mandates>; see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441-42 (2001); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-social-respbusiness.html>; see also Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 41-43 (1991). But see, e.g., Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 585 (1992) (“Having established a theoretical justification for the new constituency statutes and their relationship to emerging case law, I will then in Part III offer a two-part model for enforcement of these statutes.”); Steven R. Ratner, *Corporation and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (arguing that international law should provide for human rights obligations for corporations).

arena are largely emphasizing voluntary approaches to the adoption and spread of CSR. In this Article, we examine the new corporate social responsibility regimes emerging in China and India. We seek to raise questions about why these nations, both jockeying for greater global power, though with disparate legal and economic systems, have chosen to pursue the mandatory CSR approach.²² In doing so, we fill a gap in the existing literature.²³ In addition, we seek not only to identify and discuss these reforms, but also to lay the foundations for a larger discussion about the implications and potential of these reforms. We hope that this analysis can both aid other countries seeking to enhance CSR and corporate governance, and contribute to the larger global debate on improving corporate governance.

A better understanding of corporate governance models around the world is critically important in an era when the United States, Europe, China and India are all in the midst of reforming corporate governance structures and seeking templates for success.²⁴ China and India are particularly significant and fertile grounds for studying the development of CSR, because both are rapidly becoming key players in the global arena who must be reckoned with and understood,²⁵ and because both are in the midst of significantly reframing corporate governance structures and developing new CSR regimes.²⁶ As leaders in the developing world, China and India also influence and help shape corporate

²² In a companion paper, we plan to explore the larger political economy factors and reasons behind each country's move toward mandatory CSR regimes, and to address broader comparisons with other recently emerging CSR regimes.

²³ See *infra* notes 30-33 and accompanying text.

²⁴ See Milhaupt & Pistor, *supra* note 1, at 2 (noting that countries are grappling with the consequences of the global financial crisis and are developing institutional responses to repair the perceived shortcomings in their financial and legal systems).

²⁵ See generally Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 U.C. DAVIS L. REV. 1029 (2011) [hereinafter Afsharipour, *Rising Multinationals*] (discussing India's economic transformation and the increasing global footprint of Indian firms); Rana, *supra* note 15, at 215-17 (discussing China's rapidly expanding financial and political power and the need for greater dialogue regarding their implications). For a detailed account of India's economic liberalization, see ARVIND PANAGARIYA, *INDIA: THE EMERGING GIANT* (2008).

²⁶ See generally Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. 335 (2009) [hereinafter Afsharipour, *Corporate Governance Convergence*] (providing an overview of corporate governance reforms in India); Afra Afsharipour, *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 SEATTLE U. L. REV. 996 (2011) [hereinafter Afsharipour, *Directors as Trustees*] (stating that "not only has the Indian government implemented laws to address corporate governance matters, but it has also started addressing CSR"). See also Ewing & Windisch, *supra* note 12, at 1 (stating that, with respect to CSR, "as economic growth in countries such as China and India grows at an exponential rate the research focus needs to shift accordingly") (citations omitted).

governance regimes in other developing countries.²⁷ Furthermore, strong corporate governance and CSR practices “are of crucial importance to both local firms and foreign investors that are interested in pursuing the tremendous opportunities for investment and growth” that economies such as China and India provide.²⁸ In essence, what China and India do in the realm of CSR will impact not only their own corporations, populations, and legal environments, but will also have significant consequences for corporations, consumers and populations around the world, as both countries become increasingly integral parts of the global supply chain and take over ever-larger shares of the global economy.²⁹

Yet, despite the significance of their CSR reforms and their value as a source of comparative analysis and models, the emerging CSR regimes in China and India have attracted little scholarly attention.³⁰ India’s, like China’s, “emergence as a global economic power poses enormous explanatory challenges for scholars of comparative corporate governance,” and understanding how they are changing “is a pressing task for researchers.”³¹ CSR regimes, in particular, in China and India have received even less scholarly attention than their broader

²⁷ See Lin, *supra* note 13, at 67 (while “the contemporary CSR movement is primarily pushed by the civil society in developed countries . . . the movement has great impact on developing countries in the age of globalization”); see also Ho, *supra* note 2, at 378 (“As a leader in emerging markets, China offers an important context in which to examine state promotion of CSR.”); Murtaza Syed & James P. Walsh, *The Tiger and the Dragon*, 49 FINANCE & DEVELOPMENT 36, 36 (2012), available at <http://www.imf.org/external/pubs/ft/fandd/2012/09/syed.htm> (“China and India are the giants of the emerging world . . . [and their] emergence has had profound implications for the rest of the world.”).

²⁸ See Nandini Rajagopalan & Yan Zhang, *Corporate Governance Reforms in China and India: Challenges and Opportunities*, 51 BUS. HORIZONS 55, 56 (2008) (also noting that “improvements in corporate governance can enhance investor confidence in firms in emerging economies and increase these firms’ access to capital”).

²⁹ See, e.g., Afsharipour, *Rising Multinationals*, *supra* note 25 (describing the takeover of Western companies by Indian firms); Edward Wong, *China Exports Pollution to the U.S., Study Finds*, N.Y. TIMES (Jan. 20, 2014), <http://www.nytimes.com/2014/01/21/world/asia/china-also-exports-pollution-to-western-us-study-finds.html> (reporting that a recent study had found that the “movement of air pollutants associated with the production of goods in China for the American market has resulted in a decline in air quality in the Western United States”).

³⁰ See Ho, *supra* note 2, at 378 (noting that while scholars have devoted a great deal of attention to comparative corporate governance, few scholars have examined CSR within that mix); Rajagopalan & Zhang, *supra* note 28, at 55 (noting that research “to date on corporate governance has mainly dealt with the efficacy of various mechanisms that can protect shareholders from self-interested executives, and the focus has generally been on (Western) developed economies” and that “relatively little research effort has been devoted to corporate governance issues in emerging economies such as India and China”); *id.* at 55 (stating that China and India, though their corporate governance issues have been little studied, “provide unique opportunities and challenges for governance challenges and research”).

³¹ Li-Wen Lin & Curtis J. Milhaupt, *We Are the [National] Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699 (2013).

corporate governance systems.³² And when CSR in these countries has been studied, most emphasis is placed on what China and India can learn from the West.³³

We posit that, alternatively, a comparative analysis of these issues should be viewed as a two-way exchange—both sides of the globe have much to learn from each other, and studying the new forms of CSR in China and India may benefit the West as well as the rest of the world. Though largely overlooked by corporate law scholars, these countries may very well be the source of groundbreaking innovations in corporate governance and corporate social responsibility,³⁴ and provide important lessons for other countries in the current era of economic fragility and instability.³⁵ Ultimately, we hope this Article will provide a greater understanding of the CSR regimes now unfolding in China and India and their implications, add to the search for innovative corporate governance models, and inspire further study of these important issues.

³² See Ans Kolk, Pan Hong, & Willemijn van Dolen, *Corporate Social Responsibility in China: An Analysis of Domestic and Foreign Retailer's Sustainability Dimensions*, 19 BUS. STRATEGY AND THE ENV'T, 289, 293 (2010) ("CSR in China has hardly been studied so far," and academic research in particular is lacking); see, e.g., Ho, *supra* note 2, at 396 (noting that "few studies to date have engaged in any in-depth examination of state-backed CSR outside the developed world"); Lattemann et al., *supra* note 6, at 427-28 (discussing gaps in research on CSR across countries).

³³ See Rajagopalan & Zhang, *supra* note 28, at 57 (focusing much of their analysis on how China and India can best adopt Western corporate governance practices—e.g., noting that the "continuing influence of the state in Chinese firms may adversely affect the speed at which, and the extent to which, Chinese firms can adapt to Western standards in corporate governance"); see also Kolk, Hong, & van Dolen, *supra* note 32, at 293-94 (noting that "most research on CSR has originated from, and focused on, Western countries," and that while academic research in Asia on this issue has been increasing, there is a gap on research on CSR in China); Justin Tan, *Institutional Structure and Firm Social Performance in Transitional Economies: Evidence of Multinational Corporations in China*, 86 J. BUS. ETHICS 171, 172 (2009) ("While growing awareness and scholarly resources have been directed to CSR studies in recent years, the majority have been focused on activities in the Western markets in which MNC's headquarters are located. However, in emerging markets, where poor government regulations and insufficient media scrutiny have left MNC operations relatively unchecked, the topic is under-examined.").

³⁴ See Ewing & Windisch, *supra* note 12, at 3 (explaining why the study of the development of CSR in China has important implications for CSR development from global and comparative perspectives).

³⁵ See generally Afsharipour, *Corporate Governance Convergence*, *supra* note 26. See also JOHN GILLESPIE ET AL., PUSHING BACK ON GLOBALIZATION: AN INTRODUCTION TO REGULATION IN ASIA 1 (John Gillespie & Randall Peerenboom eds., 2009) (discussing legal globalization, trade, and global regulation and noting that "[w]hat little is written in this area primarily focuses on Western countries, leaving legal globalization in Asia comparatively under-researched and under-theorized"); Zhao, *supra* note 8, at 275 ("There is nothing small or trivial about the 2008 global financial crisis. The deepest and broadest crisis since the 1930s has put the entire financial market into turmoil and has resulted in severe losses and a possible slowdown of the whole world economic system in the years since 2007 . . .").

The balance of this Article proceeds as follows. Section II provides a brief overview of the origins and contemporary definitions of CSR, describes global efforts to construct voluntary CSR standards, and highlights the reasons why the Western approach toward CSR has adopted the largely voluntary model. Section III describes the emerging CSR model in China, and explores the social and economic reasons behind China's rapidly evolving, novel, and more mandatory CSR approach. Section IV then turns to India. It provides the historical background for India's current CSR model and examines groundbreaking moves in Indian corporate law toward legally mandated CSR. Section V then explains the implications of these new mandatory approaches towards CSR and what these developments may mean for China and India and for other countries seeking to learn from their experiences.

II. WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

In the United States and Europe, a great deal of scholarly and civic attention has been devoted to defining CSR,³⁶ advocating for the widespread adoption of CSR,³⁷ and promulgating codes of conduct and CSR guidelines.³⁸ Most definitions of CSR incorporate some versions of the following: guidelines, codes of conduct, or pledges encompassing positive corporate action across five dimensions (economic, social and environmental value creation, stakeholder relations and voluntariness).³⁹ The three dimensions of value creation that companies should consider are often referred to as the "Triple P bottom line: Profit, People and the Planet."⁴⁰ These views of CSR are aimed at encouraging

³⁶ See, e.g., Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 611-15 (2001) (discussing the genesis of the CSR movement); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831 (2008) (defining CSR under a "Creative Capitalism Spectrum").

³⁷ See, e.g., M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 614 (2009) (describing the large magnitude of the socially responsible investing industry); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004) (focusing on CSR as a tool for economic development).

³⁸ See generally Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994); Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075 (2002).

³⁹ See Graafland & Zhang, *supra* note 10.

⁴⁰ *Id.* For further exploration of the triple bottom line concept, see generally JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* (1998); ANDREW W. SAVITZ WITH KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO* (2006).

corporations and governments to recognize that corporations are not only responsible to their shareholders, but also owe or should owe responsibilities to “stakeholders,” that is, other persons or communities who are directly or indirectly affected by a corporation’s actions.⁴¹ These views of CSR largely focus on voluntary mechanisms for corporate action.⁴²

Scholars have noted that the “evolution of the modern concept of CSR” is derived from corporate governance debates and practices in the United States and Europe.⁴³ In the United States, such debates arose as a result of rapid shifts in the U.S. economy due to industrialization and mass production of goods and services. Starting with the seminal debates between Adolf Berle and Merrick Dodd, scholars and policy makers have long debated the role and extent of CSR in the United States and Europe.⁴⁴ These early debates led to corporate philanthropic efforts and welfare programs conducted by corporations for employees before evolving to the broader CSR concepts articulated today.⁴⁵

While the conversation may have begun in the West, a more global focus on CSR emerged over the past two decades due to the significant attention paid to the activities of multinational corporations (MNCs) in developing countries, “and the impact of their operations on human rights, labour issues and community relations.”⁴⁶ This focus has intensified as MNCs have become publicly mired in corporate responsibility scandals in emerging markets.⁴⁷ In response to the

⁴¹ See Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT’L L.J. 309, 311 (2004) (linking CSR to “stakeholder theory” which recognizes a variety of responsibilities between a corporation and its stakeholders including employees, customers, investors, and suppliers).

⁴² See *supra* note 14 and accompanying text.

⁴³ See AMAO, *supra* note 11, at 66; see also C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 79-80 (2002) (describing nearly 100 years of debate over CSR in the U.S. legal community).

⁴⁴ See AMAO, *supra* note 11, at 57-59; Erika R. George, *See No Evil? Revisiting Early Visions of the Social Responsibility of Business and the Contemporary Conversation*, 33 SEATTLE U. L. REV. 1, 13-14 (2010).

⁴⁵ See Kolk, Hong & van Dolan, *supra* note 32, at 293.

⁴⁶ See AMAO, *supra* note 11, at 66; see also Kolk, Hong, & van Dolen, *supra* note 32, at 293 (noting that CSR has a relatively long history in the West and while it first “consisted merely of philanthropy and subsequently concern for employee matters, in the middle of the 20th century this broadened to attention for organisations’ broader task environment, initially primarily customers, distributors, suppliers and creditors, and later social and environmental issues more generally”). For descriptions of the types of supply chain problems that led to calls for increased corporate responsibility by MNCs in the 1990s, see generally Shrutti Rana, *Fulfilling Technology’s Promise: Enforcing the Rights of Women Caught in the Global High-Tech Underclass*, 15 BERKELEY WOMEN’S L.J. 272 (2000).

⁴⁷ See Tan, *supra* note 33 at 172.

increasingly international activities of MNCs, various international institutions have formulated CSR standards.⁴⁸

Among the most globally influential CSR guidelines or standards are the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,⁴⁹ and the goals embodied in the United Nations Global Compact.⁵⁰ The OECD Guidelines, though intended to provide voluntary principles and standards, have been recognized by OECD “adhering countries,” as well as other countries, as “recommendations jointly addressed by governments to multinational enterprises.”⁵¹ The OECD Guidelines, having gone through several updates, are “described as the comprehensive document on CSR.”⁵² These guidelines specifically endorse the idea that corporations should take the views of diverse stakeholders into account, and recommend that corporations “[c]ontribute to economic, social, and environmental progress with a view to achieving sustainable development.”⁵³ They provide a series of recommendations in areas such as employment, the environment, consumer interests, and disclosure practices aimed at improving corporate performance with respect to the “triple bottom line” described above.⁵⁴ Of course, the guidelines are just that—*i.e.*, guidelines that are not intended to be legally binding or enforceable.⁵⁵

Described as the “world’s largest voluntary corporate citizenship initiative,”⁵⁶ the United Nations Global Compact is intended to unite businesses with stakeholders such as UN agencies, labor and civil society organizations and governments to “advance ten universal principles in the areas of human rights, labor, the environment, and anti-corruption efforts by encouraging voluntary

⁴⁸ See AMAO, *supra* note 11, at 28-49; see also Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL’Y 334, 357-59 (2009) (describing various international “mixed hard law, soft law, and ‘voluntary’ initiatives containing core CSR principles”).

⁴⁹ See OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008), available at <http://www.oecd.org/investment/mne/1922428.pdf>.

⁵⁰ See UN GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Feb. 7, 2014).

⁵¹ See OECD, *supra* note 49, at 5-6, 12 & n.1 (including the text of the Declaration on International Investment and Multinational Enterprises); *id.* at 6 n.1 (listing adhering countries). Some scholars have argued that given vast government involvement in the OECD, the OECD Guidelines are only “nominally” voluntary. See Pitts, *supra* note 14, at 485.

⁵² See AMAO, *supra* note 11, at 34.

⁵³ See OECD, *supra* note 49, at 14.

