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Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China

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LI-WEN LIN*

Mandatory Corporate Social Responsibility?

Legislative Innovation and Judicial Application in China

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Abstract

Corporate social responsibility (CSR) is often understood as voluntary corporate behavior beyond legal compliance. The recent emergence of CSR legislation is challenging this typical understanding. A number of countries including China, Indonesia and India have expressly stated in corporate law that companies shall undertake CSR. The CSR law is controversial. Critics of CSR see the law as an unwise effort to challenge profit maximization as the only social responsibility of the corporation. Even CSR advocates welcome the CSR law with great caution. Given the vague statutory language of CSR, the practical application of the law places high demands on the judiciary. However, as the countries that have adopted the CSR law are mainly developing countries with rather weak legal institutions, it raises a common concern that the law is simply an innovation without implementation. This article conducts an empirical study on China, an early adopter of the CSR legislation. The empirical analysis of Chinese court cases reveals what the CSR law means in judicial practice, whether CSR is in fact mandatory and in what types of disputes CSR is relevant or outcome determinative. Among various findings, this article shows that the CSR law is by no means as useless as commonly expected. The meaningful application of the law is attributable to the law's fit with China's legal infrastructure and socio-

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political institutions. Chinese courts have innovatively applied CSR in various contexts far beyond the traditionally Western-led focus on directors' fiduciary duties. The Chinese experience suggests that the significance of the CSR law is more of a judicial review standard than a corporate behavior standard, which further confirms the importance of judicial capacity in implementing the vague law. This article concludes with insights for the corporate purpose debate in comparative perspective and policy suggestions for adopting the CSR legislation.

INTRODUCTION

Corporate social responsibility (CSR) often refers to “companies voluntarily going beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities.”¹ CSR is typically considered voluntary and beyond compliance with the law. However, law is playing an increasing role in shaping the development of CSR. The voluntary assumption is becoming shaky. Governments are fostering CSR through various legal means.² The most common regulatory approach is disclosure. Companies are required to disclose social and environmental information to the public. Disclosure is indirect regulation. It does not mandate any substantive change of corporate behavior. Rather it relies on interested information users such as investors, consumers and communities to pressure firms to engage in more CSR activities.³ According to a 2016 report jointly produced by KPMG International, Global Reporting Initiative (GRI), United Nations Environment Program (UNEP) and the Center for Corporate Governance in Africa, almost 400 sustainability reporting instruments have been introduced in 64 countries and more than two thirds of the instruments are mandatory through government regulation.⁴

Direct regulation that mandates CSR behavior is very rare. Yet, a few countries such as China, India and Indonesia have taken a progressive approach to CSR under corporate law, a legal area where CSR has been deemed highly controversial. Their corporate statutes expressly

¹ See European Commission, *Corporate Social Responsibility (CSR) in the EU*, <http://ec.europa.eu/social/main.jsp?catId=331>.

² See Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (Doreen McBarnet et al. eds., 2007).

³ See Archon Fung et al., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007).

⁴ See Global Reporting Initiative (GRI), *Carrots and Sticks: Global Trends in Sustainability Reporting Regulation and Policy* (2016 edition), <https://www.globalreporting.org/resource/library/Carrots%20and%20Sticks-2016.pdf>.

state that companies shall engage in CSR activities. China is probably the first country in the world that expressly writes the phrase of “corporate social responsibility” into its corporate statute. China’s 2006 Company Law provides that “[i]n the course of doing business, a company shall 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.”⁵ As a Chinese commentator noted, this provision is “a big contribution made by Chinese legislators to corporate law around the world.”⁶ Just one year after China’s legislative move, in 2007, Indonesia passed an amendment to its corporate statute to include that “the company having its business activities in the field of and/or related to natural resources shall be obliged to perform its social and environmental responsibility.”⁷ More recently, India’s 2013 Companies Act requires directors to “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 the protection of environment.”⁸ It further requires companies to establish a board-level CSR committee and contribute 2% of their average net profits in the previous three years to permissible CSR activities.⁹

⁵ See Chinese Company Law (2006), art.5.

⁶ See Junhai Liu, XIN GONGSIFA DE ZHIDU CHUANGXIN: LIFA ZHENGDIAN YU JIESHI NANDIAN [INSTITUTIONAL INNOVATION OF NEW COMPANY LAW: POINTS IN DISPUTE AND DIFFICULTIES IN INTERPRETATION OF LAWMAKING] 553 (2006).

⁷ See Indonesian Law No. 40 of 2007 on Limited Liability Companies, art.74. See also, Assegaf Hamah & Partners, *New Regulation on Mandatory CSR for Resources Companies Adds Little New*, <http://www.ahp.co.id/clientalert/ClientAlert25May2012.pdf>.

⁸ See Indian Companies Act (2013), s.166. For a detailed analysis of the mandatory CSR law in India, see Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465 (2017).

⁹ See Indian Companies Act (2013), s. 135.

The recent emergence of such CSR laws has raised controversies.¹⁰ Advocates of shareholder primacy denounce this CSR legislation, believing that any deviation from shareholder interests would just do more harm than good. While CSR advocates generally welcome this legislative endeavor, their acceptance comes with reservations. A common concern is that although the CSR law appears imperative, it is probably merely aspirational in practice given that the statutory language of CSR is too vague to be operational.¹¹

As the CSR law has become an emerging legal reality, there is an urgent need to look beyond the theoretical debate and examine the law's real world application. CSR is a highly incomplete concept and possible CSR actions are hard to be standardized. Analogous to fiduciary duty in corporate law, CSR is "a residual concept that can include factual situations that no one has foreseen and categorized."¹² The meaning of CSR takes shape in concrete contexts rather than conceptual definitions. As a result, courts, as opposed to regulators, undertake a particularly important role in enforcing the CSR provision in the corporate statute.¹³ The legal transplant

¹⁰ The controversies are deeply rooted in the so-called corporate purpose debate or the CSR debate. For a summary of the normative CSR debate, see THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19-226 (Andrew Crane et al. eds., 2008) (providing a comprehensive review of arguments for and against CSR).

¹¹ See e.g., Patricia Rinwigati Wassgstein, *The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications*, 98 J. BUS. ETHICS 455, 461 (2011) (arguing that "Without the clear clarification that such a regulation would provide, Article 74 is more inspirational in character than it is any kind of operational regulation"); Knowledge@Wharton, *Corporate Social Responsibility in India: No Clear Definition, but Plenty of Debate* (August 2, 2011), <http://knowledge.wharton.upenn.edu/article/corporate-social-responsibility-in-india-no-clear-definition-but-plenty-of-debate/>; Peixin Luo, *Woguo Gongsì Shehui Zeren De Sifa Caipan Kunjing Ji Ruogan Jiejue Silu* [*The Judicial Adjudication Dilemma and Several Solutions for Corporate Social Responsibility in China*], 12 LEGAL SCI. 66 (2007) (in Chinese) (arguing that Chinese courts are unlikely to apply the CSR law given its vagueness).

¹² See Robert Charles Clark, CORPORATE LAW 141 (1986).

¹³ See Katherina Pistor and Chenggang Xu, *Incomplete Law*, 35 INT'L L. & POL. 931 (2003); Katherina Pistor and Chenggang Xu, *Fiduciary Duty in Transitional Civil Law Jurisdiction: Lessons from the Incomplete Law Theory*, in GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS (Curtis J. Milhaupt ed., 2003). According to the incomplete law theory provided by Professors Pistor and Xu, when law is highly incomplete, the optimal allocation of the residual lawmaking and enforcement powers depends on the extent of expected harm and the costs of standardizing actions that might cause harm. They argue that fiduciary duty is a good example where the residual lawmaking and enforcement powers should be allocated to courts rather than regulators. The harm arising from a breach of fiduciary duties is typically limited to a subset of existing stakeholders related to the corporation, as opposed to systematic harm. Moreover, the costs of standardizing all possible actions that might result in breaching fiduciary duties are

literature of fiduciary duty provides abundant experiences across the world of how challenging it is to put the vague law into judicial practice despite a huge body of foreign case law available for reference.¹⁴ The CSR legislation, as a very recent legal innovation with extremely limited experience available for guidance, will certainly face far more challenges.

In practice, how have courts applied the CSR provision under the corporate statute? Existing literature generally presents a depressing picture primarily with the analysis of the statutory language and the common perception of incompetent courts in developing countries that have adopted the law.¹⁵ This picture appears so pessimistic that empirical research on the judicial application of the CSR law is not something worth to pursue. Nevertheless, this article shows some hopeful lights shining from the generally negative image through an empirical analysis of Chinese court cases. The Chinese CSR law has been more than a decade old, which provides a long enough time span to evaluate its effects. The empirical research reveals what the CSR provision means in judicial practice, whether CSR is in fact mandatory, and in what types of disputes CSR is relevant or outcome determinative.

Since 2006, at least 169 unique Chinese court cases have explicitly referenced the CSR provision or the CSR concept. Although the judicial application of the CSR law remains limited, the law is not useless or simply expressive. Chinese courts have used it in legally consequential manners. Moreover, the substantive interpretation of CSR is contingent on the political,

prohibitive. It requires a context-specific analysis to determine whether a duty of loyalty or a duty of care has been breached. Furthermore, as any daily corporate decisions may incur the issues of fiduciary duties, there would be excessive intervention in business management if enforced by regulators, who are proactive enforcers, compared to reactive courts.

¹⁴ For European countries, see Katherina Pistor and Chenggang Xu, *supra* note 13. For Japan, see Hideki Kanda and Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887 (2003). For China, see Guangdong Xu, *Directors' Duties in China*, 14 EUR. BUS. ORG. L. REV. 57 (2013); Donald C. Clarke and Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH* 243-95 (D. Puchniak, H. Baum, and M. Ewing-Chow eds., 2012).

¹⁵ See *supra* note 11.

economic and social situations in China. For instance, Chinese courts take social stability as an important dimension of CSR. The judicial use of CSR has been made possible because the CSR law has certain fit with China's macro and micro institutions including relevant legal infrastructure.

The recent development of the CSR law provides a practical lens to revisit the purpose of the corporation in comparative perspective. The traditional debate about the corporate purpose tends to be firm-based, theoretical and insulated from real-world macro institutions including politics. The CSR law reveals the institutional forces in shaping corporate purpose in legal terms. In addition, this article provides insights into the multi-faceted relationship between CSR and corporate law. Existing corporate law scholarship, mainly based on the experience of Anglo-Saxon countries, takes CSR analysis exclusively tied with directors' fiduciary duties. However, Chinese courts have innovatively applied CSR in other corporate law contexts unrelated to directors' fiduciary duties. The Chinese experience suggests that the CSR law is more of a judicial review standard than a corporate behavior standard. It further evidences that interpreting CSR places high demands on the judiciary.

This article proceeds as follows. Section I explains the legal path of CSR in China. CSR began as a contractual transplant through global supply chains. It then has elevated to a legislative innovation and now it is begging judicial interpretation. Section II examines the possible extra-judicial effects of the CSR law in China. Section III gives an empirical analysis of the court cases expressly referring to the term of CSR. Section IV evaluates the empirical findings in comparative law perspective and offers policy advice for turning CSR into a mandatory duty.

I. THE LEGAL PATH OF CSR IN CHINA: FROM CONTRACTUAL TRANSPLANTATION TO LEGISLATIVE INNOVATION

The term “qiye shehui zeren” (“corporate social responsibility”) is a neologism that arrived in China in the 1990s through global supply chains. The anti-sweatshop and environmental movements in the West caused multinational companies to adopt social and environmental criteria in selecting their suppliers. For instance, Apple Inc. has the Supplier Code of Conduct and Wal-Mart adopts the Standards for Vendor Partners. Such supplier standards are commonly referred to as “codes of vendor conduct.” Numerous suppliers in China are required to comply with such vendor codes. At first blush, the popularity of codes of vendor conduct in global supply chains may appear simply a result of imitation and dissemination of business practices among corporations. In fact, such vendor codes in global supply chains have regulatory features that culminate in a form of legal transplantation through private contracting.¹⁶ Codes of vendor conduct usually incorporate international law such as the International Labor Organization (ILO) Labor Conventions and the Universal Declaration of Human Rights. They also often refer to multinational companies’ home-country labor and environmental laws. Rather than simply being included as part of multinational companies’ internal procurement handbooks, codes of vendor conduct are real legal obligations in supply contracts. Suppliers are required by contract to implement the incorporated social and environmental laws. To ensure suppliers’ compliance, multinational companies often use internal and external auditing systems to enforce the contractual obligations.

¹⁶ See Li-Wen Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009).

Incorporation of CSR standards in global supply contracts initially confronted great suspicion and hostility in China.¹⁷ It was often viewed as developed countries' protectionist measures aimed at undermining the competitiveness of developing countries. The unregulated CSR certification industry in China further made Chinese suppliers perceive CSR no more than a label for purchase. Moreover, the lack of input from local suppliers gave rise to imperialism charges. However, with China's transition "up the value chain" and the rising awareness of labor and environmental issues, the externally imposed notion of CSR became an increasingly accepted internal value. Homegrown CSR initiatives began to emerge in growing numbers after the turn of the century.¹⁸ Unlike Western countries where non-state actors such as non-governmental organizations play an important role in advancing CSR, China takes a state-centric approach.¹⁹ The Chinese government has been active in using laws and regulations to promote CSR. Among these various state-led initiatives, the most salient and representative is probably the express recognition of CSR in China's corporate law.

CSR is a concept compatible with the stakeholder model of corporate governance. In this regard, the Chinese company law provides a fertile ground for CSR to thrive. Although China's 1994 Company Law, the first national corporate statute since 1949, did not expressly reference CSR, it resonated with some aspects of it, particularly regarding employee participation in management. For instance, limited liability companies and joint stock companies were required to include employee representatives on the board of supervisors; such employee representatives should be elected by employees. Companies were required to consult with trade unions and

¹⁷ See Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321 (2007).

¹⁸ For a review of the CSR initiatives in China, see Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 67-86 (2010).

¹⁹ See 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 (2013).

employees when making decisions concerning employee wages, welfare, safe production processes, and other issues related to employee interests; companies were also required to invite employee representatives to attend relevant meetings.²⁰ The 1994 Company Law also included an encompassing provision broad enough to embrace the idea of CSR. Article 14 provided that “Companies shall comply with the law, conform to business ethics, strengthen the construction of socialist civilization, and subject themselves to the government and public supervision in the course of doing business.”

China undertook a comprehensive revision to its corporate law in 2004. The reform efforts culminated in the 2006 Company Law. Article 5 of the statute makes it clear that “[i]n the course of doing business, a company shall 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.”²¹ CSR is now clearly engraved in China’s corporate statute.

The low-transparency of China’s law-making process makes it hard to know why the legislators decided to expressly include CSR in the corporate statute. Nevertheless, some government officials and legal scholars who took part in the legislative process compiled and published the opinions considered in the law-making process, which may serve as an alternative source of the legislative history.²² In the deliberation process at the National People’s Congress of China (NPC), a group of thirty-one NPC delegates from Shanghai proposed that the company

²⁰ See Chinese Company Law (1994), arts. 55 & 121.