⁵⁴ See generally, OECD, *supra* note 49 (recommendations discussed throughout).

⁵⁵ See AMAO, *supra* note 11, at 36.

⁵⁶ See *Corporate Responsibility Profile of United Nations Global Compact*, CSRWIRE, <http://www.csrwire.com/members/12044-united-nations-global-compact> (last visited Feb. 7, 2014).

participation by businesses.”⁵⁷ These ten principles are divided into categories paralleling these areas and are set forth below:

Human Rights:

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

Principle 2: make sure that they are not complicit in human rights abuses.

Labour:

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment:

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

Principle 8: undertake initiatives to promote greater environmental responsibility; and

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

Anti-Corruption:

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.⁵⁸

The UN Global Compact is significant not only for the size of this initiative, but also because the principles articulated above are drawn from a variety of global sources such as the Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development.⁵⁹ However, like the OECD Guidelines, the UN Global Compact is intended to be “neither a code nor regulation,” and is by design not enforceable.⁶⁰ Despite its

⁵⁷ *Id.*

⁵⁸ See UN GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Feb. 7, 2014).

⁵⁹ See *id.* It is also important to note that both China and India are signatories to these various international declarations. See Ho, *supra* note 2, at 402-03; OECD, INVESTMENT POLICY REVIEW: INDIA 138-39 (2009), available at <http://www.oecdbookshop.org/oecd/display.asp?lang=EN&sf1=identifiers&st1=202009091p1>.

⁶⁰ See AMAO, *supra* note 11, at 39. If a company that has signed the global compact fails to provide the required statement of support and the various reports on the progress the company has made in achieving the principles, it will be removed from the list of participants in the UN Global Compact. See *id.* at 39.

non-enforceability (or perhaps because of it), the Global Compact has signatories from around the world, including civil society participants, academic organizations and hundreds of companies from China and India.⁶¹

Though CSR has a long history, for the purposes of this Article, we focus on CSR as including the dimensions described above and the country-specific CSR standards or regulations set forth *infra* in Parts III and IV. Importantly, the contemporary definitions of CSR we utilize herein are the ones most relevant to our analysis as they gained prominence in the United States and in Europe, as well as in international institutions, during the 1990s and the early 2000s,⁶² just at the time when both China and India began launching transformative economic liberalization reforms.⁶³ Significantly, it was also during the 1990s that CSR concepts, as they are now articulated in the United States and Europe, were introduced to China and India,⁶⁴ as efforts rose to address safety and human rights

⁶¹ See UN GLOBAL COMPACT: PARTICIPANTS AND STAKEHOLDERS, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Apr. 4, 2014).

⁶² See *Corporate Responsibility Profile of United Nations Global Compact*, *supra* note 55 (noting that the UN Global Compact was launched in 2000); see also Katherine V. Jackson, *Towards a Stakeholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 325-27 (2011) (describing widespread support in Europe and U.S. for CSR guidelines such as OECD guidelines); WORLDWATCH INSTITUTE, *supra* note 3 (noting that “[w]orldwide, a growing number of businesses are embracing CSR practices, including rigorous work safety standards, environmental reporting requirements, and more ‘responsible’ investment patterns. In 2003, investments using socially responsible criteria exceeded \$2.63 trillion worldwide . . .”).

⁶³ See Nandini Rajagopalan & Yan Zhang, *Recurring Failures in Corporate Governance: A Global Disease?*, 52 BUS. HORIZONS 545, 548-49 (2009); see also *infra* notes 92-95 and accompanying text (discussing China’s economic transformation); *infra* notes 167-168 and accompanying text (discussing India’s corporate governance reforms in response to its rapidly expanding economy).

⁶⁴ See Anita Chan & Kaxton Sui, *Wal-Mart’s CSR and Labor Standards in China* 3 (BDS Working Paper Series No. 4, 2004), available at [http://bdsnetwork.cbs.dk/publications/Working%20Papers/bsd_working_paper_\(paper4\).pdf](http://bdsnetwork.cbs.dk/publications/Working%20Papers/bsd_working_paper_(paper4).pdf) (“The concept of Corporate Social Responsibility was introduced into China in the mid-1990s. It originated with the anti-sweatshop movement in the developed countries, which accused brand-name Western corporations of turning a blind eye to dangerous, inhumane conditions in the factories around the world that make merchandise for them under contract. To ward off criticism, many Western companies have adopted “corporate codes of conduct,” demanding compliance with a minimum set of standards by their sub-contractors in China and in other developing countries.” (citations omitted)); Ho, *supra* note 2, at 398 (explaining that “CSR concepts were introduced to Chinese companies primarily through codes of conduct and third-party audits in the wake of the sweatshop exposés of the 1990s”). GILLESPIE ET AL., *supra* note 35, at 34-35 (discussing how globalized labor standards were transferred to Asia through transnational supply chain agreements in the clothing, footwear, and textile industries as well as studies suggesting that regulatory templates used by outside advisers are “overwhelmingly derived from global (mainly Western) norms and practices”); TATJANA CHAHOUD ET AL., GERMAN DEVELOPMENT INSTITUTE, CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY IN INDIA – ASSESSING THE UN GLOBAL COMPACT’S ROLE 4 (2007), available at <http://mercury.ethz.ch/service>

concerns across the growing global supply chain in which China and India were both becoming key producing and exporting nations.⁶⁵ That is, MNCs under fire for their practices in emerging economies such as China and India sought to address critiques of their international labor practices by bringing then-developing CSR practices from the West to their operations in China and India, among other developing countries.⁶⁶ This in turn means that these are the definitions of CSR that were imported into China and India and, to an extent, influence and shape the basis of their current CSR reform efforts.⁶⁷

It is also important to further emphasize here that the CSR concepts as discussed above have developed and largely been viewed as voluntary mechanisms. As previously noted, CSR has developed in the United States and Europe as a concept that is aimed at conducting “business beyond compliance with the law and beyond shareholder wealth maximization;”⁶⁸ that is, expressly voluntary compliance by businesses.⁶⁹ Some advocates of CSR have gone so far as to advocate that where corporate behavior is “strongly regulated by law, it cannot be characterized as CSR.”⁷⁰

The U.S. model of CSR as a voluntary, not mandatory, approach to affecting corporate action can be linked to two important features of the American legal context. First, in the U.S., it is widely argued that corporations’

engine/Files/ISN/95853/ipublicationdocument_singledocument/2a6e76e7-0fd5-4e5b-8574-6ed77c-911459/en/Study+26e.pdf (discussing the high rate of participation by Indian entities in the UN Global Compact).

⁶⁵ See Ho, *supra* note 2, at 398; Elaine Sio-ieng Hui, *Corporate Social Responsibility Revisited: Can it Address Chinese Workers’ Needs in a Changing Socio-Economic Context* (Asia Monitor Resource Centre, CSR Research Paper Series No. 1, 2010), available at <http://www.amrc.org.hk/system/files/CSR%20Research%20Paper%20Series%20No%201.pdf> (noting that CSR has been gaining “prominence since the 1990s as a tool of transnational corporations (TNCs) in mediating labour relations in supplying countries interlocked in the global production chain”); see also Chan & Sui, *supra* note 64 (explaining how Western CSR concepts were introduced into China in the mid-1990s as part of the anti-sweatshop movement in these countries which led companies to adopt codes of conduct); Lin, *supra* note 13, at 89 (“The idea of CSR was transported to China in the 1990s mainly through global supply chains. The anti-sweatshop movement and environmental movement have cause multinational companies to adopt social and environmental standards in selecting their suppliers”); *id.* at 81 (and that global supply chains continue “to play an important role in disseminating the concept of CSR in China”).

⁶⁶ See Ewing & Windisch, *supra* note at 12, at 1.

⁶⁷ See generally Ho, *supra* note 2 (explaining that multinationals have brought CSR concepts to China and India); see also CHAHOUD ET AL., *supra* note 63 (discussing Indian participation in the UN Global Compact); Hui, *supra* note 65, at 2 (noting that China is involved in International CSR initiatives including the OECD Guidelines, the ILO Labour Standards, and the UN Global Compact).

⁶⁸ See Lin, *supra* note 13, at 64.

⁶⁹ Some scholars have argued that CSR has evolved into more mandatory legal requirements. See KERR, JANDA & PITTS, *supra* note 11, at 471-93.

⁷⁰ Graafland & Zhang, *supra* note 10, at 35.

primary goals and responsibilities should be centered on “shareholder wealth maximization” rather than a broader approach involving other stakeholders.⁷¹ Under this view, corporate responsibilities to other stakeholders are thus seen as essentially voluntary.⁷² Indeed, Milton Friedman once famously stated that “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits,” a view now known as the shareholder model of business that has dominated business thinking in the United States for decades.⁷³ Under this theory, shareholders should have a position of unrivaled primacy with respect to the other actors involved or affected by a business, and as a result, businesses should be managed to maximize shareholder’s value above all.⁷⁴

Second, this view is explicitly linked to Western ideas of private ownership and the corresponding idea that since shareholders are the owners of corporations, they should control it.⁷⁵ As will be discussed below, China and India utilize different corporate structures and ownership models, and these differences in corporate structure and ownership make it possible for different corporate governance structures to develop and take hold in these countries.

This view of corporate action (sometimes known as the “shareholder primacy” model) gained force in the 1990s just as the models of corporate responsibility we discuss here were emerging.⁷⁶ Not un-coincidentally, these CSR

⁷¹ See Stephen M. Bainbridge, *In Defense of the Shareholder Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423-25 (1993) (arguing that “the mainstream of corporate law remains committed to the principles expressed by the *Dodge* court. . . . As it has long done, Delaware law still requires directors to put shareholder interests ahead of those of non-shareholders. At least in Delaware, the shareholder wealth maximization norm thus remains a more accurate description of the state of the law than any of its competitors”) (referring to the case of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919)); Hansmann & Kraakman, *supra* note 21, at 439 (arguing that there is “no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”). *But see, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 299-305 (1999); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1409-21 (2008). For further exploration of the shareholder primacy norm, see D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290-91 (1998).

⁷² See, e.g., Bantekas, *supra* note 41, at 317 (stating that “the application of CSR rests on a voluntary basis (indeed this has been the cornerstone of the concept)”). For an overview of the debate regarding CSR, see Alan C. Neal, *Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?*, 29 COMP. LAB. L. & POL’Y J. 459, 464 (2008).

⁷³ Ignacio Ferrero, W. Michael Hoffman, & Robert E. McNulty, *Must Milton Friedman Embrace Stakeholder Theory?*, 119 BUS. & SOC’Y REV. 37, 39 (2014).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654-55 (2006) (citing a study finding “that the norm of shareholder wealth maximization was implicit in most business school courses”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001)

models primarily arose from the efforts of NGOs and public international bodies, such as the United Nations and OECD, rather than governments.⁷⁷ These developments are significant to this comparative analysis, as both China and India offer different approaches to corporate governance (in China, for example, the state is often the primary shareholder in corporations, and in India most companies are controlled by majority shareholders or the state) and stakeholders other than shareholders play different roles in these societies as compared to the United States and Europe.⁷⁸

As China and India seek to establish themselves as global economic players on par with the United States and Europe,⁷⁹ it is important to ask why they have eschewed the voluntary model in favor of a mandatory CSR model. Moreover, as the development of CSR in these nations will impact not only CSR but also emerging corporate governance models around the world, we situate this analysis “within the wider field of economic governance [since the] social responsibility of a company is contingent on the institutional framework of business and therefore embedded within a wider field of economic governance.”⁸⁰ Why and how China and India are approaching CSR differently than the United States and Europe is therefore critical to understanding the future and potential of CSR.

China and India now appear to be moving a step further than international standard-making bodies, as well as the United States and Europe, in developing mandatory approaches to CSR. As they do so in a moment of critical national and global change, understanding their reasons and methods is even more important for future corporate governance and CSR efforts and reforms. In the next

(“Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth.”); *id.* at 2065 (“Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.”).

⁷⁷ See Bantekas, *supra* note 41, at 317 (also noting that the 2001 European Commission Green Paper on CSR emphasizes the voluntary aspect of CSR).

⁷⁸ In China, NGOs and other civil society organizations are severely restricted in their activities by the Chinese government, and therefore cannot play the same societal roles that similar organizations play in the United States, or pressure the government or corporations in the same ways or to the same extent. For example, see KARLA W. SIMON, CIVIL SOCIETY IN CHINA: THE LEGAL FRAMEWORK FROM ANCIENT TIMES TO THE “NEW REFORM” ERA 340-41 (2013) (explaining that, for example, religious groups conducting charity work in China are forced to operate under strict government restrictions limiting their activities and behavior most significantly with respect to political and religious issues; in addition, Chinese “authorities [have recently] said that they want to encourage charitable work by religious groups, especially during natural disasters, but are wary of permitting them to mingle with overseas organizations”).

⁷⁹ See Rana, *supra* note 15, at 231-32 (describing some of China’s efforts to achieve greater global and economic prominence as the U.S. falters financially).

⁸⁰ Graafland & Zhang, *supra* note 10, at 35.

sections, we begin an inquiry into why and how China and India are moving towards a mandatory CSR regime.

III. THE EMERGING CORPORATE SOCIAL RESPONSIBILITY REGIME IN CHINA

Like most enduring societies, China has a rich history of businesses conducting philanthropic endeavors.⁸¹ While corporate philanthropy is not the same as CSR, it nonetheless provides an important foundation for the reception and development of CSR, both in China and historically in the United States.⁸² Many scholars have attempted to locate and document antecedents of modern-day CSR in Chinese history and culture. For example, scholars have pointed to the communal structure of Chinese society and the familial structure of many businesses as providing historical examples of businesses that maintained social responsibilities to family members, surrounding communities, and the state.⁸³ Others have argued that early forms of CSR can be found in conceptions such as that of the “Confucian merchant” who infused business practices with views of social responsibility.⁸⁴ Also, for centuries Chinese businesspeople have engaged

⁸¹ See OECD, CHINA-OECD PROJECT ON GOVERNMENT APPROACHES TO ENCOURAGING RESPONSIBLE BUSINESS CONDUCT, OECD DOC. DAF/INV/WD(2007)17, at 24 (Dec. 5, 2007) (noting that China has a “well-established tradition of generosity by successful Chinese entrepreneurs, including Overseas Chinese Tycoons who have founded a number of major public establishments in China and elsewhere . . . [and] Rich individuals in China continue to make large donations to a wide variety of public services” and that [s]uch largesse is frequently ascribed to Confucian values”).

⁸² See *id.* at 24 (emphasizing that while corporate philanthropy is not a substitute for CSR, it can sometimes “constitute one channel among others for enterprises’ endeavors to behave in a socially responsible way”); see also Kolk, Hong, & van Dolen, *supra* note 32, at 293 (noting that CSR in the United States has its roots in philanthropic efforts).

⁸³ See Lin, *supra* note 13, at 85 (citing traditional Chinese businesses formed around kinship bonds and claiming that “[f]amily enterprises had responsibilities not only to their family members but also the larger social communities and even to the state (the “political family”). This broad scope of responsibilities shared the main idea of modern CSR—corporations should be accountable not only to shareholders but to other stakeholders (*e.g.*, local communities).” See also Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1606-07 (2000) (describing the divergent origins of Chinese and U.S. corporate structures, and analyzing the roles of families and clans as corporate units in China).

⁸⁴ See, *e.g.*, USA China Law Group, *Western and Chinese Perspective of Corporate Social Responsibility*, USA CHINA LAW BLOG (June 12, 2009), <http://www.usachinalaw.com/blog/article-resources/western-and-chinese-perspective-of-corporate-social-responsibility/> (arguing that “[a]lthough CSR is said to have been founded in the West, China has a long history of CSR” and pointing to a speech by Yining Li at the 2006 Global Corporate Social Responsibility Forum in Beijing noting that “[f]rom a tradition of deep[] in Chinese culture, one’s happiness and success is only possible when those around him are also happy and successful”); also quoting a speech stating that “[T]he Eastern idea of “merchant spirit” from Confucius thought coupled with the Western idea [of] “obligation spirit” rooted in Greek thought together fully represent [] corporate efforts to

in large-scale charitable works and maintained social service programs often reserved to the realm of governments in other regions.⁸⁵

It is important to note here that these attempts to locate precursors to contemporary CSR norms in Chinese history and culture, while contestable,⁸⁶ appear to be a means of fostering greater acceptance of CSR norms in a society where there is increasing resistance to simply importing Western “legal transplants” into the Chinese legal system.⁸⁷ Locating Chinese historical and cultural antecedents for modern-day CSR efforts may help reduce societal resistance to the government’s actions in this realm. Furthermore, these attempts to link contemporary CSR concepts with China’s past and present may also constitute a way of infusing existing or imported CSR norms with Chinese influences—thereby furthering the Chinese government’s goal of creating a CSR regime with “Chinese Characteristics.”⁸⁸

In discussing China’s recent moves towards mandatory CSR, however, this Article focuses its analysis on the recent and on-going transformation of the Chinese economy from a socialist economy to one that is increasingly market-oriented and moving towards privatization.

China’s moves towards mandatory CSR are arguably a part of the larger, history-making transformations now occurring throughout China, as the Chinese government seeks to re-orient the massive Chinese economy into a more market-

pursue excellence and give back to society.” See also OECD, *supra* note 48, 218 n.55 (noting that one Chinese scholar, “while seeing ‘Western’ CSR as springing from Protestantism, ascribes Chinese CSR values to the somewhat innovative concept of the ‘Confucian merchant’”).

⁸⁵ See Lin, *supra* note 13, at 86 (noting that in China “[b]efore the economic reform, a state-owned enterprise was not only a production unit but also a social services center. A[n] SOE shouldered an important function of providing a cradle-to-grave welfare package to employees and their families”); see also *id.* at 86 (noting that the provision of these services should be distinguished from current conceptions of CSR).

⁸⁶ See generally Ewing & Windisch, *supra* note 12 (discussing whether CSR in China is an extension of Confucian philosophy as opposed to a reflection of Western influences).

⁸⁷ See Carl Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 948, 952 (2011) (discussing a Communist Party campaign beginning in 2006 that emphasized “the need to avoid the pernicious influence of ‘Western’ rule-of-law theories” and discussing the Chinese government’s stated desire to explicitly reject “Western” legal transplants).

⁸⁸ See USA China Law Group, *supra* note 83 (noting that China is emphasizing “CSR with Chinese Characteristics” which is intended to build upon fundamental similarities with Western CSR while maintaining a strong state role); see also Bradford & Posner, *supra* note 17, at 7 (discussing Chinese exceptionalism and arguing that China pursues a foreign policy focusing on the needs of developing countries and prioritizes economic development and environmental reforms over human rights issues); Lanlin Bu, Micheal Bloomfield, Jiali An, *CSR Guide for Multinational Corporations in China: Prosperity with Integrity* (2013) at 1-2 (noting that in China “a new brand of CSR with Chinese characteristics is emerging”); Lin, *supra* note 13, at 66 (noting that the “Chinese government’s implicit exclusion of human rights from its official CSR measures signals a CSR discourse with Chinese characteristics”).

based economy⁸⁹ as well as raise China's global economic and political clout as it carries out its economic reforms.⁹⁰

CSR also constitutes an important tool for the Chinese government to address social unrest as its people grapple with the consequences of rapid economic growth and change. For example, the World Bank has noted that since China began shifting from a centrally planned to a market-based economy over the last four decades, China has not only achieved rapid economic growth, but it has also had to deal with great challenges such as high levels of inequality and poverty, demographic change, rapid urbanization and environmental change, and concomitant social disruption.⁹¹ As will be discussed below, it appears that over the last two decades, the Chinese government has moved from criticizing efforts to impose Western-style CSR on its companies as inappropriate pressure from developed nations onto a developing one, to adopting CSR practices as a way of "branding" and raising the profile of Chinese-made goods for international markets, to finally using CSR as a way of providing a safety valve for public discontent. Currently then, the Chinese government appears to be promoting CSR at least in part as a way to present itself as responsive to public outcry over corporate and government malfeasance, and to assuage public protests before they can escalate into broader social unrest or political dissent.

A. *Incorporating Corporate Social Responsibility into Chinese Law*

The roots of China's recent CSR reforms lie in the government's decades-long shift from a state-run economic system to a privatized, market-oriented system aimed at increasing China's economic development and economic growth.⁹² For nearly a generation, and accelerating in the past decade, the Chinese government has tried to re-orient its economy toward private enterprise and competition as part of a policy known as 'reform and opening,' as it moved away from a centrally planned economic system to one that embraces some free

⁸⁹ See Ruskola, *supra* note 82, at 1601-02.

⁹⁰ See Rana, *supra* note 15, at 233-33 (discussing some of China's recent efforts to raise its global economic and political power). For another view on how China may be seeking to increase its economic and political clout, and how this is reflected in the government's reform efforts, see Bradford & Posner, *supra* note 17, at 7 (arguing that there are three exceptional states today—the United States, the EU, and China, and that the Chinese version of "exceptionalism" is founded on the Chinese view that "international law should pose less burdensome obligations on poor countries" and that "economic growth should take precedence over human rights (at least, in poor countries)").

⁹¹ See THE WORLD BANK, *China Overview*, <http://www.worldbank.org/en/country/china/overview> (last visited March 1, 2014).

⁹² See Rana, *supra* note 15, at 216, 220-21.

trade and liberal economic principles.⁹³ Among other things, this means that many social welfare services that were formerly provided by the state, such as housing for long-term company employees, are now left to the private sector or individuals (providing an interesting parallel to the development of CSR in the U.S.).⁹⁴

While China's rapid economic growth has quickly made it one of the world's largest economies,⁹⁵ China has also suffered from a widening income gap.⁹⁶ It has also struggled to balance economic growth with public dissent over government economic and social policies. China has also been confronted with the problems of massive social dislocation resulting from rapid economic growth and government urbanization policies.⁹⁷ In this light, China's attempts to foster greater CSR can be viewed as both an attempt to quell public discontent in the wake of preventable corporate disasters and rising income inequality, as well as a politically charged method of economic development that seeks to transform Chinese products into world-quality goods while tempering the critiques of its trading partners who claim it is disregarding social, environmental or human rights norms.⁹⁸

⁹³ See *id.* at 220 (discussing China's recent moves from a planned to a more market-based economy).

⁹⁴ Adam Chodorow, *Charity with Chinese Characteristics*, 30 UCLA PAC. BAS. L.J. 1, 2 (2012); see also *supra* notes 45 and 82.

⁹⁵ See Kenny, *supra* note 15; see also Angela Monaghan, *China Surpasses US as World's Largest Trading Nation*, THE GUARDIAN (Jan. 10, 2014), available at <http://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation>.

⁹⁶ See Hui, *supra* note 65 at 4 (noting the escalating income gap in China as reflected by its Gini coefficient which reached the level of .47 in 2010, and discussing how this has led to increased discontent regarding social inequality); see also YAN HAO, CHINA'S GROWING MIDDLE CLASS IN AN INCREASINGLY STRATIFIED SOCIETY 2 (2006) (noting that as China is a country that is currently experiencing economic instability, there is a widening income gap between the middle class and a lower class of the newly poor).

⁹⁷ See Bradford & Posner, *supra* note 17, at 13, and discussion accompanying note 90 above (emphasizing that "China also believes that international law should impose less burdensome obligations on poor countries. According to China, economic growth should take precedence over human rights (at least, in poor countries)"). See also Alan Taylor, *Rising Protests in China*, THE ATLANTIC (Feb. 17, 2012), available at <http://www.theatlantic.com/infocus/2012/02/rising-protests-in-china/100247/> ("As China grows into its role as a 21st-century economic powerhouse, its government is struggling with the growth of popular unrest. Groups of Chinese citizens, from small bands of workers to entire villages, have been staging protests across the massive nation with increasing frequency. According to research by the Chinese Academy of Governance, the number of protests in China doubled between 2006 and 2010, rising to 180,000 reported 'mass incidents.' The uprisings are responses to myriad issues, primarily official corruption, government land grabs, Tibetan autonomy, and environmental problems.").

⁹⁸ See Taylor, *supra* note 97. See generally Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (the People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216 (1996) (discussing the dangers of rapid economic development and its link to an increase in violence against women). See also MICHAEL SANTORO, PROFITS AND PRINCIPLES:

1. The Growth of CSR in China

China's new CSR regime is emerging against this backdrop of economic and social change. First, as noted previously, MNCs operating in China brought concepts of CSR, as it is now known in the U.S. and Europe, into China during the 1990s as a response to global public criticism of labor, safety, and other concerns at their Chinese operations.⁹⁹ During this early phase of CSR, CSR was viewed as a Western transplant that flowed into China primarily through contractual agreements between MNCs and Chinese companies, as MNCs instituted CSR practices in their Chinese partners or subsidiaries who were producing goods for export. For example, a number of American companies brought CSR practices into China (and other countries on the global supply chain) in order to mollify protests in the West over the ways in which American companies were allegedly violating, or perhaps complicit in, violations of labor, human rights, and other legal norms in their overseas operations.¹⁰⁰

During this time, Chinese companies and citizens exhibited some resentment to this introduction of CSR principles, which they viewed as an imposition of Western developed country norms onto a country that was still developing and had fewer financial resources than developed countries. These perceptions were only exacerbated by the ways that Western companies often approached Chinese companies, for example, by publicly stating that "China needs to be taught to engage in corporate social responsibility, that corporate social responsibility practices from the 'West' will naturally apply to the Chinese cultural context, and the corporate social responsibility practices that Chinese firms were engaging are, as viewed from a Western perspective, lower order in the scheme of CSR development."¹⁰¹ Thus, when contemporary Western notions of CSR were first brought into China on a large scale, the process was conducted in a culturally fraught manner with imperialistic undertones.

GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA (2000). This approach also appears to be a paradigmatic example of the Chinese government's view that environmental and economic growth concerns should take precedence over human rights issues, at least until China reaches a higher stage of development. See Bradford & Posner, *supra* note 17, at 7 (discussing Chinese exceptionalism and arguing that China pursues a foreign policy focusing on the needs of developing countries and places economic development and environmental reforms over human rights issues). It is important to note that despite its recent growth, China is still considered a developing country. See THE WORLD BANK, *China Overview*, *supra* note 91.

⁹⁹ See Ho, *supra* note 2 and accompanying notes and text; see also Lu Tang & Hongmei Li, *Corporate Social Responsibility Communication of Chinese and Global Corporations in China*, 35 PUB. REL. REV. 199-212, 200-01 (2009).

¹⁰⁰ See GILLESPIE ET AL., *supra* note 35, at 34-35 (explaining how globalized labor standards including Western CSR norms were transferred from multinational corporations to Asian countries via transnational supply chain agreements in the clothing, footwear, and textile industries).

¹⁰¹ Ewing & Windisch, *supra* note 12, at 2 (discussing assumptions in the CSR literature as it relates to Western-Chinese interactions over CSR during the late 1990s and early 2000s).

During this period, however, the Chinese media and academics were also independently discussing CSR concepts and their application and development in China.¹⁰² With these foundations, along with the Chinese leadership's then-held view that CSR had been used as a method of pressuring Chinese businesses to meet Western companies' demands—whether or not they were the better course for Chinese companies—state agencies and government entities began to develop their own CSR-like labor standards and codes of conduct.¹⁰³ These developments came as MNCs began to conduct “social audits” at Chinese factories to ensure compliance with Western or global CSR codes or principles.¹⁰⁴ Interestingly, it was around this time that Chinese companies also began to re-characterize CSR to fit their own purposes. That is, they realized that implementing either imported or indigenous CSR standards in Chinese manufacturing or export arenas could be used as a “branding” mechanism that would enhance views of Chinese products abroad, and thereby help China and Chinese companies achieve their goals of greater economic growth and a desire to be taken more seriously on the world stage.¹⁰⁵

Thus, by the beginning of this millennium, CSR in China had expanded and developed further as more Western companies operating in China advocated the use of a CSR approach. At the same time, China was increasingly engaging with international institutions promoting CSR such as the United Nations, OECD, ILO, and the World Bank, and was also developing more indigenous CSR models.¹⁰⁶

Significantly, China also had another internal source for CSR: arguably, China's 1994 Company Law, while not expressly mentioning CSR, did contain language which could be viewed as legal provisions mandating CSR.¹⁰⁷ For example, the Company Law provided for enhanced labor rights (though the inclusion of labor rights in this version of the Company Law is often viewed as a reflection of socialist ideology, and incorporates a view of labor rights from a

¹⁰² See Ho, *supra* note 2, at 398 (locating early references to CSR in the media and academy in the mid-1980s).

¹⁰³ *Id.* at 398-99.

¹⁰⁴ See Hui, *supra* note 65, at 2.

¹⁰⁵ See Simon Zadek, Maya Forstater, & Kelly Yu, *Corporate Responsibility and Sustainable Economic Development in China: Implications for Business*, U.S. CHAMBER OF COMMERCE 9 (2012), available at https://www.uschamber.com/sites/default/files/legacy/international/files/17296_China%20Corp%20Social%20Responsibility_Opt.pdf (noting that Chinese state-owned enterprises (SOEs) recognize CSR as a tool to meet the demands of a diverse group of consumers, and that “CSR is becoming an embedded aspect of China's own global brand and way of doing business internationally.”). See, e.g., Ewing & Windisch, *supra* note 12 at 2 (discussing the use of CSR as a branding mechanism).

¹⁰⁶ See Zadek, Forstater & Yu, *supra* note 105, at 9.

¹⁰⁷ See Lin, *supra* note 13, at 69 (describing Article 14 as an “overarching provision broad enough to contain the idea of CSR”).

socialist perspective, rather than labor rights as they are perceived in the United States or by CSR proponents who wish to improve labor conditions in the global supply chain).¹⁰⁸ Most importantly, Article 14 of the Company Law contained a provision which can be viewed as incorporating CSR, stating:

Companies must comply with the law, conform to business ethics, strengthen the construction of the socialist civilization, and subject themselves to the government and public supervision in the course of business.¹⁰⁹

Arguably, this provision presaged China's moves to mandatory CSR in two ways. First, it required companies to conform with business ethics, a broad concept that is viewed as "beyond compliance with the law" in the U.S. and Europe and is instead left to the realm of CSR in those countries.¹¹⁰ Second, the portion of the law subjecting a corporation to public and government supervision contains important parallels to a stakeholder model of corporate behavior, which allows consumers, communities and other stakeholders to monitor corporate action. This is also noteworthy because, similar to India and as will be discussed further below, China's legal framework for CSR differs from the dominant Western model of CSR which views CSR as more akin to a supplement or side-note to the shareholder wealth maximization model. Unlike this Western model, it could be said, then, that China has at least since 1994 included CSR in its corporate law "as a concept closely related with the stakeholder model of corporate governance."¹¹¹

By 2005, CSR in China had undergone a marked shift, as the government's view turned from "skeptical to promoter."¹¹² That year, Premier Hu Jintao publicly stated that China would implement a new policy vision of building a "harmonious society."¹¹³ In 2006 the Central Committee of the

¹⁰⁸ *Id.* at 68-69.

¹⁰⁹ *Id.* at 69; see [The Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994), art. 14 (2005)(China).

¹¹⁰ *Id.*

¹¹¹ Lin, *supra* note 13, at 68 (noting that "CSR is a concept closely related with the stakeholder model of corporate governance" and that "[i]n this regard, the Chinese Company Law may coexist harmoniously with CSR," although when "Chinese legislators drafted the company law in the early 1990s, the idea of modern CSR was not conceptualized." See generally William Goetzmann & Elisabeth Koll, *The History of Corporate Ownership in China: State Patronage, Company Legislation, and the Issue of Control*, A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS, 149 (2005) (discussing the historical trajectory of company law in China).