²¹ See Chinese Company Law (2006), art.5.

²² See XIN GONGSIFA XIUDING YANJIU BAOGAO [A RESEARCH REPORT ON THE AMENDMENTS TO COMPANY LAW] (Kongtai Cao et al. eds., 2005) (in Chinese). The Chinese government did not disclose official documents concerning the legislative history. The editors of this report compiled the opinions considered in the legislative process. The leading editor was the head of the State Council’s Legislative Affairs Office, responsible for drafting laws and regulations. Other editors were also affiliated with the Office; some are prominent law professors in China.

law should make it clear that “companies shall protect and improve the interests of other stakeholders in addition to shareholders.”²³ This group of NPC delegates also proposed that CSR might be included as one of the legislative purposes of the company law. A NPC delegate of the Jilin Province proposed that the company law should emphasize simultaneously shareholder wealth maximization and CSR. He proposed that, in addition to protecting shareholders’ interests, “companies should consider other social interests such as the interests of employees, consumers, creditors, local communities, environments, socially disadvantaged groups, and the general public.”²⁴ A number of NPC delegates of the Guangdong Province recommended that the company law should devote a specific section to the relationships between the company and its stakeholders.²⁵ Interesting to note is that most of the NPC delegates who suggested the inclusion of CSR were mainly from regions that had relatively early exposure to the responsible supply chain movement.

In addition to the inclusion of the general CSR provision, the 2006 Company Law improves employee rights in corporate governance, which adds some implementation details of the CSR principle. Under the new company law, the number of employee representatives on the supervisory board shall not be less than one third of the board.²⁶ Moreover, it affirms the importance of labor protection that “the representative of the trade union may in accordance with the law enter into a collective contract on behalf of employees with the company in respect of wages, work hours, welfare, insurance, labor safety, etc.”²⁷

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Chinese Company Law (2006), art. 52; Chinese Company Law (2013), art 51.

²⁷ See Chinese Company Law (2006), art. 18.

The CSR provision does not only appear in the corporate statute but also in the partnership law. The 2007 Partnership Law includes a revised provision that “the partnership firm and its partners shall comply with laws and administrative regulations, conform to social morals and business ethics, and undertake social responsibility.”²⁸ The 2000 Sole Proprietorship Law has a similar provision though it does not expressly reference CSR. It requires that “the sole proprietorship shall comply with laws and administrative regulations, conform to the principle of good faith, and shall not harm social and public interests.”²⁹ Clearly, social responsibility is part of the laws governing the fundamental forms of business organizations in China.

The nature of the CSR provision (i.e. Article 5) under China’s corporate statute, which appears mandatory on its face, has been a subject of debate among Chinese corporate law scholars. Some scholars take the CSR provision as an ethical obligation mainly because the corporate statute does not define what CSR is and does not provide any remedies for non-compliance. As a result, they argue that the CSR provision is legally unenforceable and only exhortatory in nature.³⁰ In contrast, some scholars argue that the CSR provision is mandatory.³¹ The corporate statute declares CSR as a fundamental legal principle of corporate governance. As a fundamental legal principle, it is mandatory in nature and shall be applied to interpretations of all provisions throughout the statute. Moreover, the company law has provided some specific obligations consistent with the CSR principle, such as employees’ participation in corporate governance. Other scholars argue that the CSR provision is both an ethical obligation and a legal obligation. Considered that the statutory language of Article 5 includes compliance with the law

²⁸ See Chinese Partnership Law (2007), art. 7.

²⁹ See Chinese Sole Proprietorship Law (2000), art. 4.

³⁰ See e.g., Xiaoxing Chen, *Qiye Shehui Zeren Falu Guizhi De Lixing Sikao Jian Ping Zhongguo Gongsifa Di 5 Tiao Zhi Guiding [Rational Consideration on the Legal Rule of Corporate Social Responsibility: A Comment on Article 5 of Chinese Company Law]*, in CHINA COMMERCIAL LAW ANNUAL 2009 (in Chinese) 50-53 (Baoshu Wang et al. eds., 2009).

³¹ See e.g., Liu, *supra* note 6, at 555.

and beyond, they argue that the meaning of CSR includes legal obligations and ethical expectations. CSR is legally enforceable in respect of compliance with the law. The ethical dimension of CSR creates a legal environment conducive to CSR shareholder proposals and stakeholder-oriented interpretations of directors' fiduciary duties.³²

While Chinese scholars hold different views on the meaning of CSR under Article 5, they share a consensus that the CSR provision will probably be unused by courts. The unclear meaning of CSR makes it difficult for courts to apply in real cases. If there is any observable effect of the CSR provision, it will occur extrajudicially. Over the years, most Chinese scholars simply assumed, without empirical verification, the absence of judicial application of the CSR law.³³ However, as this article will show, a non-negligible number of Chinese court cases in recent years have expressly referenced CSR and some cases have applied CSR to determine a legal outcome.

II. NON-JUDICIAL APPLICATION OF CSR IN CHINA

Before examining how Chinese courts apply the CSR provision under the corporate statute, it is important to investigate possible effects of the CSR provision outside the courtroom. Many Chinese legal scholars argue that the CSR provision under the corporate statute at best only serves exhortatory or educational purposes. As a result, the main effect of the CSR provision, if at all, takes place outside court cases. Although the CSR provision under the 2006 Company Law provides an important legal foundation for CSR development in China, it is

³² See e.g., Jianbo Lou, *Zhongguo Gongsifa Di Wu Tiao Di Yi Kuan de Wenyi Jieshi Ji Shishi Lujing* [The Literal Interpretation and Implementation Path of Article Five Paragraph One of Chinese Company Law], 20 PEKING U. L. J. 36 (2008).

³³ An exception is Peizhong Gan and Yu Zhou, *Woguo Gongsifa Jiangou Zhong De Guojia Jiaose* [The Role of the State in Building Corporate Law in China], 2 CONTEMP. L. REV. 56 (2014). The authors found only one court case referenced the term "social responsibility" and the case involved a consumer dispute with China Mobile, a state-owned telecommunication enterprise.

simply one of numerous governmental efforts to promote CSR. After the express recognition of CSR in the corporate statute, the Chinese government has introduced different types of measures – endorsing, facilitating, partnering and mandating – to promote CSR activities.³⁴ The numerous CSR initiatives provide specific regulatory guidance on how to implement the broadly stated CSR provision in the company law. As an empirical matter, it is difficult to measure the practical effects of the CSR provision in isolation. Many CSR activities may be more directly attributable to specific regulatory measures than the general CSR provision in the corporate law.

As in other countries, CSR reporting is probably the most visible CSR practice on the rise. Figure 1 shows the number of Chinese companies publishing stand-alone CSR reports during the period of 2006-2015.³⁵ It shows a noticeable increase in the number of listed and non-listed companies engaging in CSR reporting since 2006. The rise of CSR reporting in China is a direct result of disclosure regulations by the two stock exchanges in China.³⁶ In 2006, the Shenzhen Stock Exchange released the Guide on Listed Companies' Social Responsibility (here after "Shenzhen Guide") with the view to further the CSR principle stated in the corporate statute.³⁷ The Shenzhen Guide encourages listed companies to publish CSR reports.³⁸ The Shenzhen Guide also provides principles on how a listed company shall handle its relationship with each of the various stakeholders. In 2008, the Shanghai Stock Exchange took a progressive

³⁴ See Ho, *supra* note 19.

³⁵ See Syntao, *A Journey To Discover Values 2015: A Study Of Corporate Social Responsibility Reporting in China*, <http://www.syntao.com/syntao/index.php/web/report/detail?id=101>.