¹¹² Lin, *supra* note 13, at 68.

¹¹³ See Hu Jintao, President of the People's Republic of China, Keynote Address at the Boao Forum for Asia Annual Conference 2011: Towards Common Development and a Harmonious Asia, Speech (Apr. 14, 2011), available at http://english.gov.cn/2011-04/15/content_1845382.htm.

Communist Party adopted this as a policy mandate, which also “included a mandate for all governments to strengthen CSR.”¹¹⁴ These developments followed on the heels of other major CSR developments in China, such as the development of local government and industry codes of conduct, including the voluntary labor standard CSA8000, developed by the local government of Changzhou, and the domestic textile industry standard developed by the China National Textile and Apparel Council, CSC9000T. China also created a Global Compact Liaison Office during this period.¹¹⁵

Importantly, we argue that this growing emphasis on a vision of a “harmonious society”—in which CSR plays an important role—can be viewed as an attempt by the Chinese government to temper and redirect public dissent from the social dislocations caused by rapid economic growth while leaving intact its authoritarian stance on public expression. For example, implementing greater CSR measures in the wake of corporate or natural disasters has been shown to alleviate public dissent that might have otherwise spilled over into less manageable protests.¹¹⁶ Thus, any contemporary discussion of CSR in China should recognize the political and social roles government-funded CSR can play in China. Put another way, in China CSR is not just aimed at improving corporate performance. Rather, the role CSR now plays in China is a political and social one that is notably different from the conceptions of CSR that arose in the West, where political and social dissent by non-shareholder stakeholders is generally more visibly and openly dealt with by governments and corporations. This, in turn, highlights some of the reasons we argue China is both deliberately and organically developing a CSR system with “Chinese Characteristics.”

2. China’s 2006 Company Law and Express Recognition of Corporate Social Responsibility

It is important to note that when China initially changed its Company Law in 1994 (itself a transplant from Germany),¹¹⁷ it was expressly attempting to re-orient its corporate laws along free market lines. It was also seeking to “activate the profit-seeking” motive of companies as well as extricate them from

¹¹⁴ See Ho, *supra* note 2, at 399 (describing the policy directive to strengthen CSR); see also Zhonggong Zhongyang Guanyu Goujian Shehuizhuyi Hexie Shehui Ruogan Zhongda Wentide Jueding [CCP Central Committee Decision on Important Issues Concerning the Establishment of a Harmonious Socialist Society], 6th Party Plenum of the 16th CCP Central Committee, art. 5(4) (Oct. 11, 2006), available at http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm.

¹¹⁵ Ho, *supra* note 2, at 399, 403.

¹¹⁶ See, e.g., *supra* notes 2 and 3 and accompanying text for examples of how the Chinese government was able to use or promote CSR in ways that helped reduce or redirect public outrage over corporate and government malfeasance.

¹¹⁷ See Umakanth Varottil, *Independent Directors and Their Constraints in China and India*, 2 JINDAL GLOBAL L. REV. 127, 140 (2011).

the social service functions (such as employee housing) that were previously responsibilities of state-owned entities.¹¹⁸

However, during drafting efforts for the 2006 Company Law, China was in a markedly different position than it was in 1994. With a rising economic and political profile, and the concomitant ability to question the dictates and values of the West, China was in a position not only to pursue profits and greater economic growth,¹¹⁹ but also to “emphasize that businesses operating in China must not place profit seeking above morality and broader social welfare, [and] rather should adopt responsible and sustainable business practices.”¹²⁰ China’s growing CSR efforts during that period can be viewed as part of China’s larger efforts at the time to develop a greater global voice—a voice that was distinctively China’s own.¹²¹ This voice is one of confidence in China’s ability to challenge Western norms and ideas, especially with the foundations of Western economies wobbling. This voice is also one that seeks to convey that Chinese perspectives are worthy of respect or notice by the United States, and that Chinese legal and business practices can serve as potential models that the United States should look to as it emerges from financial crises and corporate scandals.¹²²

Thus, during the comprehensive revision process for the Company Law, beginning in 2004, it is not surprising that “CSR was one of the many issues considered in the revision,”¹²³ as China was now using CSR for its own political ends, not just Western appeasement. At this time, Chinese leaders began publicly stating that “profit” must not come above “morality,”¹²⁴ another example of China’s willingness to publicly challenge American moral or economic

¹¹⁸ Lin, *supra* note 13, at 69 (discussing the “macro-economic” background against which the 1994 Company Law was drafted, and discussing reasons for the failure to put CSR “in a conspicuous position.”).

¹¹⁹ See Rana, *supra* note 15, at 215 (noting China’s rapid economic growth); see also Lin, *supra* note 13, at 89 (discussing pressure from American consumers to purchase from socially responsible corporations); Kenny, *supra* note 15 and accompanying text (describing China’s recent economic and political rise, rivaling the economic and political power of the United States).

¹²⁰ See Ho, *supra* note 2, at 399; see also Rana, *supra* note 15, at 232 (arguing that “[a]s China steps up its role in the global financial arena, China is gaining not only political and financial power, but an important sense of pride and international confidence. This confidence, in fact, appears to rise in almost direct proportion to the missteps of the United States and other major financial powers. . . . [a] fascinating issue to consider is how China will seek to use this moral as well as financial power. Recently, China has begun to use this power to publicly scold the United States for its perceived excesses and profligate spending.”).

¹²¹ See Rana, *supra* note 15, at 232 (describing China’s rising confidence and willingness to critique nations such as the U.S. in the wake of economic problems during the recent financial crisis); see also Zhao, *supra* note 8 (noting that the recent financial crisis “was initiated in America, where there had been a sustained period characterised by growing loan incentives, declining lending standards, and rising housing prices”).

¹²² See also Rana, *supra* note 15, at 232.

¹²³ Lin, *supra* note 13, at 70.

¹²⁴ See Ho, *supra* note 2, at 399.

prominence and proffer a distinctive model for economic growth. When the new Company Law came into effect on January 1, 2006, it explicitly recognized CSR.¹²⁵ Article 5 of the 2006 Company Law now states:

In the course of doing business, a company must comply with laws and administrative regulations, conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility.¹²⁶

Notably, during the legislative process a number of different delegates discussed both CSR and the idea that “companies must protect and improve the interests of other stakeholders in addition to shareholders,” expressly bringing in the idea that companies should not only focus on the shareholder wealth maximization norm, but also on CSR and stakeholder interests.¹²⁷ Academic debates on CSR were also considered by lawmakers during this process.¹²⁸ While these discussions are important, their authoritativeness remains unclear due to the lack of transparency in the legislative process in China, and because the Chinese government has not disclosed official documents on the legislative history of the Company Law.¹²⁹ In fact, the information above was culled from government officials and scholars who participated in the legislative process, and published opinions considered during the process.¹³⁰

In addition, while CSR is now expressly incorporated into Chinese law, the enforceability of the law remains unclear, with some interpreting Article 5 as exhortatory rather than mandatory.¹³¹ Nonetheless, there appears to be strong

¹²⁵ *Id.*

¹²⁶ Lin, *supra* note 13, at 71 (translating Article 5 of the Company Law of the People’s Republic of China); see Ho, *supra* note 2, at 400; Company Law (2006), art. 5; see also, e.g., Wen Jiabao Tan Qiyedia Zeren: Chengxin He Daode Shi Xiandai Shehui Yinggai Jiejuede Jipo Wenti [Wen Jiabao on Entrepreneur’s Responsibilities: Integrity and Morality Are the Urgent Problems for a Modern Society To Solve], PEOPLE’S DAILY ONLINE (Feb. 27, 2010, 4:54 PM), <http://politics.people.com.cn/GB/11041111.html>.

¹²⁷ Lin, *supra* note 13 at 70.

¹²⁸ *Id.*

¹²⁹ *Id.* (discussing how the author obtained documents pertaining to the legislative history of the Company Law, the lack of transparency in the Chinese legislative process, and the government’s failure to release official documents relating to the legislative history).

¹³⁰ *Id.*

¹³¹ Two primary interpretations of Article 5 conflict in their opinions as to the enforceability of Article 5. See, e.g., Lou Jianbo, Zhongguo Gongsifa Diwu Tiao Diyikuande Wenyi Jieshi ji qi Shishi Lujing [A Literal Interpretation of Article 5, Clause 1 of China’s Corporate Law, and Its Approach of Application], in *Studies on Corporate Social Responsibility* 224, 224-42 (Lou Jianbo et al. eds., 2009) (interpreting Article 5 as potentially enforceable); Shi Jichun et al., Lun Gongshe Shehuizeren: Falu Yiwu, Daode Zeren ji Qita [On CSR: Legal, Ethical, and Other Duties], 2

support for CSR among China's leaders, and officials at the central and subnational levels of government have begun to "publicly advocate the economic development benefits of CSR."¹³² National-level government entities and domestic institutions have begun issuing a number of CSR initiatives, and China's participation in international CSR initiatives is increasing.

3. CSR Initiatives and the Current CSR Framework in China

In addition to the Company Law, the Chinese government issued a Labour Contract Law in 2008 which addressed CSR issues.¹³³ Also in 2008, the state-owned Assets Supervision and Administration Commission of the State Council issued "Instructions for CSR in State-Owned Enterprises", and the Chinese Academy of International Trade and Economic Cooperation issued "Guidelines for CSR Compliance for Foreign-Invested Enterprises".¹³⁴

Since the passage of the 2006 Company Law, China has collaborated with the OECD on sustainability and CSR, and has endorsed the UN Global Compact, the UN Principles for Responsible Investment, the International Finance Corporation's Equator Principles, and helped develop the ISO2600:2010 standards.¹³⁵

After natural disasters such as the 2008 Sichuan Earthquake, public calls for increased CSR only rose in urgency.¹³⁶ In response to this disaster as well as the global financial crisis, in 2008 Chinese President Hu Jintao stated, "[t]he government of every nation must strengthen leadership and oversight, and by establishing and perfecting the law, create a positive environment for companies to bear social responsibilities."¹³⁷ This disaster was seen as a transformative moment for both Chinese philanthropy and CSR, as it led to an outpouring of relief efforts by individuals, who successfully called for greater corporate and government action in response to the devastation. This was a remarkable situation where public calls for reform led to government action in a system generally

SHOUDU SHIFAN DAXUE XUEBAO [PEKING NORMAL U. J.] (2008) (interpreting Article 5 as aspirational and unenforceable). These interpretations are noted in Ho, *supra* note 2, at 400 n.130.

¹³² Ho, *supra* note 2, at 400.

¹³³ Hui, *supra* note 65, at 2.

¹³⁴ *Id.*

¹³⁵ Ho, *supra* note 2, at 402-03.

¹³⁶ *See id.* at 400 (describing how the earthquake changed perceptions of corporate responsibility and is viewed as a watershed moment in the development of CSR in China).

¹³⁷ Hu Jintao Zai APEC Di Shiliuci Lingdaoren Feizhengshi Huiyishangde Jianghua [Hu Jintao Speech at the APEC 16th Informal Leaders Meeting] (Nov. 22, 2008) (transcript available at www.gov.cn/ldhd/2008-11/23/content_1156875.htm); Ho, *supra* note 2, at 403 (discussing how the support of national leaders led to increased CSR in 2008-2009).

marked by low levels of non-government stakeholder action and government-led efforts to control public discourse and stakeholder dialogue.¹³⁸

While the Chinese State Council attempted to create CSR guidelines in 2008 and 2010 that would apply to both state-owned and non-state enterprises, it has not yet done so as of the date of this publication. However, in China's Twelfth Five-Year Plan for 2011 to 2015; the government re-emphasized that widening economic disparities, environmental degradation, and consumer protection remain top priorities for China's leadership because of the challenges they represent to social stability, and ultimately, to the legitimacy of the state.¹³⁹

China has also begun developing reporting mechanisms and other potentially innovative CSR initiatives. For example, Chinese stock exchanges recently created CSR disclosure initiatives. The Shenzhen Stock Exchange issued a "Guide on Listed Companies' Social Responsibility" in 2006 that encouraged listed companies to issue CSR reports, and was expressly "promulgated based on the Company Law and the Securities Law with purposes of achieving scientific development, building a harmonious society, advancing toward economic and social sustainable development, and promoting corporate social responsibility."¹⁴⁰ In 2008, the Shanghai Stock Exchange issued a "Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange" as well as a "Notice on Strengthening Social Responsibility of Listed Companies" requiring listed companies to disclose environmental information and encouraging the publication of CSR reports.¹⁴¹ In addition to fostering the advancement of CSR, what these stock exchanges are doing in terms of creating "reputational sanctions" for listed companies supports the view that "China's stock exchanges, despite limitations on their independence from the state, may emerge as important actors for strengthening oversight over China's listed companies."¹⁴² Such CSR initiatives could also play an important part in supporting sustainable economic growth in China.

¹³⁸ See generally Nicholas D. Kristof, *Earthquake and Hope*, N.Y. TIMES (May 22, 2008), available at http://www.nytimes.com/2008/05/22/opinion/22kristof.html?_r=0 (stating that "[i]n the aftermath of the great Sichuan earthquake, we've seen a hopeful glimpse of China's future: a more open and self-confident nation, and maybe—just maybe—the birth of grass-roots politics here" and that "the earthquake may be remembered as a milestone in [the] peaceful evolution" of China towards capitalism and democracy).

¹³⁹ Ho, *supra* note 2, at 401; see also Delegation of the European Union to China, Full English Translation of the Twelfth Fifth-year Plan, available at British Chamber of Commerce in China, <http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version>.

¹⁴⁰ See discussion in Lin, *supra* note 13, at 76 and accompanying footnotes.

¹⁴¹ *Id.* at 76-77.

¹⁴² See Benjamin Leibman & Curtis J. Milhaupt, *Reputational Sanctions in China's Securities Market*, 108 COLUM. L. REV. 929, 934 (2010) (also stating that "such controlled devolution of authority may be crucial to continuing to strengthen legal institutions in China, just as it has proved an important determinant of China's economic success to date").

Indeed, early figures show that Chinese companies are increasingly publishing CSR reports, though there remains much room for improvement. For example, one source reported that in 2005, prior to the passage of the amended Company Law, 13 Chinese companies issued CSR reports; in 2006 the number rose to 32, and by 2009 the number had risen to 582.¹⁴³ As CSR gains traction in China, these reports should continue to increase significantly.

The above discussion shows that over the last three decades China has made great progress in developing, adopting and implementing CSR reforms. Moreover, just as in India, China has significantly accelerated its CSR efforts over the last several years, meaning that this critically important economic moment for both countries is also a critically important stage for CSR development in both countries. China's emerging legal framework and government or stakeholder driven initiatives show much promise and the potential for the development of innovative CSR reforms. At this nascent stage, it is difficult to tell how effective China's CSR reforms will be over the long-term. The next section examines some of the shortcomings of the Chinese CSR regime, and begins a dialogue into issues China should consider as it moves towards greater implementation of CSR and attempts to turn promise into reality.

B. Shortcomings of the Current Chinese Corporate Social Responsibility Framework

China has made significant strides in the development of CSR. However, to turn rhetoric and good intentions into reality, China needs to enhance enforcement, clarity, and awareness of its CSR laws and initiatives.

For example, despite the public and media attention now focused on CSR, Chinese businesspeople are often unfamiliar with CSR practices and provisions.¹⁴⁴ Studies show that around the time of the passage of the 2006 Company Law, many Chinese businesspeople were generally aware of CSR, but often equated it with philanthropic efforts and viewed it as a concern for larger

¹⁴³ DEVELOPMENT CENTER FOR CSR, CHINA WTO TRIBUNE, RESEARCH ON CSR REPORTING IN CHINA (2001-2009) at 1, available at <http://csr-china.net/FILES/CSRREPORT2012/csrreportresea rchfrom2001-2009.pdf>.