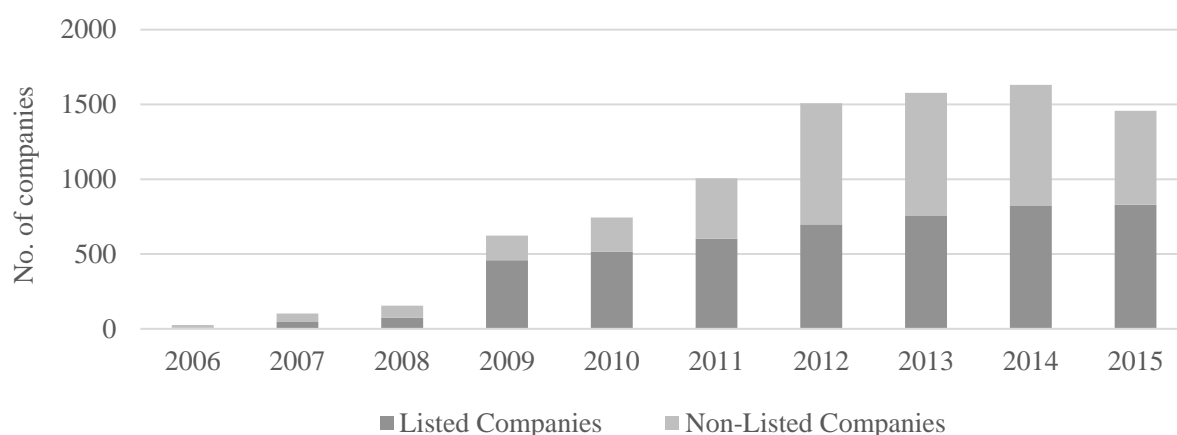
³⁶ For a detailed discussion about the Chinese stock exchanges' CSR disclosure rules and the implementation effects, see Li-Wen Lin, *Corporate Social and Environmental Disclosure in Emerging Securities Markets*, 35 N.C.J. INT'L L. & COM. REG. 1, 18-22 (2009).

³⁷ The Shenzhen Stock Exchange's Guide on Listed Companies' Social Responsibility, art. 1 (published on September 25, 2006) (explaining the purpose of the Guide).

³⁸ The Shenzhen Stock Exchange's Guide on Listed Companies' Social Responsibility, art. 36 (published on September 25, 2006). According to Article 36, "[c]ompanies may release their social responsibility reports along with their annual reports." It also suggests that this report should contain at least the following information: "(1) implementation of social responsibility relating to employee protection, impact on environment, product quality and community relationship; (2) assessment of implementation of the Guide and reasons for the gap, if any; (3) measures for improvement and the timetable."

approach mandating certain types of listed companies to issue annual CSR reports.³⁹ Moreover, the State-Owned Assets Supervision and Administration Commission (SASAC), the government's ownership agency, has required the state-owned enterprises to publish annual CSR reports.⁴⁰

FIGURE 1. NUMBER OF CHINESE COMPANIES PUBLISHING STAND-ALONE CSR REPORTS, 2006-2015



Source: SynTao, *A Journey to Discover Values 2015: A Study of Corporate Social Responsibility Reporting in China*.

Another observable trend is the growth of green finance in China.⁴¹ In 2007, China introduced green credit policies that encourage banks to adopt environmental due diligence for credit management and to channel financing to environmentally friendly projects. As of June 2017, the green credit loan balance grew to 8.22 trillion RMB. Moreover, until now, China has

³⁹ Three types of companies are subject to this disclosure requirement, including: companies in the Shanghai Stock Exchange Corporate Governance Index, companies that list shares overseas, and companies in the financial sector. According to information released by the Shanghai Stock Exchange, 290 listed companies published CSR reports for the fiscal year of 2008. Of these 290 companies, 258 companies issued CSR reports due to the regulatory requirement while only 32 companies did so voluntarily. For more detailed information, see Lin, *supra* note 36.

⁴⁰ In 2008, SASAC released the Guiding Opinions on Central Enterprises' Implementation of Social Responsibility, which required the state-owned enterprises (SOEs) under the central government's control to publish CSR reports by 2018. In 2012, SASAC released an informal notice requiring the central SOEs to begin publishing CSR reports in 2012. All the central SOEs have published annual CSR reports since then.

⁴¹ See Virginia Harper Ho, *Sustainable Finance & China's Green Credit Reforms: A Test Case for Bank Monitoring of Environmental Risk*, 51 CORNELL INT'L L. J. 609 (2018).

become the world's second largest issuer of climate-aligned bonds since its first corporate green bond was issued in 2015.⁴²

Many CSR performance instruments have emerged to measure and compare Chinese companies' social and environmental performance.⁴³ One of the leading CSR performance rankings is provided by the CSR Research Center of Chinese Academy of Social Sciences, which was established in 2008. The center annually evaluates and ranks companies' social and environmental performance based on a scheme of 150 indicators that take into account international standards and local situations. According to the annual evaluations over the years, Chinese companies have demonstrated a gradual increase in CSR performance. Most CSR rankings in China show that the leading performers are state-owned enterprises, especially those controlled by the central government.

Absent consensus on how to measure CSR performance, any performance evaluation may be controversial. Still, the bottom line is that the Chinese government's various measures including the CSR provision in the corporate statute have raised CSR awareness among companies. In this regard, the CSR principle stated in the company law may serve an expressive function to "reconstruct existing norms and to change the social meaning of action through a legal expression or statement about appropriate behavior."⁴⁴ However, beyond the expressive function, does the CSR law provide any adjudicative function?

⁴² See Climate Bonds Initiative and China Central Depository & Clearing Company (CCDC), CHINA GREEN BOND MARKET 2017, available at https://www.climatebonds.net/files/files/China_Annual_Report_2017_EN_Final_14_02_2018.pdf.

⁴³ Major CSR evaluation indexes in China include: the Chinese CSR Annual Index published by Political Science Institute of East China University Political Science and Law, Shanghai Jiaotong University Corporate Legal Research Center, Eastern Public Welfare Regulation and Evaluation Center; the Chinese Corporate Social Responsibility Ranking published by the Southern Weekly China CSR Research Center; China's CSR Top 500 published by China Enterprise Evaluation Association and Tsinghua University School of Social Sciences.

⁴⁴ See Cass R. Sustein, *On the Expressive Function of Law*, 144 U. PENN. L. REV 2010, 2031 (1996).

III. AN EMPIRICAL OVERVIEW OF CHINESE COURT CASES

This article collects court cases from two authoritative and commonly used Chinese law databases – China Judgements Online and China Law Info. This article covers court cases that expressly include the term of “corporate social responsibility” or the Article 5 of China’s company law. The data collection was completed by the end of February 2018. The sample includes 169 independent cases.⁴⁵ Of the 169 cases, 91 cases expressly cite Article 5 of the company law. The rest explicitly reference the term of “corporate social responsibility.”

As is true of any empirical study of court cases, this sampling method has limitations. It does not include cases that are resolved before the court delivers its judgment. Also, note that Chinese judges have been actively encouraging parties to mediate.⁴⁶ Chinese courts do not publish cases that are finally resolved through mediation. The courts also do not publish some cases for a host of reasons.⁴⁷ The publically available cases do not represent the universe of all the court cases in China. Despite the limitations, the available data provides useful insights into how the notion of CSR has been used by Chinese courts.

A. *Trend*

China introduced the term “CSR” in its company law in 2006. Figure 2 shows that there were only an extremely small number of cases in the first few years after the CSR legislation in

⁴⁵ Duplicative cases are counted as one case. Cases launched by different plaintiffs based on the same facts are counted as one case. Decisions for the same dispute (e.g. a trial followed by an appeal) are counted as one case.