¹⁴⁴ See WORLDWATCH INSTITUTE, *supra* note 3 (noting that "CSR, a practice that requires companies to address social and environmental considerations alongside the drive for profits, remains unfamiliar to most Chinese businesses" and that for CSR to expand beyond charitable endeavors, CSR "should be mainstreamed into a company's business model from the get-go, not considered a luxury to add on later."); see also Hui, *supra* note 65, at 4-8 (discussing a case study conducted at a Chinese production company that is part of a Japanese MNC, and finding that although the Chinese company "claimed to promote CSR," and developed CSR guidelines, employees seemed unaware of the company's CSR activities. The author concluded that CSR initiatives were utilized "more like a tool to discipline [] employees and ensure that they work harder for the company's interests.").

companies rather than small businesses.¹⁴⁵ While awareness has improved since then, businesses remain concerned about increased costs related to CSR and what is viewed as unwanted international pressure and the imposition of non-culturally acceptable external norms.¹⁴⁶ However, countervailing concerns about “branding” for lucrative foreign markets have simultaneously led to greater acceptance of CSR, and provide further incentives for enhancing CSR practices in China in the future.¹⁴⁷

Other major problems include transparency and enforcement. Currently, China’s businesses operate in what is viewed as “a weak legal system [with] weak civic accountability.”¹⁴⁸ The rule of law in China is arguably under attack,¹⁴⁹ and civil society stakeholders have a deliberately constrained role in public discourse,¹⁵⁰ limiting their ability to promote CSR practices. In China, the combination of poor government regulation and enforcement and a lack of public scrutiny from the media or civil society organizations means that companies’ CSR activities are relatively unchecked.¹⁵¹

Moreover, as noted in Part III.A. *supra*, the enforceability of CSR in the Company Law is unclear. As one commentator put it, “the law in China is an aspirational standard, as in most developing countries, not the minimal level” as in many developed countries.¹⁵² This statement unfortunately appears to hold true in the CSR context as well. Consequently, it is important for Chinese leaders to implement stronger CSR laws, enforcement mechanisms and incentives.

In addition, the lack of transparency in both China’s legal system as well as in companies’ operations in China makes it difficult to independently assess the impact of CSR. From a corporate governance perspective, the fact that many Chinese companies are controlled by the state complicates CSR monitoring and compliance efforts that in other systems might be carried out by independent

¹⁴⁵ See Kolk, Hong, & van Dolen, *supra* note 32, at 293.

¹⁴⁶ WORLDWATCH INST., *supra* note 3, at 5.

¹⁴⁷ *Id.*

¹⁴⁸ Tan, *supra* note 33, at 174.

¹⁴⁹ See Minzner, *supra* note 86 (stating that currently in China “Party propaganda authorities are presenting Chinese Courts and judges with an official depiction of their roles that is a dramatic reversal of the emphasis of judicial professionalism prevalent in the 1990s. These trends are playing out against the background of Party political campaigns that are reasserting tighter control over the Chinese judiciary, cracking down on public interest lawyers, and attempting to curtail the influence of foreign rule-of-law norms among Chinese judges and officials.”).

¹⁵⁰ TIMOTHY HILDEBRANDT, SOCIAL ORGANIZATIONS AND THE AUTHORITARIAN STATE IN CHINA 1-3 (2013).

¹⁵¹ See Tan, *supra* note 33, at 172 (exploring reasons why MNC’s CSR practices in emerging markets such as China are often unexamined).

¹⁵² See Kolk, Hong, & van Dolen, *supra* note 32, at 295.

directors, other stakeholders, or made public through disclosure procedures.¹⁵³ Along with weak corporate governance mechanisms, corruption is also an obstacle to implementing CSR.¹⁵⁴ In an environment of lax enforcement and low transparency, the business environment in China has been described as a “hotbed for unethical practices such as conspicuous corruption, tax fraud, fraudulent inter-business dealings, [and the] plundering of state assets during the last two decades of economic reform in China.”¹⁵⁵

Thus, at present, CSR appears to be a way for the Chinese government to quell public dissent and concerns over public safety,¹⁵⁶ as well as increase the international profile of Chinese companies.¹⁵⁷ Yet, China has the potential to do far more with CSR, if enforcement, awareness, and transparency concerns can be addressed. Its current efforts encouraging the development of CSR, and internal and external forces supporting greater use of CSR in China, all point to a potentially positive future for CSR in China.

Our analysis indicates that China has done much to develop a CSR regime with “Chinese Characteristics” and is in fact developing innovative CSR measures such as the CSR initiatives developed by its securities exchanges.¹⁵⁸ China’s moves toward mandatory CSR appear stem from several factors, among them the manner in which China is privatizing its economy and the differences in its corporate governance system from those in the West.

To some extent, it may also be argued that China’s emerging CSR regime is developing in a more mandatory fashion than those in the United States and

¹⁵³ See Varottil, *supra* note 115, at 145-50 (discussing corporate governance problems in Chinese companies, including the lack of independent outside directors and state control of company boards).

¹⁵⁴ See generally RANDALL PEERENBOOM, RESISTANCE TO A CHINESE MARKET ECONOMY, in GILLESPIE ET AL., *supra* note 35, at 116-17 (stating that in China “[s]ecurity markets are dominated by firms in which the state continues to hold a majority share, which has hampered the development of corporate governance and a legal regime to protect minority rights; transparency of government policymaking remains an issue. Corruption also continues to be a problem, with China only slightly outperforming the average in its income class in 2006. There are also continued concerns about excessive bureaucracy, poorly drafted and inconsistently implemented regulations, intellectual property violations, and human resources constraints, including a shortage of managerial level professionals and growing labor costs.”).

¹⁵⁵ Tan, *supra* note 33, at 174.

¹⁵⁶ See *supra* notes 2-3 and accompanying text.

¹⁵⁷ See Lin, *supra* note 13, at 26 n.89 (noting that the “United States and the EU are the major markets to which China exports” and that “consumers in these markets tend to express preference for products made in a socially and environmentally responsible manner. China as a seller has to satisfy their demands; otherwise, other competitors will fill in and take the market share.”).

¹⁵⁸ See discussion of Chinese stock market initiatives, *supra* notes 140 to 142 and accompanying text. For a discussion of the potential of philanthropic and CSR creativity to effect legal change, see generally Shruti Rana, *Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility*, 64 ALA. L. REV. 1121, 1126-27 (2013).

Europe because of the comparatively smaller role of outside stakeholders and the stronger role of the state;¹⁵⁹ as such, China's development of an alternative CSR regime may ultimately suggest that "the liberal concept of CSR as something voluntary reflects the institutional make-up of the USA and UK where CSR originated."¹⁶⁰ In addition, currently China has an important opportunity to contest the Western shareholder primacy model through the development of its own corporate governance and CSR structure.¹⁶¹ Finally, China's mandatory approach appears to have effected rapid growth and development in CSR, fostering the creation of a multiplicity of CSR laws, initiatives, and practices over the past decade alone—signifying that China may become a prominent and fertile ground for the development of innovative CSR and corporate governance mechanisms.

For these reasons, China's CSR efforts provide a rich area of study and deserve both scholarly and public attention moving forward in the global search for more effective and innovative CSR and corporate governance mechanisms.

IV. INDIA'S NEW CORPORATE SOCIAL RESPONSIBILITY REGIME

Charitable giving has long been a priority for many Indian corporations.¹⁶² Some of the largest business houses in India, such as the Tata Group, have had a sustained focus on corporate philanthropy.¹⁶³ Long before any discussion of CSR as a legal requirement, some of India's largest conglomerates established separate philanthropic funds and welfare programs or initiatives as a form of charity to indicate the virtues of the company or the organization.¹⁶⁴ For example, two-thirds of all the profits made by Tata Group companies go into two charitable trusts that support an assortment of socially responsible causes,

¹⁵⁹ See generally Kristof, *supra* note 136 (noting the Chinese Propaganda Department's control over the media in natural disasters such as the Sichuan Earthquake and the government's decision to "report on how wonderful" the relief efforts were rather than to strive for accuracy, indicating a lack of stakeholder prominence and dialogue in this situation).

¹⁶⁰ See Stephen Bremmer et al., *Corporate Social Responsibility and Institutional Theory: New Perspectives on Private Governance*, SPECIAL ISSUE: CORPORATE SOCIAL RESPONSIBILITY AND INSTITUTIONAL THEORY: NEW PERSPECTIVES ON PRIVATE GOVERNANCE, SOCIO-ECONOMIC REV. 10, 13 (2012).

¹⁶¹ See, e.g., Ewing & Windisch, *supra* note 12, at 1 (describing the (contested) view that "Western business practices (focused on shareholder profit)" may encounter conflict with other corporate models, such as "Eastern beliefs (focused on company stability)").

¹⁶² See Afsharipour, *Directors as Trustees*, *supra* note 26, at 1012-14.

¹⁶³ See *id.* at 1013; see also Lattemann et al., *supra* note 6, at 429.

¹⁶⁴ See MEERA MITRA, IT'S ONLY BUSINESS! INDIA'S CORPORATE SOCIAL RESPONSIVENESS IN A GLOBALIZED WORLD 34-36 (2007).

institutions, and individuals in a wide variety of areas.¹⁶⁵ Some scholars have even argued that business responsibility in India is rooted in Gandhi's trusteeship model with companies seen as trustees who manage resources on behalf of society.¹⁶⁶

This spirit of philanthropy, while quite strong in some companies, has not necessarily translated into widespread good governance among Indian companies. Beginning in the late 1990s, the Indian government, along with industry groups, began a concerted push toward better corporate governance standards.¹⁶⁷ India's reform efforts were spurred by the needs of India's rapidly expanding economy, including a significant widening of India's investor base to encompass both increased foreign and institutional investors.¹⁶⁸

India's corporate governance reforms began through the introduction of voluntary governance standards proposed by leading industry groups.¹⁶⁹ Over the years, however, the Securities Exchange Board of India (SEBI), the country's primary capital markets regulatory authority, and the Ministry of Corporate Affairs (MCA) have worked to move India's corporate governance regime toward a rigorous set of mandatory requirements. These efforts culminated in comprehensive revision of India's primary corporate law, the Companies Act.¹⁷⁰

India's corporate governance reform efforts initially focused primarily on traditional corporate governance concerns regarding directors and shareholders. But over the past several years, corporate governance has taken on a broader view, as evidenced by the Companies Act, 2013 which includes a broad sweeping provision codifying the duties of directors.¹⁷¹ Section 166 of the Companies Act, 2013 provides that directors must "act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for

¹⁶⁵ See Bala N. Balasubramanian, *Governing the Socially Responsible Corporation – A Gandhian Perspective*, ETHICS, BUSINESS AND SOCIETY: MANAGING RESPONSIBLY 10 (Ananda Das Gupta ed. 2010).

¹⁶⁶ See *id.* For a detailed discussion of Gandhi's trusteeship model, see MITRA, *supra* note 162, at 20-25. Other scholars have "emphasized that spirituality and CSR are deeply rooted in the Indian tradition" and that for India "CSR is not a new temporary phenomenon, but rather it is linked to Indian culture and religion." Lattemann et al., *supra* note 6, at 429.

¹⁶⁷ For a detailed overview of India's corporate governance reform efforts, see Afsharipour, *Corporate Governance Convergence*, *supra* note 26, at 365-77; Afsharipour, *supra* note 5, at 33, 39-53.

¹⁶⁸ See Afsharipour, *Corporate Governance Convergence*, *supra* note 26, at 340.

¹⁶⁹ See *id.* at 367-68.

¹⁷⁰ See Bala N. Balasubramanian, *Strengthening Corporate Governance in India - A Review of Legislative and Regulatory Initiatives in 2013* 2 (IIM Bangalore Research Paper No. 447, Jan. 2014), available at <http://ssrn.com/abstract=2391643> (passage of the Companies Act, 2013 "is probably the single most important development in India's history of corporate legislation, next only to the monumental Companies Act 1956 which it replaces").

¹⁷¹ See Companies Act, No. 18 of 2013, INDIA CODE (2013), § 166.

the protection of environment.”¹⁷² This broad vision of directors’ duties to stakeholders more generally is then reiterated in the Code for Independent Directors which provides that independent directors shall “safeguard the interests of all stakeholders, . . . [and] balance the conflicting interest of the stakeholders.”¹⁷³

A. Incorporating Corporate Social Responsibility Into Indian Law

The somewhat-radical vision of directors’ duties espoused in the Companies Act has its roots in earlier efforts by the Indian government. Since 2009, the Indian government has made repeated efforts to infuse CSR standards into the corporate governance of Indian businesses. These efforts aim to transform CSR activities from a collection of good citizenship and philanthropic activities undertaken by only the largest business houses to a way of doing business that involves the right combination of enhancing long-term shareholder value and protecting the interests of various other stakeholders, such as employees, creditors, consumers, and society at large.¹⁷⁴

In 2009, the Indian Ministry of Corporate Affairs (MCA) made its first formal CSR-related efforts when it introduced the Voluntary Guidelines for Corporate Social Responsibility (CSR Guidelines).¹⁷⁵ Since then, the Indian government has introduced several other efforts to address CSR concerns, including instituting a requirement for Central Public Sector Enterprises to create a CSR budget.¹⁷⁶ The imposition of CSR standards into Indian corporate law made significant headway in 2013 when the Companies Act, 2013 was finally passed and in 2014 when the Act’s CSR rules became effective.¹⁷⁷ Becoming one of the few countries to have imposed CSR requirements, Indian company law now mandates extensive CSR policies, spending, and disclosure.

The move toward mandatory CSR is driven by the belief that the private sector has to assist the government in furthering economic growth that is inclusive, with wealth distributed among the Indian population. This belief was

¹⁷² See *id.*

¹⁷³ See Companies Act, *supra* note 171, sched. IV, II(5)-II(6).

¹⁷⁴ See Afsharipour, *Directors as Trustees*, *supra* note 26, at 997.

¹⁷⁵ MINISTRY OF CORPORATE AFFAIRS, GOV’T OF INDIA, CORPORATE SOCIAL RESPONSIBILITY VOLUNTARY GUIDELINES 2009 (Dec. 14, 2009) [hereinafter CSR GUIDELINES (2009)], available at http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

¹⁷⁶ Press Release, Press Information Bureau, Ministry of Corporate Affairs, Government of India, Corporate Social Responsibility (Aug. 11, 2011), <http://pib.nic.in/newsite/erelease.aspx?releid=74428>; see also The Indian Department of Public Enterprises, Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises (Apr. 1, 2013), available at http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf.

¹⁷⁷ See Companies Act, *supra* note 171, § 135.

clearly articulated by the then Minister of Corporate Affairs in proposing the CSR Guidelines:

We have seen the business sector generating wealth and value for the shareholders in the last sixty years, but simultaneously we also have the problems of poverty, unemployment, illiteracy, malnutrition etc. facing the nation. The corporate growth is sometimes seen as widening the gap between the India and Bharat through its income – skewing capability. This gap needs to be bridged. While the Government undertakes extensive developmental initiatives through a series of sectoral programmes, the business sector also needs to take the responsibility of exhibiting socially responsible business practices that ensures the distribution of wealth and well-being of the communities in which the business operates.¹⁷⁸

Thus, unlike the Western vision of CSR as a side-note to shareholder wealth maximization, the Indian vision of CSR anticipates CSR as a central component of corporate activity.