⁴⁶ See Carl F. Minzner, *China’s Turn against Law?* 59 AM. J. COMP. L. 935 (2011) (discussing China’s recent return to mediation and its implications).

⁴⁷ Cases involving state secrets, crimes committed by minors, custody or guardianship of children, disputes resolved through mediation are excluded from online publication. For a detailed discussion about the promise and perils of using the huge body of Chinese court cases, see Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 21st Century China Center Research Paper No. 2017-01, Columbia Public Law Research Paper No. 14-551, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985861.

2006. Note that the number of cases in 2017 may be under-inclusive because many cases had not yet been released at the time of data collection as they were still pending and there was a time lag between final ruling and publication. Although both of the databases cover court cases published as early as in the 1990s,⁴⁸ no CSR cases were found before 2007. On the face of it, Figure 2 appears to suggest a noticeable increase starting from 2013. However, the rise in the number of CSR cases since 2013 is probably attributable to greater data availability in both of the databases. The number of published civil judgements in both databases surged in 2013 and since then it has continued to grow remarkably.⁴⁹ The number of CSR cases has a very strong and positive correlation with the total number of published civil judgements over the years.⁵⁰ Considered the trivial number of CSR cases in the first few years after the 2006 CSR legislation and the slow growth rate of CSR cases relative to the growth rate of published civil cases over the decade,⁵¹ the data indicates that it takes time for judges and litigants to digest the CSR law and explore possible legal usages.

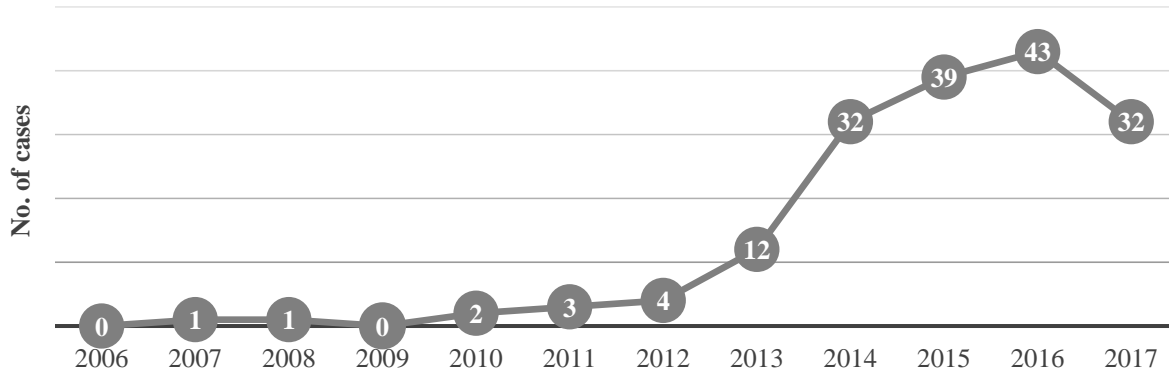
⁴⁸ China Judgements Online covers civil judgements published as early as in 1996. China Law Info covers civil judgements published as early as in 1990.

⁴⁹ In 2013, the number of published civil judgements in China Judgements Online was close to a million of cases, an increase by about 3.66 times from the previous year. China Law Info has a similar data pattern with more than 800,000 civil judgements published in 2013, nearly doubling the previous year's number. Both databases show that since 2014 the number of published civil judgements has been several millions per year.

⁵⁰ The Pearson coefficient for the relationship between the annual number of CSR cases and the annual number of China Judgements Online civil cases over the period of 2006-2017 is 0.916. The Pearson coefficient for the relationship between the annual number of CSR cases and the annual number of China Law Info civil cases is 0.979. A Pearson correlation coefficient ranges between 1 and -1. The rule of thumb for interpreting the strength of correlation is as follows: 0 means no correlation; +.3 (-.3) indicates a weak positive (negative) relationship; +.5 (-.5) indicates a moderate positive (negative) relationship; +.8 (-.8) indicates a strong positive (negative) relationship; +1 (-1) indicates a perfect positive (negative) relationship.

⁵¹ From 2007 to 2016, the number of CSR cases increased by 42 times while the number of published civil judgements increased by 491 times in the China Judgements Online database and by 228 times in the China Law Info database.

FIGURE 2. NUMBER OF PUBLISHED CSR CASES, 2006-2017



Note: The case publication year of the data sources started in the 1990s.

B. Jurisdictional Distributions

Table 1 shows the distribution of the CSR cases by the level of court.⁵² A majority of the CSR cases took place at the county or district court level. This case distribution is highly correlated with the distribution of total civil judgements across court levels.⁵³ A possible and intuitive explanation for the correlation is that the greater number of civil cases at the lower-court level provides a larger case pool from which CSR issues may arise.

TABLE 1. CASE DISTRIBUTION BY THE LEVEL OF COURT

Level of Court	Number of Cases (Percentage)
High Court	8 (4.7%)
Intermediate Court	56 (33.1%)
County/District	104 (61.6%)

⁵² When a case is appealed to a higher court that expressly considers CSR, it is counted as a higher court case rather than a lower court case.

⁵³ The Pearson correlation for the relationship between the number of CSR cases and the number of civil judgements by the level of courts is 0.932.

Special Court ⁵⁴	1 (0.6%)
Total	169 (100%)

Table 2 shows the provincial distribution of the CSR cases. The distribution is largely in proportion to the total civil cases distribution across provinces. Statistically, there is a strong correlation between the number of CSR cases and the number of civil cases by province.⁵⁵ Still, some interesting patterns should be noted. In Table 2, the top five provinces account for 48.6% of all the CSR cases. These provinces are more economically developed regions of China. In addition, they have prominent presence of export-oriented private enterprises that have been exposed to responsible production standards in global supply chains since the 1990s. The relatively advanced economic development and the longer exposure to the international market may contribute to the growing CSR awareness and a greater likelihood to invoke CSR in the courtroom.

TABLE 2. PUBLISHED CSR CASES BY PROVINCE

Province	Number of Cases (Percentage)
Guangdong	22 (13.0%)
Jiangsu	18 (10.7%)
Shanghai	16 (9.5%)
Zhejiang	15 (8.9%)
Fujian	11 (6.5%)

⁵⁴ The special court here is Beijing Railway Transport Court.

⁵⁵ The Pearson correlation coefficient for the relationship between the number of CSR cases and the number of civil cases by province is 0.644; the spearman rank rho is 0.723. Both correlation coefficients suggest a statistically significant strong positive relationship. The number of civil cases by province is drawn from China Judgements Online.

Anhui	9 (5.3%)
Guangxi	9 (5.3%)
Beijing	7 (4.1%)
Hubei	6 (3.6%)
Sichuan	6 (3.6%)
Tianjin	6 (3.6%)
Other 22 Jurisdictions	44 (26.0%)
Total	169 (100%)

C. *Corporate Types*

Although most CSR literature focuses on public companies, only 16 (9.5%) of the CSR cases involve a public company. It is possible that Chinese courts declined to accept some cases brought against public companies that exercised political influence over the courts.⁵⁶ However, note that there are over 180 million registered business firms in China and only about 3,500 of them are public companies.⁵⁷ From a statistical perspective, public companies are expected to account for a very small portion of the court cases (the expected percentage is as little as 0.00194%). Yet, the dataset shows that by percentage, public companies are statistically significantly overrepresented in the CSR cases.⁵⁸

According to CSR theories, public companies should shoulder greater social responsibility than non-public companies should because public companies often possess

⁵⁶ See Benjamin L. Liebman, *China's Courts: Restricted Reform*, 620 CHINA Q. 631 (2007); Robin Hui Huang, *Private Enforcement of Securities Law in China: A Ten-year Retrospective and Empirical Assessment*, 61 AM. J. COMP. L. 757 (2013).