1. Corporate Social Responsibility Voluntary Guidelines (2009)

The Indian government's first effort to incorporate its vision of a corporate environment with balanced businesses that consider both shareholders and stakeholders into Indian corporate law came in 2009. In late 2009, the MCA proposed groundbreaking CSR Guidelines in what has been deemed the first concrete attempt to recognize CSR from a regulatory standpoint.¹⁷⁹ The guidelines “admittedly embrace the triple bottom line approach” from international CSR standards.¹⁸⁰

Nevertheless, the guidelines also framed CSR as part of Indian history and culture, stating “Indian entrepreneurs and business enterprises have a long tradition of working within the values that have defined our nation's character for millennia. India's ancient wisdom, which is still relevant today, inspires people to

¹⁷⁸ CSR GUIDELINES, *supra* note 175, at 5.

¹⁷⁹ See Umakanth Varottil, *Voluntary Guidelines on Governance and Social Responsibility*, INDIANCORPLAW BLOG (Dec. 31, 2009), <http://indiacorplaw.blogspot.com/2009/12/voluntary-guidelines-on-governance-and.html>.

¹⁸⁰ See Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?*, 41 COMMON L. WORLD REV. 299, 300 (2012). Many Indian companies have joined the UN global compact, although their participation has been discounted by scholars that note that there has been little improvement in the lives of stakeholders as a result of such membership. See A.K. Sharma & Rupal Tyagi, *CSR and Global Compact: The Indian Perspective*, 9 IUP. J. CORP. GOV. 38, 43, 55-58 (2010).

work for the larger objective of the well-being of all stakeholders.”¹⁸¹ This claim of the guideline’s distinct “Indian approach” to CSR, however, has been challenged by scholars who have argued that it is “simply rhetoric” used “to justify deviations from commonly accepted concepts or practices.”¹⁸²

The fundamental principle of the CSR Guidelines is that

[E]ach business entity should formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, and that this should be an integral part of overall business policy and aligned with a company’s business goals. The policy should be framed with the participation of various level executives and should be approved and overseen by the Board.¹⁸³

According to the CSR Guidelines, the CSR Policy should cover the following core elements:

- Care for all stakeholders, including shareholders, employees, customers, suppliers, project-affected people, society at large, etc.;
- Ethical functioning, transparency, and accountability;
- Respect for workers’ rights and welfare;
- Respect for human rights;
- Respect for the environment; and
- Activities for social and inclusive development.¹⁸⁴

2. ESG Guidelines – July 2011

In July 2011, the MCA issued the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (ESG Guidelines).¹⁸⁵ The new ESG Guidelines establish concrete measures that may be voluntarily adopted by companies to address interests of various stakeholders

¹⁸¹ CSR GUIDELINES, *supra* note 175. Similarly, in a 2010 interview, the chairman of the MCA stated that directors and senior management are “custodians of public money, they are the trustees—if we go to the Mahatma Gandhi concept of trusteeship They are actually the trustees of the nation.” Interview by Jitendra V. Singh with R. Bandyopadhyay, Chairman, Indian Ministry of Corporate Affairs, *available at* <http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4488>.

¹⁸² Deva, *supra* note 180, at 317.

¹⁸³ *See* CSR GUIDELINES, *supra* note 175, at 11.

¹⁸⁴ *Id.* at 11-12.

¹⁸⁵ MINISTRY OF CORPORATE AFFAIRS, GOV’T OF INDIA, NATIONAL VOLUNTARY GUIDELINES ON SOCIAL, ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS [hereinafter ESG GUIDELINES], *available at* http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

such as employees, customers and the environment.¹⁸⁶ They supersede the 2009 CSR Guidelines and revolve around nine core principles:

1. Businesses should conduct and govern themselves with ethics, transparency and accountability;
2. Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle;
3. Businesses should promote the well-being of all employees;
4. Businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized;
5. Businesses should respect and promote human rights;
6. Business should respect, protect, and make efforts to restore the environment;
7. Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner;
8. Businesses should support inclusive growth and equitable development; and
9. Businesses should engage with and provide value to their customers and consumers in a responsible manner.¹⁸⁷

Each of these core principles receives further elaboration in the ESG Guidelines.

The ESG Guidelines may set the tone, yet their effectiveness depends largely on the nature and extent of adoption and implementation by Indian businesses. Similar to the 2009 Guidelines, the ideals set forth are lofty:

The Guidelines emphasize that businesses have to endeavor to become responsible actors in society, so that their every action leads to sustainable growth and economic development. Accordingly, the Guidelines use the terms ‘Responsible Business’ instead of Corporate Social Responsibility (CSR) as the term ‘Responsible Business’ encompasses the limited scope and understanding of the term CSR.

The Guidelines take into account the learnings from various international and national good practices, norms and frameworks, and provide a distinctively ‘Indian’ approach, which will enable businesses to balance and work through the many unique requirements of our land. By virtue of these Guidelines being

¹⁸⁶ Deva, *supra* note 180, at 309-10.

¹⁸⁷ ESG GUIDELINES, *supra* note 185, at 7-26.

derived out of the unique challenges of the Indian economy and the Indian nation, they take cognizance of the fact that all agencies need to collaborate together, to ensure that businesses flourish, even as they contribute to the wholesome and inclusive development of the country. The Guidelines emphasize that responsible businesses alone will be able to help India meet its ambitious goal of inclusive and sustainable all round development, while becoming a powerful global economy by 2020.¹⁸⁸

Nevertheless, there has been little indication of widespread adoption of the ESG Guidelines by Indian businesses.

In order to increase transparency and adoption of the ESG initiatives, in August 2012, India's primary capital markets regulatory authority, the Securities Exchange Board of India (SEBI), issued a circular mandating that the top 100 listed companies based on market capitalization submit Business Responsibility Reports ("BRR") regarding their ESG initiatives.¹⁸⁹ The BRRs must be submitted as part of a company's annual report. Other listed companies have also been encouraged by SEBI to voluntarily disclose information on their ESG performance in the BRR format.¹⁹⁰ Failure to comply with the BRR requirement will be construed as non-compliance with Clause-55 of the Equity Listing Agreement, although it remains unclear how SEBI will deal with defaulting companies.

3. Corporate Social Responsibility and State-Controlled Entities

In addition to various guidelines applicable to private sector entities, the Indian government has also imposed CSR requirements for state-controlled entities.¹⁹¹ In April 2010, the government issued guidelines for Central Public Sector Enterprises (CPSEs) which required such companies to create a CSR

¹⁸⁸ ESG GUIDELINES, *supra* note 185, at 4.

¹⁸⁹ See SECURITIES & EXCHANGE BOARD OF INDIA, *Frequently Asked Questions on Business Responsibility Reports* (May 10, 2013), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1368184343037.pdf [hereinafter SEBI, BRR FAQs]; Rajib Kumar Debnath et al., *Corporates Set to Plant the Seed of Sustainable Reporting*, THE HINDU BUSINESSLINE (Aug. 4, 2013), <http://www.thehindu.com/features/taxation-and-accounts/corporates-set-to-plant-the-seed-of-sustainable-reporting/article4985853.ece>.

¹⁹⁰ See SEBI, BRR FAQs, *supra* note 189, at 1.

¹⁹¹ The Indian government owns a large proportion of shares in many Indian companies, and some of the country's largest companies are state-owned. See George S. Geis, *Can Independent Blockholding Play Much of a Role in Indian Corporate Governance?*, 3 CORP. GOVERNANCE L. REV. 283, 295, 303-06 (2007).

Ed. 2] *Emergence of New Corporate Social Responsibility Regimes in China and India* 215

budget.¹⁹² Furthermore, in April 2013, new “Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises” came into effect.¹⁹³ These new guidelines view CSR as a core component of the work of public sector enterprises, stating “[i]n the context of public sector enterprises [CSR] should be viewed as a way of conducting business, which enables the creation and distribution of wealth for the betterment of its stakeholders, through the implementation and integration of ethical systems and sustainable management practices.”¹⁹⁴ Going above mandatory CSR spending requirements, the guidelines also require that every CPSE undertake “at least one major project for development of a backward district” in order to contribute “significantly in the long run to socio-economic growth in all the backward regions of the country.”¹⁹⁵

Despite lofty goals of imposing stringent CSR standards on state-controlled entities, evidence seems to suggest that much work remains to be done. For example, in December 2013 the Parliamentary Standing Committee on Industry noted that many CPSEs had not been using their CSR funds.¹⁹⁶ Another report by the Comptroller and Auditor General of India indicated that many CPSEs had spent much less on CSR activities than required.¹⁹⁷

4. Amendment of the Companies Act

In 2010, the MCA began to move toward incorporating CSR, and a more mandatory version of CSR, into a proposed Companies Act. The 2009 version of the Companies Bill did not include any provisions related to CSR.¹⁹⁸ However, the 2009 version of the bill underwent extensive review by the Standing Committee of Parliament on Finance.¹⁹⁹ The Standing Committee’s review

¹⁹² Press Release, Press Information Bureau, Ministry of Corporate Affairs, Government of India, Corporate Social Responsibility (Aug. 11, 2011), <http://pib.nic.in/newsite/erelease.aspx?relid=74428>.

¹⁹³ DEPARTMENT OF PUBLIC ENTERPRISE, GUIDELINES ON CSR AND SUSTAINABILITY FOR CENTRAL PUBLIC SECTOR ENTERPRISES (effective Apr. 1, 2013), available at http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf.

¹⁹⁴ *Id.* at 1.1.1.

¹⁹⁵ *Id.* at 1.2.3.

¹⁹⁶ See *Non-utilisation of CSR Fund by PSUs Unhealthy Trend: Parliamentary Panel*, ECON. TIMES (Dec. 10, 2013), http://articles.economicstimes.indiatimes.com/2013-12-10/news/45035393_1_csr-and-sustainability-activities-cpses-dpe.

¹⁹⁷ See Kirthi V. Rao, *47 CPSEs Fail to Meet CSR Norms: CAG*, LIVESMINT & THE WALL STREET JOURNAL (May 7, 2013), <http://www.livemint.com/Companies/PO8msLUN7TtVln2CkebmQI/47-CPSEs-fail-to-meet-CSR-norms-CAG.html>.

¹⁹⁸ See The Companies Bill (Proposed), No. 59 of 2009 at 179-82, LOK SABHA (2009), available at http://www.icai.org/resource_file/17166companies_bill_2009.pdf.

¹⁹⁹ See Standing Comm. on Finance, 15th Lok Sabha, The Companies Bill, 2009, 21st Report (Aug. 2010), available at http://www.icsi.edu/webmodules/linksofweeks/21_Report_Companies_

included a discussion of the extent of CSR being undertaken by corporations and the need for a comprehensive CSR policy.²⁰⁰

In response to the Standing Committee's pressure, the MCA indicated that it would introduce mandatory CSR requirements into the Companies Bill.²⁰¹ Responding to the Standing Committee's requests regarding CSR, the then-Secretary to the Government at the Ministry of Company Affairs stated: "There was no mention in the earlier Companies Act about corporate social responsibility. We are just mentioning that there will be a Corporate Social Responsibility Policy in each and every company beyond a certain limit, which are profitable companies and which are of certain size."²⁰² The Secretary further added:

This is the first time and historically it may be the first time in the world – is that we are putting the Corporate social responsibility which the Chairman directed to us. We are putting it in the law itself that every company beyond the certain limit should have a corporate social responsibility policy. This is something we cannot mandate beyond that, but we are making a provision in the law itself.²⁰³

Over the next several years, the MCA fluctuated between imposing mandatory CSR requirements into the Companies Bill and adopting CSR recommendations with a "comply-or-explain" approach, eventually settling on a compromise approach.²⁰⁴ The compromise approach arose after significant criticism of the mandatory spend provision in the draft Companies Bill. Critics from both academia and industry argued that "CSR is fundamentally an inspirational exercise" that is difficult to legislate or enforce.²⁰⁵

Bill.pdf [hereinafter Standing Comm. on Finance, 21st Report]

²⁰⁰ *Id.* at 33, ¶ 49.

²⁰¹ *Id.* at 158-59, ¶¶ 9.41-9.45; see also Press Release, Ministry of Corporate Affairs, Gov't of India, Recommendation to Make Formulation of a CSR Policy Mandatory for Big Companies (Sept. 10, 2010), available at <http://pib.nic.in/newsite/erelease.aspx?relid=65670>; Umakanth Varottil, *Movement Towards Mandatory CSR*, INDIANCORPLAW BLOG (Sept. 11, 2010, 11:47 AM), <http://indiacorplaw.blogspot.com/2010/09/movement-towards-mandatory-csr.html>.

²⁰² Standing Comm. on Finance, 21st Report, *supra* note 199, at 158, ¶ 9.42.

²⁰³ *Id.* at 159, ¶ 9.45.

²⁰⁴ See Standing Comm. on Finance, 15th Lok Sabha, The Companies Bill, 2011, 57th Report, at 14-15 (June 2012), available at http://www.taxindiaonline.com/RC2/pdfdocs/wnew/Standing_Co_mmittee_Report_Companies_Bill_2012.pdf.

²⁰⁵ Karnani, *supra* note 4; see also *Azim Premji Against Law on Mandatory CSR Spending by Corporates*, ECON. TIMES (Mar. 24, 2011), available at http://articles.economictimes.indiatimes.com/2011-03-24/news/29181451_1_csrspending-corporate-affairs-murli-deora-azim-premji; *IT CEOs Back Premji, Against Mandatory CSR*, TIMES OF INDIA (Mar. 26, 2011), available at http://articles.timesofindia.indiatimes.com/2011-03-26/software-services/29191926_1_csr-azim-premji-corporate-social-responsibility.

After years of debate, on December 18, 2012 the Lok Sabha (the lower house of the Parliament of India) passed the Companies Bill (2012) which was slated to replace the Companies Act (1956).²⁰⁶ The Companies Bill (2012) was approved in the Rajya Sabha (the upper house of the Parliament of India) on August 8th. Unlike the Companies Act (1956), the Companies Bill (2012) included substantial corporate governance provisions, together with CSR requirements to be fulfilled by the board of directors. The Companies Bill (2012) received presidential assent on August 29, 2013 and became the Companies Act, 2013.²⁰⁷ Pursuant to Section 1(3) of the Companies Act, 2013, the Central Government must notify the date(s) on which the Act will come into force.²⁰⁸ As discussed below, in late February 2014, the MCA stated that the CSR provisions of the Act would become effective as of April 1, 2014.²⁰⁹

a. The Requirements of the Companies Act, 2013

Section 135 of the Companies Act, 2013 (hereinafter “Companies Act” or “the Act”) sets out the contours of India’s new CSR requirements, which will be applicable beginning in the 2014-15 fiscal period.²¹⁰ The reach of the CSR clause is expected to be vast. While it is not yet clear exactly how many companies will be covered by the CSR clause in the Companies Act, the Indian Institute of

²⁰⁶ See The Companies Bill (2012), available at <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>; see also Press Release, Ministry of Corporate Affairs, Government of India (Jan. 9, 2013), available at http://www.mca.gov.in/Ministry/press/press/Press_Release_09jan2013.pdf.

²⁰⁷ Companies Act, *supra* note 171.

²⁰⁸ *Id.* § 1(3). On September 12, 2013 the Central Government notified 98 sections of the Companies Act, 2013, pursuant to § 1(3) of the Companies Act, 2013. See MINISTRY OF CORPORATE AFFAIRS, GOV’T OF INDIA, NOTIFICATION (Sept. 12, 2013), available at <http://www.mca.gov.in/Ministry/pdf/CommencementNotificationOfCA2013.pdf>. On September 18, 2013, the Ministry of Corporate Affairs released another notification clarifying that the relevant sections of The Companies Act, 1956, which correspond to the 98 notified sections ceased to have effect from September 12, 2013. See MINISTRY OF CORPORATE AFFAIRS, GOV’T OF INDIA, CIRCULAR (Sept. 18, 2013), available at http://www.mca.gov.in/Ministry/pdf/General_Circular_16_2013.pdf. The Companies Act, 1956 continues to remain in force in respect of matters for which provisions of the Companies Act, 2013 are yet to be notified.

²⁰⁹ See MINISTRY OF CORPORATE AFFAIRS, GOV’T OF INDIA, NOTIFICATION (Feb. 27, 2014), available at http://mca.gov.in/Ministry/pdf/CompaniesActNotification1_2014.pdf.

²¹⁰ PROPOSED DRAFT CORPORATE SOCIAL RESPONSIBILITY RULES UNDER SECTION 135 OF THE COMPANIES ACT, 2013: GUIDING PRINCIPLE, available at http://www.cuts-international.org/pdf/Draft-CSR_Rules_2013.pdf [hereinafter Draft CSR Rules]. The final CSR rules issued by the MCA clarify that for companies which otherwise do not need to appoint independent directors (for example some unlisted firms), the requirement to have an independent director on the CSR committee will not apply. See MINISTRY OF CORPORATE AFFAIRS, THE COMPANIES (CORPORATE SOCIAL RESPONSIBILITY POLICY) RULES, 2014, RULE 5(1) (Feb. 27, 2014), available at http://mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf [hereinafter MCA, CSR Rules].

Corporate Affairs estimates that at least 6,000 Indian companies will be required to comply with the CSR provisions of the Companies Act.²¹¹

Under the Companies Act, CSR is considered to be a board-level activity. Every company with a net worth of rupees five hundred crore or more (approx. \$81 million), or turnover of rupees one thousand crore or more (approx. \$162 million), or a net profit of rupees five crore or more (approx. \$811,400) during any financial year must constitute a CSR Committee of the Board consisting of three or more directors, out of which at least one director must be an independent director.²¹² The Act empowers the CSR Committee with (i) formulating and recommending to the Board, a CSR Policy which must indicate the activities to be undertaken by the company; (ii) recommending the amount of CSR expenditure to be incurred on such activities; and (iii) regularly monitoring the CSR initiatives of the company.²¹³ The Board must then take into account the recommendations made by the CSR Committee and approve the CSR policy of the company.²¹⁴

Under the Act, the Board must “ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.”²¹⁵ If a company does not have adequate profit or is not in a position to spend the prescribed amount on CSR, the regulation would require the directors to provide disclosure and give suitable reasons in their annual report, with a view to checking non-compliance.²¹⁶

While there was much debate over whether to have made the CSR spending provision in the Act mandatory, the final consensus was to approach spending through a “comply or explain” framework. Thus, while there is no penalty for failing to spend on CSR, there are penalties for failing to report on CSR activities conducted or failing to explain why CSR spending was not carried out. Failure to explain is punishable by a fine on the company of not less than

²¹¹ See CII, *supra* note 4, at 5; see also ERNST & YOUNG, available at [http://www.ey.com/Publication/vwLUAssets/Understanding_companies_Bill_2012.pdf/\\$FILE/Understanding_companies_Bill_2012.pdf](http://www.ey.com/Publication/vwLUAssets/Understanding_companies_Bill_2012.pdf/$FILE/Understanding_companies_Bill_2012.pdf) (estimating that the law would cover over 2,500 companies in India, including the top 100 companies across sectors). Other reports indicate that given the low profitability threshold in the Act, the CSR requirements may apply to about 8,000 companies in India. INSTITUTIONAL INVESTOR ADVISORY SERVICES, *Corporate Social Responsibility: Review of current policies, practices and disclosures* 13 (Mar. 2014), available at http://iias.in/downloads/IIAS_CSR_Report.pdf.

²¹² Companies Act, *supra* note 171, § 135(2).

²¹³ *Id.* § 135(3).

²¹⁴ *Id.* § 135(4).

²¹⁵ According to the MCA’s final CSR rules, to implement Section 135, net profit is defined as the net profit of a company per its financial statement, excluding profits arising from branches outside India and any dividend received from other companies in India. See MCA, CSR Rules, *supra* note 210.

²¹⁶ Companies Act, *supra* note 171, § 135.

Ed. 2] *Emergence of New Corporate Social Responsibility Regimes in China and India* 219

50,000 rupees (approx. \$900) and up to 25 lakh rupees (approx. \$46,000).²¹⁷ Furthermore, officers who default on the reporting provision could be subject to up to three years in prison and/or fines of not less than 50,000 rupees (approx. \$900) and as high as 5 lakh rupees (approx. \$9,200).²¹⁸ To date, however, the MCA has provided “no guidance as to what constitutes a sufficient or statutorily valid explanation for failure to spend in the board report.”²¹⁹

The Companies Act does not purport to define CSR, but it does include a detailed schedule of CSR activities that companies “may” undertake.²²⁰ The list of activities initially included in the Companies Act appears to be somewhat narrower than the broad vision of CSR encapsulated in the ESG Guidelines. However, as discussed below, the final rules adopted by the MCA to implement Section 135 of the Act both define the term “CSR” and expand the list of permissible CSR activities.

According to the original Schedule VII of the Act (which was later updated in early 2014 through the MCA’s final rules), activities which may be included by companies in their CSR policies should relate to:

- Eradicating extreme hunger and poverty;
- Promotion of education;
- Promoting gender equality and empowering women;
- Reducing child mortality and improving maternal health;
- Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
- Ensuring environmental sustainability;
- Employment enhancing vocational skills;
- Social business projects;
- Contribution to the Prime Minister’s National Relief Fund or any other fund set up by the Central Government or the State Governments for socioeconomic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and
- Such other matters as may be prescribed.²²¹

Furthermore, Section 135 of the Act states that CSR should preferably be spent in local areas where the company operates.²²²

²¹⁷ *Id.* § 134.

²¹⁸ *Id.*

²¹⁹ KORDAN PHILANTHROPY ADVISORS, THE 2% CSR CLAUSE: NEW REQUIREMENTS FOR COMPANIES IN INDIA (2013), available at <http://www.kordant.com/assets/2-Percent-India-CSR-Report.pdf>.

²²⁰ Companies Act, *supra* note 171, § 135, Schedule VII.

²²¹ *Id.*

²²² *Id.* § 135 (stating that a company must “give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities”).

b. The MCA's Draft & Final Rules

i. The MCA's Draft Rules

In order to provide further clarification on the requirements of Section 135, in September 2013 the Indian Ministry of Corporate Affairs released draft rules which were open to comments and suggestions.²²³ The draft rules suggest that CSR needs to go beyond local communities and beyond the concept of philanthropy. The guiding principles of the draft rules states:

CSR is the process by which an organization thinks about and evolves its relationships with stakeholders for the common good, and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies. Thus CSR is not charity or mere donations.

CSR is a way of conducting business, by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use CSR to integrate economic, environmental and social objectives with the company's operations and growth.²²⁴

The draft rules provide several important additions and clarifications to Clause 135 of the Companies Act. First, the draft rules provide that any surplus arising out of CSR activities will have to be reinvested into CSR initiatives, and this will be over and above the 2% spend figure.²²⁵ Second, with respect to qualified CSR activities, the draft rules provide that only CSR activities undertaken in India will be taken into consideration and that activities meant exclusively for employees and their families will not be considered CSR activity.²²⁶ And finally, the draft rules provide that many methods can be used by a company to implement its CSR activities, including through (i) a company directly on its own; (ii) the company's own non-profit foundation operating within India and set-up so as to facilitate this initiative; (iii) independently registered non-profit organizations operating in India that have a record of at least

²²³ See *Suggestions on Draft Rules under Companies Act, 2013*, MINISTRY OF CORPORATE AFFAIRS, <http://ncbfeedback.mca.gov.in/>; see also Umakanth Varottil, *Draft Rules under the Companies Act; CSR*, INDIA CORPLAW BLOG (Sept. 10, 2013), <http://indiacorplaw.blogspot.com/2013/09/draft-rules-under-companies-act-csr.html>.

²²⁴ Draft CSR Rules, *supra* note 210.

²²⁵ *Id.* at Part II.

²²⁶ *Id.* at Part II.

three years in similar such related activities; and (iv) collaborating or pooling their resources with other companies.²²⁷

ii. The Final Rules

After a feedback period, on February 27, 2014, the MCA notified Section 135 of the Companies Act, 2013 (CA 2013) and the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CSR Rules).²²⁸ The rules take effect from April 1, 2014. The final rules continue to provide the same requirements with respect to calculation of net profit, restricting CSR activities to India, and using trusts to undertake CSR activities. Similarly, activities undertaken solely for the benefits of employees and their families will remain outside the purview of CSR activity and expenditure incurred in the normal course of business will not count as part of the 2% CSR expenditure requirement.

The final rules reflect several important changes from the draft rules. For example, the final rules expand the coverage of the Act's CSR requirements to foreign companies with branches or project offices in India so that foreign companies with Indian businesses will be subject to mandatory CSR provisions.²²⁹

Moving beyond the specifics included in the Companies Act, the MCA now defines the term CSR and has amended Schedule VII of the Companies Act to elaborate upon and expand the list of permitted CSR activities. The final rules define CSR to mean and include (although it is not limited to): (i) projects or programs relating to activities specified in the Schedule; or (ii) projects or programs relating to activities undertaken by the Board in pursuance of recommendations of the CSR Committee as per the declared CSR policy subject to the condition that such policy covers subjects enumerated in the Schedule.²³⁰ Furthermore, the MCA's newly issued Schedule VII expands the scope of CSR activities already included in the Companies Act and adds several new activities

²²⁷ *Id.*

²²⁸ See MCA, CSR Rules, *supra* note 210.

²²⁹ See MCA, CSR Rules, *supra* note 210. Commentators have noted that the MCA has exceeded its legislative mandate by applying the CSR rules to foreign companies since under the Companies Act Section 135 is only applicable to companies incorporated under Indian law. See NISHITH DESAI ASSOCIATES, *Social Sector Hotline: New Rules for Corporate Social Responsibility Announced*, (Mar. 12, 2014), available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/new-rules-for-corporate-social-responsibility-in-india-its-effectiveness-and-legality.html?no_cache=1&cHash=c3c9597008f8602ff6430feed1b03360; Harinderjit Singh, *CSR Rules: The Ambit of the Act Enlarged*, THE FIRM (Mar. 25, 2014), available at http://thefirm.moneycontrol.com/story_page.php?autono=1057825.

²³⁰ MCA, CSR Rules, *supra* note 210. Some experts have noted that it appears that activities outside Schedule VII would not be considered as permitted CSR activities. See *Political Funding Kept Out of CSR Ambit*, THE HINDU BUSINESSLINE (Feb. 27, 2014), <http://www.thehindubusinessline.com/companies/political-funding-kept-out-of-csr-ambit/article5733385.ece>.

under the rubric of CSR. Under the new Schedule VII, CSR now also includes (i) preventive healthcare and sanitation, (ii) providing safe drinking water, (iii) protection of national heritage, art and culture, (iv) rural development projects, (v) measures to benefit armed forces veterans and war widows, (vi) rural development projects, (vii) promoting rural sports, nationally recognized sports, and paralympic sports, (viii) setting up homes and hostels for women, orphans and senior citizens, (ix) reducing inequalities in socially and economically backward groups and (x) supporting technology incubators in government-approved academic institutions.²³¹

c. Reporting and Disclosure

One important aspect of the CSR provisions in the Companies Act is the move toward additional disclosure.²³² The Companies Act requires that the board of the company must, after taking into account the recommendations made by the CSR committee, approve the CSR policy for the company and disclose its contents in their report and also publish the details on the company's official website, if any.²³³ In addition, if the company fails to spend the prescribed amount, the board, in its report, must specify the reasons.²³⁴

Many Indian companies fail to fully disclose their CSR policies,²³⁵ so additional disclosure could be a tool for NGO advocates and lawyers to work with companies and pressure them to comply with their CSR policies.²³⁶ A recent study of CSR reporting among India's top 500 companies found that around 49% of these companies were reporting on CSR, but in most reports there is no mention of amount spent.²³⁷ Many of these companies "are only making token gestures towards CSR," working within the philanthropic model rather than the stakeholder model.²³⁸ Another report found that CSR reporting is "qualitative rather than quantitative in nature," and that most listed Indian companies do not

²³¹ See MINISTRY OF CORPORATE AFFAIRS, NOTIFICATION, AMENDMENTS TO SCHEDULE VII OF THE COMPANIES ACT, 2013 (Feb. 27, 2014), available at http://mca.gov.in/Ministry/pdf/CompaniesActNotification3_2014.pdf.

²³² See INSTITUTIONAL INVESTOR ADVISORY SERVICES, *supra* note 211, at 3.

²³³ Companies Act, *supra* note 171, § 135(3).

²³⁴ The rules do not clarify "what constitutes a valid reason for not carrying out CSR activities in a given financial year." INSTITUTIONAL INVESTOR ADVISORY SERVICES, *supra* note 211, at 14.

²³⁵ See INSTITUTIONAL INVESTOR ADVISORY SERVICES, *supra* note 211, at 4-5.

²³⁶ See Lattemann et al., *supra* note 6, at 429; Seema G. Sharma, Comment, *Corporate Social Responsibility in India: An Overview*, INT'L LAW., Winter 2009, at 1521. Among Brazil, Russia, India, and China (BRIC countries), Indian firms rank third in CSR communications intensity. Shaomin Li et al., *Corporate Social Responsibility in Emerging Markets*, 50 MGMT. INT'L REV. 646, 648 (2010).

²³⁷ Richa Gautam & Anju Singh, *Corporate Social Responsibility Practices in India: A Study of Top 500 Companies*, 2 GLOBAL BUS. & MGMT. RES.: AN INT'L J. 1, 49 (2010).

²³⁸ *Id.*

have stand-alone CSR reports.²³⁹ There is also a larger focus on CSR outputs compared with CSR outcomes.²⁴⁰ Even for information technology companies, CSR reporting on the Internet is “strikingly low.”²⁴¹

Indian firms may not clearly see the benefits of CSR reporting; when asked if there was a business case for CSR reporting, Indian companies were unsure whether the benefits accrued from CSR were from CSR reporting or actual CSR activities.²⁴² The respondents were unsure to what extent the role of CSR reporting impacted employee morale, given that the CSR activities were already underway, and they doubted the efficacy of CSR reporting on employees below a certain level of managers.²⁴³ They also did not think CSR reporting improved customer relations because of their already strong reputations.²⁴⁴ But some companies saw value in CSR reporting, stating that they believed that institutional investors cared about CSR reporting.²⁴⁵

B. Shortcomings of India's Emerging Corporate Social Responsibility Model

The potential for CSR reforms in India is enormous. There are several important concerns, however, with the Indian government's approach to CSR.²⁴⁶ First, the mandatory spend provision indicates a more philanthropic model of CSR rather than the broader stakeholder model. Instead of approaching CSR from a holistic viewpoint that addresses the activities of companies in a variety of areas, the Companies Act provides a limited scope for CSR activities and arguably reduces CSR to an ineffective 2% spending provision.²⁴⁷ Second, the Act has come under criticism that the government is attempting to force

²³⁹ C.V. Baxi & Rupamanjari S. Ray, *Corporate Social & Environmental Disclosure & Reporting*, 44 INDIAN J. INDUS. RELATIONS 356, 357 (2009).

²⁴⁰ *Id.* at 360.

²⁴¹ See Vidhi Chaudhri & Jian Wang, *Communicating Corporate Social Responsibility on the Internet: A Case Study of the Top 100 Information Technology Companies in India*, 21 MGMT. COMM. Q. 232, 242 (2007).

²⁴² Adam J. Sulkowski, S.P. Parashar & Lu Wei, *Corporate Responsibility Reporting in China, India, Japan, and the West: One Mantra Does Not Fit All*, 42 NEW ENGL. L. REV. 787, 805 (2008).

²⁴³ *Id.* at 803-04.

²⁴⁴ *Id.* at 804.

²⁴⁵ *Id.*

²⁴⁶ In addition to the criticisms discussed in this section, critics have also lamented the lack of clarification regarding the tax treatment of the CSR provisions. See Singh, *supra* note 229.