⁵⁷ National Bureau of Statistics of China, CHINA STATISTICAL YEARBOOK (2017) Table 1-5, available at <http://www.stats.gov.cn/tjsj/ndsj/2017/indexch.htm>.

⁵⁸ Z-Score is 278.422; p-value is close to 0.

significant powers and exert impact on society.⁵⁹ This view is recognized in the following case where the court apportioned more liability to the defendant based on its identity as a publicly listed company. In this case, the plaintiff and defendant entered into a contract to jointly develop and provide heating services to a residential community. The parties disputed over the validity of the contract termination and the associated damages. Among other rationales, the court explained:

In terms of corporate social responsibility, the implementation of the agreement indeed resolved the heating service problem for the residents in the community. Considered factors including the corporate nature, firm size and operating environments, the defendant, as a publicly listed heating company, should undertake greater social responsibility and obligations than the plaintiff firm.⁶⁰

In the dataset, the public companies were often state-owned enterprises (SOEs). SOEs involved in 35 of the 169 cases, representing approximately 20%. Note that the number of SOEs accounts for less than 1% of the total number of registered business entities in China.⁶¹ In this regard, SOEs had overrepresentation in the CSR cases. The prominent SOE presence may reflect a common expectation that SOEs shoulder special missions other than making profits and have

⁵⁹ See Domènec Melé, *Corporate Social Responsibility Theories*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 47-82 (Andrew Crane et al. eds., 2008) (discussing CSR theories and noting a group of CSR theories based on corporate power). See also Min-Dong Paul Lee, *A Review of The Theories of Corporate Social Responsibility: Its Evolutionary Path And The Road Ahead*, 10 INT'L J. MGMT. REV. 53 (2008) (noting that “the vast majority of CSR research focuses almost exclusively on large publicly traded corporations” and provides “very little reflection on what CSR means for small and medium enterprises”).

⁶⁰ See *Shenyang Shi Shuanxi Gufen Youxian Gongsi Yu Shenyang Huitian Redian Gufen Youxian Gongsi, Lian Ying Hetong Jiufen Yi Shen Minshi Panjueshu* [Shenyang City Shuanxi Corporation v. Shenyang Huitian Thermal Power Corporation, First-Instance Civil Judgement on A Joint Venture Contract Dispute] (Shenyang Shenhei District People’s Court, Jan. 26, 2017) (China Judgements Online).

⁶¹ See National Bureau of Statistics of China, CHINA STATISTICAL YEARBOOK (2017) Table 1-8, available at <http://www.stats.gov.cn/tjsj/ndsj/2017/indexch.htm>.

monopoly in China's critical sectors. Chinese courts expressly stated in six cases that SOEs should undertake more social responsibility and thus bear legal liabilities arising from tort or other laws.⁶² For instance, in a case where an electric scooter driver was injured partly because China Telecom, a large state-owned telecom service provider, failed to take reasonable precautionary measures during its road constructions. The court attributed more fault to China Telecom by stating that "China Telecom, a large telecom state-owned enterprise providing the public with telecom services that are closely connected to people's daily life and having a higher reputation and greater social impact, should bear more corporate social responsibility."⁶³

D. Issue Types

CSR may emerge in different types of issues, as shown in Table 3. Most CSR cases took place in the contract law context, particularly insurance contracts. Often, in an insurance contract case, the insurance policy holder as the plaintiff argued that the insurance company as the defendant was socially irresponsible for refusing payments. Real estate sale contracts represent

⁶² See Zhongguo Dianxin Gufen Youxian Gongsi Shanghai Fen Gongsi Su Yang Weizhong Wujian Sunhai Zeren Jiufen Yi An Er Shen Minshi Panjueshu [China Telecommunication Corporation's Shanghai Branch Company v. Yang Weizhong, Second Instance Civil Judgement on A Property Damage Dispute] (Shanghai First Intermediate People's Court, Oct. 19, 2017) (China Judgements Online); Zou Weihua Su Zhongguo Lianhe Wangluo Tongxin Youxian Gongsi Zhaoqing Shi Fen Gongsi Deng Gongsi Dianxin Fuwu Hetong Jiufen An [Zou Weihua v. China Unicom Co., Ltd.'s Zhaoqing Branch Company et al., A Telecom Services Contract Dispute] (Guangdong Province Zhaoqing City Duanzhou District People's Court, Nov. 7, 2014) (China Law Info); Chengdu Ditie Yunying Youxian Gongsi Yu Xia Hong Deng Qinquan Zeren Jiufen Shangsu An [Chengdu Metro Operation Co. Ltd. v. Xia Hong et al., An Appeal of Tort Liability Dispute] (Sichuan Chengdu Municipal Intermediate People's Court, Sep. 18, 2016) (China Law Info); Zhao Xingyou Yu Zhongguo Gongshang Yinhang Gufen Youxian Gongsi Haerbin Hulan Zhihang Laodong Zhengyi Er Shen Minshi Panjueshu [Zhao Xingyou v. Industrial and Commercial Bank of China Harbin Hulan Branch, Second Instance Civil Judgement on A Labor Dispute] (Heilongjiang Harbin Municipal Intermediate People's Court, Dec. 15, 2015) (China Judgements Online); Song Qinghai Yu Zhongguo Yidong Tongxin Jituan Chongqing Youxian Gongsi Dianxin Fuwu Hetong Jiufen An [Song Qinghai v. China Mobile Group Chongqing Co., Ltd., A Telecom Services Contract Dispute] (Chongqing First Intermediate People's Court, Nov. 9, 2015) (China Law Info); Huizhou Shi Huiyang Gaoyu Shiye Fazhan Youxian Gongsi Su Zhongguo Shiyou Huagong Gufen Youxian Gongsi Guangdong Shiyou Fen Gongsi Zulin Hetong Jiufen An [Huizhou City Gaoyu Development Co., Ltd. v. Sinopec Guangdong Branch Corp., A Lease Contract Dispute] (Guangdong Provincial High Court, Jun. 20, 2014) (China Law Info).

⁶³ See China Telecommunication Corporation's Shanghai Branch Company, *supra* note 62.

another area where CSR could be invoked. Usually the court or the plaintiff viewed the defendant real estate developer failed to undertake CSR and caused damages to homebuyers. Note that a few cases involved consumer contracts with telecom service providers. In such cases, the state-owned telecom service providers were often viewed socially irresponsible for the improper exercise of their monopoly powers in the market.

Corporate law cases represent nearly a third (29.6%) of all the CSR cases, which is unsurprising given that Chinese company law includes an express CSR provision. Article 5 of China's company law includes two paragraphs. The first paragraph provides that "In the course of doing business, a company shall comply with laws, 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." The second paragraph provides that "The legitimate rights and interests of a company shall be protected by laws and may not be trespassed." A close examination of the corporate law cases that expressly referenced Article 5 reveals that the courts often meant to reference the part about legal compliance and legitimate rights protection rather than the part about social responsibility. For example, the courts often cited Article 5 without any explanation in piercing the corporate veil cases where shareholders abused the corporate form and took advantages of creditors. The courts also cited Article 5 without any clarification in cases where statutory or internal governance procedures were not duly followed. These cases did not really amount to the application of CSR. Such cases at best indicated that legal compliance is social responsibility. However, a few cases seeking judicial dissolution clearly considered CSR. In these dissolution cases, the courts took CSR as an important factor in deciding whether to grant a judicial dissolution. The following section will give a more detailed discussion.