²⁴⁷ Companies Act, *supra* note 171, § 135(5); see Anel Karnani, *India Makes CSR Mandatory: A Really Bad Idea*, EUR. FIN. REV. (Oct. 20, 2013), available at <http://www.europeanfinancialreview.com/?p=7297>.

companies to do what should be the state's job, such as providing education.²⁴⁸ Third, the government seems to be seeking to capitalize on the cultural values of Indian firms, yet answers the CSR debate with the same solution that it has used, thus far with mixed success, with respect to corporate governance reforms—*i.e.*, in large part locating responsibility for CSR activities in the board of directors. The discussion below addresses each of these concerns.

The regime for CSR under the Companies Act has many detractors. The vision of CSR espoused in the Act certainly falls short of an expansive stakeholder view of CSR. Experts have questioned whether the Act's requirements render CSR a more "check-the-box" obligation and detract from the broader vision of CSR.²⁴⁹ Indian corporate law experts have noted that the exclusion of "activities undertaken in pursuance of the normal course of business of the company" is "somewhat paradoxical" and narrow as "CSR goes beyond mere spending, and must also promote social[ly] responsible and sustainable business practices."²⁵⁰ Moreover, the exclusion of activities for the benefit of employees or their families from the list of approved CSR activities "undermines the general principle that employees are a key stakeholder in the entire scheme of things."²⁵¹

Critics have noted that the 2% spend provision is essentially fruitless and will not necessarily render a business socially responsible.²⁵² For example, given the vagueness in the definition of CSR under the Companies Act and the scope of CSR activities in the MCA's final rules, a corporation in a line of business that causes significant detrimental environmental impact could spend the mandatory funds on building a school in an un-impacted rural area rather than on ensuring that it decreased its adverse environmental impact. The local-community focus of

²⁴⁸ See *Corporate Social Responsibility in India: No Clear Definition, but Plenty of Debate*, KNOWLEDGE@WHARTON (Aug. 2, 2011), <http://knowledge.wharton.upenn.edu/article/corporate-social-responsibility-in-india-no-clear-definition-but-plenty-of-debate/>.

²⁴⁹ See Satvik Varma, *Legislating CSR*, INDIACORPLAW BLOG (Feb. 19, 2011, 5:08 PM), <http://indiacorplaw.blogspot.com/2011/02/legislating-csr.html>.

²⁵⁰ Umakanth Varottil, *Draft Rules under the Companies Act; CSR*, INDIACORPLAW BLOG (Sept. 10, 2013), <http://indiacorplaw.blogspot.com/2013/09/draft-rules-under-companies-act-csr.html>.

²⁵¹ *Id.*

²⁵² See Somasekhar Sundaresan, *Govt's Approach to CSR Gives Scope for Corruption*, BUS. STANDARD (Sept. 13, 2010), http://www.business-standard.com/article/economy-policy/govt-s-approach-to-csr-gives-scope-for-corruption-110091300034_1.html; see also *Corporate Social Responsibility in India*, *supra* note 248 (stating that "India's philanthropic community is also against compulsory CSR"). But see Deva, *supra* note 180, at 314 (arguing that the spending provision may make Indian firms "take CSR more seriously"). Others have also lauded the spending requirement for preserving "the company's autonomy in selecting how its funds should be used and what CSR activity the company invests in." NISHITH DESAI ASSOCIATES, CORPORATE SOCIAL RESPONSIBILITY & SOCIAL BUSINESS MODELS IN INDIA 9 (Nov. 2013), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Corporate_Social_Responsibility__Social_Business_Models_in_India.pdf.

the CSR requirement of the Companies Act may render CSR activities as simple window-dressing without significant changes to potential social and environmental damage that a company may inflict. In addition, commentators worry whether “the ambiguity on what constitutes spending on CSR, the manner in which the amounts should be deployed and whether corporations can give their mandatory spend[ing] to a trust or foundation run by the business itself can, in fact, lead Indian businesses [to] end[] up spending less than what they currently do on CSR.”²⁵³ Moreover, there is concern that the lack of a penalty provision for non-compliance with the spending requirements of Section 135 will result in low compliance.²⁵⁴ Finally, the imposition of CSR requirements only on large companies has been described as an “elitist approach” that will not reinforce the need for “every business entity—irrespective of its size—[to] conduct its business in a socially responsible manner.”²⁵⁵

In connection with the criticism that the vision of CSR in the Companies Act is rather limited, commentators have also lamented that such CSR activities are essentially a privatization of the state’s role and responsibility in many areas.²⁵⁶ Noted Indian philanthropist Rohini Nilekani has called the provision an “outsourcing of governance” that is “taking the failure of the state and the corporates and trying to create a model out of it.”²⁵⁷ Critics have argued that “[i]t is dysfunctional for steel or aluminum companies to run schools or hospitals . . . mandatory CSR over and above taxation, forces companies to do the government’s job. And trying to outsource the state’s primary job is a bad idea.”²⁵⁸ In other words, businesses cannot substitute for the state in solving India’s massive social problems.²⁵⁹

²⁵³ See Satvik Varma, *Coercive Social Responsibility*, ECON. TIMES (Feb. 18, 2011), http://articles.economictimes.indiatimes.com/2011-02-18/news/28615641_1_csr-socialresponsibility-net-profit; see also Deva, *supra* note 180, at 315 (stating that the “minimum threshold of two per cent may also encourage companies which have been spending more than two per cent of their net profits on CSR activities to cut back their spending”).

²⁵⁴ See NISHITH DESAI ASSOCIATES, *supra* note 252, at 9-10.

²⁵⁵ Deva, *supra* note 180, at 315.

²⁵⁶ See Kounteya Sinha, *Govt Wants to Further Privatize Healthcare*, TIMES OF INDIA (Dec. 27, 2012), http://articles.timesofindia.indiatimes.com/2012-12-27/india/36021065_1_private-sector-pps-central-public-sector-enterprises.

²⁵⁷ *Corporate Social Responsibility in India*, *supra* note 248.

²⁵⁸ Akanksha Jain, *The Mandatory CSR in India: A Boon or Bane*, 4 INDIAN J. APPLIED RES. 301, 302 (2014), available at <http://www.theglobaljournals.com/ijar/file.php?val=Mjk5NQ%3D%3D>; see also Kumkum Sen, *Is CSR a sustainable business model?*, BUS. STANDARD (Feb. 2, 2014), http://www.business-standard.com/article/opinion/is-csr-a-sustainable-business-model-114020200782_1.html (the prescribed list of CSR activities “involves unwarranted expenditure by corporations in certain activities in respect of issues which are not within their domain [of] expertise”).

²⁵⁹ See Manish Sabharwal, *We do Have Mandatory CSR: Taxation will not create better corporate citizens*, ECON. TIMES (Feb. 11, 2013), http://articles.economictimes.indiatimes.com/2013-02-11/news/37039188_1_entrepreneurs-small-companies-companies-bill. But see NISHITH DESAI ASSOCIA-

The CSR provisions in the Companies Act have been described as simply ineffective. Professor Aneel Karnani explains:

The proposed law does not even discuss, let alone define, an enforcement mechanism or penalties for non-compliance. The law would be an enforcement nightmare, exacerbating an already bad situation where many laws are poorly enforced in India and further undermining respect for law. Curiously, the law even includes a loophole. If the 2 percent allocation is not made in a given fiscal year, the CSR committee has to submit an explanation to avoid being penalised. There is no discussion of what explanations would be legally valid, opening up much room for corruption and extortion.²⁶⁰

The corporate governance framework for implementing CSR activities has also come under attack. The CSR requirements of the Companies Act place the onus on the board of directors to supervise a company's CSR policies and to provide public reports on such policies, including the amount of profits spent on CSR efforts. The problem with placing directors, and invariably independent directors, as central figures is that it could potentially exacerbate the weaknesses in the country's corporate governance model (*i.e.*, the domination of promoters and majority shareholders) without taking advantage of a broader vision for CSR.²⁶¹ Indian companies in general have dominant controlling shareholders, many of whom are "old-money" business families with significant political connections.²⁶² Since board members of Indian companies still see themselves as strategic advisors to these promoters, there is a risk that CSR policies will essentially serve to further the interests and power of promoters and their views about social reality and values.²⁶³ Accordingly, experts have noted that investors and analysts should examine whether a company's CSR program unduly benefits promoters or other related parties.²⁶⁴

Given India's primary corporate governance problem, its proposed CSR guidelines may exacerbate some of the problems that exist with respect to

TES, *supra* note 252, at 1 (positing that "private sector in India is uniquely positioned to venture into the social sector and expand its consumer base by using its innovation and market expertise to create a sustainable future").

²⁶⁰ Karnani, *India Makes CSR Mandatory*, *supra* note 247.

²⁶¹ See Afsharipour, *Directors as Trustees*, *supra* note 26, at 999-1001.

²⁶² See *id.* at 999; Afsharipour, *Corporate Governance Convergence*, *supra* note 26, at 394-95.

²⁶³ See Afsharipour, *Directors as Trustees*, *supra* note 26, at 1003; see also *Corporate Social Responsibility in India*, *supra* note 248 ("[I]n many ways, in India in particular, CSR is almost a 100% overlap with whatever the promoter family's passions are.").

²⁶⁴ See MANDATORY CORPORATE SOCIAL RESPONSIBILITY: HOW SHOULD SHAREHOLDERS THINK ABOUT IT WHILE EVALUATING COMPANIES?, INSTITUTIONAL INVESTORS ADVISORY SERVICES (Dec. 2013), http://iias.in/downloads/F1%20CSR_By_invitation_Dec_2013.pdf.

majority–minority agency costs. Controlling stockholders could use the CSR funds on projects that may benefit themselves at the expense of the company as a whole. Commentators have argued that the CSR spending provisions could potentially lead to greater promoter abuse of corporate funds, essentially providing “greater scope for corruption and scams.”²⁶⁵

V. THE EMERGING CSR REGIMES IN CHINA AND INDIA: LESSONS AND IMPLICATIONS FOR THE FUTURE

This Article presents one of the first comparative inquiries into China’s and India’s emerging CSR regimes. This gap in the literature is surprising given the shift in world economic power towards these countries.²⁶⁶ Given their global influence, there is much potential for a more mandatory vision of CSR as framed in China and India to spread to the rest of the world.

As we describe above, China’s and India’s moves toward mandatory CSR can be tied to massive transformations in their economies and some of the resulting unrest related to economic disparities and corporate governance failures. China’s and India’s CSR efforts, however, have also been an important, if often overlooked, part of their larger corporate governance reform efforts. With other regions of the world, such as Latin America and Africa, undergoing similar economic transformations, the development of the Chinese and Indian CSR models may provide important lessons as countries around the world embark on corporate governance reforms.

While both China and India have moved toward robust mandatory CSR regimes, questions remain as to whether the legal changes in both countries will translate into actual changes on the ground. As other scholars have noted, “firms cannot uphold high socially responsible standards in an environment where the government lacks checks and balances and official corruption is high.”²⁶⁷ Transparency and corruption remain significant problems in both countries, and unless they are addressed the full potential of their CSR efforts will go unrealized. Moreover, CSR is part of a larger governance landscape. Thus, “in addition to pushing individual firms to adopt higher CSR standards, making improvements to the business environment, especially the governance environment, is a necessary condition” for effective CSR programs.²⁶⁸

Yet China’s and India’s progress in the realm of CSR should not go unrecognized. Both countries are attempting to develop a CSR regime with their own national characteristics. They are both seeking to find cultural and national roots for their CSR regimes, rejecting the concept that CSR is solely a Western

²⁶⁵ See Afsharipour, *Directors as Trustees*, *supra* note 26, at 1021.

²⁶⁶ See *supra* note 18 and related text.

²⁶⁷ Lattemann et al., *supra* note 6, at 437.

²⁶⁸ *Id.*

import. They are also rejecting the notion that the social responsibility of corporations is purely voluntary and that the corporation's aim should be to maximize shareholder value. These developments could allow China and India to develop CSR models with greater cultural adaptability or acceptability, as well as to organically develop models for CSR and corporate governance that present viable alternatives to those that developed under different circumstances and pressures in the West.

To successfully manage this process, China and India must overcome similar challenges. Both countries face the challenge of increasing economic growth while minimizing public discontent. Both are increasingly privatizing their economies, creating a space for corporate action in a realm previously dominated by the state, and both China and India appear to be seizing the opportunities CSR presents to improve economic growth and address public concerns. For example, both countries appear to be using CSR as a way to create innovative corporate governance mechanisms as well as position themselves at the forefront of positive economic change, becoming countries that hope to provide models for other countries rather than remaining testing grounds for foreign transplants.

Significantly, China and India also face similar problems in implementation of CSR concepts and practices. Both suffer from institutional enforcement weaknesses, and corruption and a lack of transparency are significant concerns in both countries, as noted above.

India appears to be moving forward in comparison to China in that it is implementing legal reforms in the CSR arena more quickly and more broadly than China. It also has a thriving stakeholder dialogue that is filling the space opened up by the move from state to private economic activity. China would do well to similarly make moves from exhortatory standards to more enforceable or at least more expressly articulated CSR standards. China also needs to allow further development of its civil society organizations, which can enhance checks and balances on government and corporate CSR measures, as well as increase the pool of potential solutions, as has been the case in India.

Our analysis shows that China and India have much to offer each other in enhancing CSR. Both are attempting to develop alternatives to the prevailing Western models which are also reflective of their own complex cultural and historical legacies. Each country has shown that it has the ability to create rapid, wide-ranging economic and legal change, most notably during a period where the United States and other developed countries have remained mired in legal or economic stagnation. We urge each country to look at the other's CSR efforts to look for ways to improve their own, as well as for models of CSR and corporate governance that may work better in China and India than Western transplants.

China and India have much to offer the West as well. We also urge Western countries to look closely at the models of CSR and corporate governance

emerging in China and India as they seek more robust corporate governance models. And at a minimum, we hope our analysis has shown that Western governments and companies would be wise to take more culturally nuanced approaches to transporting or implementing CSR practices in China and India. Doing so would enhance the effectiveness of CSR measures as well as reduce the possibility of diplomatic or other tensions preventing positive change. Finally, our analysis shows that China and India are both in the process of developing important and unique innovations in the corporate governance arena that have been largely overlooked, though they present useful models well worth greater analysis and understanding.

VI. CONCLUSION

This Article is an exploratory effort to assess the emerging CSR regimes in China and India. We aim to spark a conversation and shed light on these two important CSR regimes. Given the rising prominence of both countries, it is imperative for scholars to assess the evolution of institutional, legal and corporate mechanisms related to the development of CSR practices in China and India, and identify areas of convergence and divergence. In this Article, we seek to develop a better understanding of the reasons for the evolution toward mandatory CSR regimes in both countries. We claim that while both countries have been heavily influenced by Western and international CSR standards, they are each seeking to develop a CSR system with their own unique Chinese and Indian characteristics. Our analysis suggests that efforts to develop a Chinese or Indian CSR model that deviates from the voluntary CSR model of the West is in part rooted in the desire of each respective government to address uneven economic development, widening income disparities, and increasing public dissent in both countries.²⁶⁹

Of course, given both countries' significant experience with enforcement and implementation problems when facing legal reforms, it will be important to continue to assess the success and development of China's and India's CSR systems. In this Article, we highlight some of the issues that we foresee as strengths and weaknesses in each country's CSR models. Undoubtedly, new and more multifaceted problems will arise given the political, social and economic complexities of both countries. Ultimately, we hope that by studying the emergence of the developing CSR systems in these countries, we have added to the recognition of the value and importance of studying CSR and corporate governance in these countries.

We hope in future work to explore in more detail the political economy of China's and India's CSR models, along with the continuing challenges that each country will face in implementing their new CSR standards. Both China and

²⁶⁹ We plan to address each of these factors more fully in a companion paper.

India's CSR efforts provide a rich area of study and deserve both scholarly and public attention moving forward in the search for more effective and innovative CSR and corporate governance mechanisms.