Tort is another area where CSR came into play. The tort cases presented two common situations. One of the situations was that the defendant had made some payment to cover the injured plaintiff's medical expenses or losses and the defendant refused to pay further based on the argument that the initial payment was simply out of CSR rather than any legal liabilities. The other situation was that the court denounced the corporate tortfeasor for failing to assume CSR and should bear legal liabilities for negligence.⁶⁴

It is no surprise to see that many cases arose in the area of labor law, as employees usually are an important stakeholder of CSR. A common scenario was that the plaintiff demanded the defendant company to compensate for wrongful dismissal or to make social security or other payments; in response, the defendant argued that the requested payment was a voluntary social responsibility rather than a legal obligation.⁶⁵ A number of cases occurred in the area of administrative law. These cases often cited Article 5 without any clear reason except for legal compliance.

Overall, the notion of CSR appeared in a variety of cases. While the CSR provision is included under the company law, its usage is not limited to corporate law issues but a wide range of legal topics. The diversity of legal issues suggests that different stakeholders in different

⁶⁴ See e.g., Qin Yidong and Ceng Pinwen Tigong Laowu Zhe Shouhai Zeren Jiufen Er Shen Minshi Panjueshu [Second-Instance Civil Judgement on Qing Yidong and Zeng Pinwen's Labor Liability Dispute] (Guangxi Zhuang Autonomous Region Baise City Intermediate People's Court, Oct. 25, 2017) (China Judgements Online).

⁶⁵ See e.g., Tianjin Pengzhou Dianzi Youxian Gongsi Su Zhang Ling Deng Laodong Zhengyi An [Tianjin Pengzhou Electronics Co., Ltd. v. Zhang Ling et al., A Labor Dispute] (Tianjin Binhai Xin District People's Court, Sep. 27, 2016) (China Law Info); Guangxi Nanning Dongtang Xinkai Tangye Youxian Gongsi Yu Zhumouying Fuli Daiyu Jiufen Yishen Minshi Panjueshu [Guangxi Nanning Dongtang Xinkaitang Co., Ltd. v. Zhu Mo Ying, First-Instance Civil Judgment on A Benefits Dispute] (Guangxi Zhuang Autonomous Region Heng County People's Court, Nov. 11, 2013) (China Judgements Online); [Li Chuanfeng v. Zhongcheng Xinxing Oil Fields Engineering Technology Corp. Ltd, First-Instance Civil Judgement on A Labor Dispute] (Beijing Changping District People's Court, Jan. 18, 2016) (China Judgements Online); Huo Yuxia Yu Xi'an Kaiwei Shiye Youxian Gongsi Laodong Zhengyi Yi Shen Minshi Panjueshu [Huo Yuxia v. Xi'an Kaiwei Industrial Ltd., First-Instance Civil Judgement on A Labor Dispute] (Xi'an Yanta District People's Court, Jun. 15, 2017) (China Judgements Online).

contexts may invoke CSR in different ways. It further evidences the difficulty to standardize CSR behavior.

TABLE 3. REPORTED CSR CASES BY ISSUE TYPE

Issue Type	Number of Cases (Percentage)
Contract Law	
<i>Insurance</i>	13 (7.7%)
<i>Real Estate Sale</i>	10 (5.9%)
<i>Loan</i>	7 (4.1%)
<i>Lease</i>	5 (3.0%)
<i>Telecom Service</i>	3 (1.8%)
<i>Miscellaneous (excluding labor/employment)</i>	28 (16.6%)
Corporate Law	
<i>Corporate Abuse</i>	17 (10.1%)
<i>Dissolution</i>	4 (2.4%)
<i>Verification of Shareholder Status</i>	4 (2.4%)
<i>Validity of Shareholder Resolution</i>	9 (5.3%)
<i>Return of Corporate Records</i>	5 (3.0%)
<i>Miscellaneous</i>	11 (6.5%)
Tort	21 (12.4%)
Labor/Employment Law	23 (13.6%)
Administrative Law	8 (4.7%)
Property Law	1 (0.6%)
Total	169 (100%)

E. Usages

Perhaps, the most important empirical dimension is the legal usage of the CSR legislation. How has the CSR law been applied in court cases? Has the CSR law affected any legal outcome of a case? As Table 4 shows, the court cases in the dataset demonstrate five usages by who applies CSR and how the term is used: tactical, compliance, exhortatory, consequential and evidentiary. The five types of usages are not mutually exclusive. They may co-exist in one case. For instance, a case may simultaneously demonstrate tactical, exhortatory and evidentiary usages.

TABLE 4. TYPES OF CSR USAGES

Type of Usage	User	Number of Cases (Percentage)
Tactical	Plaintiff / Defendant	53 (31.4%)
Compliance	Court	100 (59.2%)
Exhortatory	Court	12 (7.1%)
Consequential	Court	4 (3.6%)
Evidentiary	Miscellaneous	10 (5.9%)

Note: Percentage is calculated with the denominator as 169 cases in the dataset.

1. Tactical

Often the courts initiated the application of CSR. However, plaintiffs and defendants sometimes invoked CSR. Table 4 shows 53 cases where plaintiffs or defendants used CSR as part of their arguments. In more detail, plaintiffs relied on CSR to support their arguments in 21 cases and defendants used CSR as a defensive tool in 32 cases. Plaintiffs usually argued

defendants' behavior as being socially irresponsible. Defendants often argued that the liability that plaintiffs attempted to impose was a voluntary social responsibility rather than a legally binding obligation.⁶⁶ In cases where plaintiffs invoked CSR, 57.1% of the plaintiffs won. In comparison, in cases where defendants invoked CSR, the defendants' win rate was only 37.5%.

Of the 53 tactical cases, only seven cases expressly referenced Article 5 of the corporate statute. Plaintiffs and defendants tended to use CSR quite liberally rather than strictly relating to any particular statutory or regulatory provision. They showed creative efforts in elaborating or expanding the meaning of CSR in their own favor. For instance, a defendant corporation invoked CSR to argue that the plaintiff's request to characterize its investment as a shareholder loan rather than equity interests would be against CSR. The defendant stated:

...In terms of stakeholders of corporate social responsibility, the corporation is responsible to not only the conventional stakeholder, i.e. shareholders, but also other stakeholders. The stakeholders include consumers, employees, suppliers, communities, social groups, the government, etc....*Such responsibility bearers include not only the corporation but also its founding shareholders....*The corporation currently owes tens of millions of dollars in employee wages, construction fees, taxes and other liabilities. If other shareholders follow suit to turn equity into debt through litigation, it will cause panic to the corporation's creditors.... Shareholders invest in the corporation for making a profit, but profit is not the only purpose. When the corporation is in difficulty, how do shareholders balance social responsibility and personal interests? Shareholders should

⁶⁶ It includes 15 cases where the plaintiff demanded more compensation from the defendant corporation and the defendant corporation argued that it already paid the plaintiff simply out of CSR rather than any legal liability. The defendant corporation argued that it had no legal liability to the plaintiff from the beginning.

not turn equity into debt through litigation, which is obviously a shirking of social responsibility.⁶⁷ [emphasis added by author]

In this case, the defendant expanded the entities undertaking CSR to include not only the corporation but also founding shareholders. However, the court disagreed with the defendant and ruled in favor of the plaintiff based on other legal reasons without considering the CSR argument.

2. *Compliance*

The most common usage by the court is to treat legal compliance as CSR, as shown in Table 4. Of the 100 compliance cases, 80 cases cited Article 5 of China's corporate statute. Legal compliance is the minimum social responsibility. Article 5 of China's company law makes it clear that the corporation has responsibility to comply with the law and further do more than what the law requires. In the dataset, a majority of the cases referenced Article 5 without providing any reasoning. A close examination of these cases appears to suggest that the purpose of the reference to Article 5 was to support the view that the corporation had an obligation to comply with the law and the corporation failed to do it.

In contract law cases, the courts often viewed Article 5 in the company law as a parallel to the legal compliance and good faith principles of Articles 6 and 7 in the contract law.

Article 6 of China's Contract Law provides that "The parties shall observe the principle of honesty and good faith in exercising their rights and performing their obligations." Article 7

⁶⁷ See Han Renfa Yu Changzhou Xinhongrui Zhiye Youxian Gongsi Minjian Jiedai Jiufen An [Han Fenfa v. Changzhou Xinhongrui Properties Co., Ltd., A Loan Dispute] (Jiangsu Changzhou City Intermediate People's Court, May 17, 2017) (China Judgements Online).

provides that “In concluding and performing a contract, the parties shall comply with the laws and administrative regulations, respect social ethics, and shall not disrupt the social and economic order or impair the public interests.”

Although the courts in many cases only implied legal compliance as CSR, the courts in a few cases explicitly stated that compliance with the law is a legal duty as well as a social responsibility. For example, a transportation corporation denied any employment relationship with an adjunct driver and therefore refused to undertake any social security obligations. In this case, the court stated that “[Article 5 of the transportation regulation] prohibits any adjunct operation of passenger vehicles. The purpose of the regulation is to protect safety of passengers and third parties and to assure public interests in society. The corporation that illegally allowed adjunct drivers shirked corporate social responsibility and should be punished according to the law.”⁶⁸ In another case where the defendant corporation refused to make any social security payments for a long-term employee, the court stated that “It is necessary to point out that employers are an important participating force in the social security system. Timely and sufficient payment of social security charges for employees is the corporation’s legal obligation as well as a representation of corporate social responsibility.”⁶⁹

The observation that a great majority of the CSR cases in the dataset viewed legal compliance as part of CSR is consistent with the minimal consensus in the scholarly debate of CSR. Legal compliance is the least controversial part of CSR.

⁶⁸ See Zhongqing Gongmao Shiye (Jituan) Youxian Zeren Gongsi Yu Zhongqing Shi Jiangbei Qu Renli Ziyuan He Shehui Baozhang Ju Xingzheng Queren Er Shen Xingzheng Panjueshu [Chongqing Industry & Trade Industry (Group) Co., Ltd. v. Chongqing Municipality Jiangbei District Human Resources and Social Security, Second-Instance Administrative Judgement] (Chongqing Municipal First Intermediate People’s Court, May 20, 2016) (China Judgements Online).

⁶⁹ See Shamen Shi Bisite Shizhuang Youxian Gongsi Yu Shamen Shi Shehui Baoxian Guanli Zhongxin Xingzheng Panjueshu An [Xiamen Bisite Fashion Co., Ltd. v. Xiamen Municipal Social Security Management Center, An Administrative Judgement] (Fujian Province Xiamen City Simin District People’s Court, Dec. 1, 2014) (China Law Info).

3. *Exhortatory*

It is commonly expected that CSR as a vague concept can at best serve an expressive or educational function if it is expressly incorporated into law. It may only raise CSR awareness and encourage companies to act in a more socially and environmentally responsible manner. In 12 cases, the courts indeed took the opportunity to exhort companies to engage in CSR activities.

For instance, in a case where the company automated its parking lot management and as a result terminated the employment relationship with its redundant employees who assisted payment collection, the employees sued for compensation on the basis that the termination was illegal. The court stated:

It is necessary to point out that technological advancement may lead to reduction in labor costs and as a result, workers may lose their jobs. However, employers should undertake corporate social responsibility and should not lose its very basic sense of responsibility to workers while enjoying the maximization of economic interests arising from technological development. Thus, this court hereby exhorts the company to take people at the foremost in the employment process and adequately balance the relationship between corporate development and employee interests.⁷⁰

In another case, a corporation managed a dam for fishing and entertainment purposes. The company and the local farming community reached an agreement in which the company had

⁷⁰ See Beijing Shijie Cheng Wuye Guanli Youxian Gongsi Shenqing Laodong Zhengyi Shensu Shenqing Yi An [Beijing World City Property Management Co., Ltd.'s Labor Dispute Application] (Beijing Superior People's Court, Sep. 29, 2016) (China Law Info).

to ensure the water supply for the community. In a drought year, the local community sued the company for failing to honor the contract. The court ruled that the company failed to perform its obligations stipulated in the contract. At the end of its ruling, the court further advised:

In addition, in nowadays, corporate social responsibility has been gradually rooted in people's hearts and internalized as a key factor for the corporation's sustainable, long-term and healthy development. The Article 5 of China's Company Law and the Article 7 of China's Partnership Enterprise Law also highlight the importance of corporate social responsibility. Thus, this court reminds the [defendant] corporation to try its best to balance the relationship between profitability and social responsibility while legally operating its business, thereby increasing its long-term competitiveness.⁷¹

Often the courts praised the defendant's voluntary compensation to the plaintiff as CSR behavior.⁷² For instance, the plaintiff, who was hired by a subcontractor and was injured in the course of performing his duties, tried to hold the subcontractor and the contractor jointly and

⁷¹ See Beijing Dadi Yujia Shengtai Luyou Kaifa Youxian Gongsi Deng Yu Beijing Shi Huairou Qu Changshaoying Manzu Xiang Dadi Cun Cunmin Weiyuanhui Hetong Jiufen Shangsu An [Beijing Dadi Yujia Ecological Travel Development Co., Ltd. v. Beijing Huairo District Shaoyingmenzu Village Committee, An Appeal of Contract Dispute] (Beijing City Third Intermediate People's Court, Dec. 13, 2016) (China Law Info).

⁷² See e.g., Wang Bing Yu Guangzhou Shi Yifanju Zhuangshi Gongcheng Youxian Gongsi, Guangzhou Yangxin Zhaoming Youxian Gongsi, Wu Wancai Tigong Laowuzhe Shouhai Zeren Jiufen An [Wang Bing v. Guangzhou City Yifanju Decoration Engineering Co., Ltd. et al., A Labor Liability Dispute] (Guangdong Guangzhou Municipal Intermediate People's Court, Jul. 20, 2016) (China Law Info); Dalian Mingyang Chuanyong Dianqi Youxian Gongsi Yu Mao Jianhua, Shao Lijiang Shengming Quan Jiankang Quan, Shenti Quan Jiufen An [Dalian Mingyang Marine Electrics Joint Stock Limited Company v. Mao Jianhua et al., A Dispute on Life, Health and Personal Rights] (Liaoning Province Dalian Municipal Intermediate People's Court, Aug. 10 2016) (China Law Info); Zhong Cai Jieneng Gufen Youxian Gongsi Yu Zhong Tie Ershisan Ju Jituan Chuandong Shuini Youxian Gongsi, Zhong Tie Ershisan Ju Jituan Youxian Gongsi Hetong Jiufen An [Sinoma Energy Joint Stock Limited Company v. China Railway 23th Bureau Group Chuandong Cement Co. Ltd. et al., A Contract Dispute] (Tianjin First Intermediate People's Court, Feb. 2, 2016) (China Law Info); Ding Yuanchen, Zhong Jiao Tianjin Gangwan Gongcheng Sheji Yuan Youxian Gongsi Laodong Hetong Jiufen Er Shen Minshi Panjueshu [Ding Yuanchen v. Tianjin Port Engineering Design and Consulting Co. Ltd. of First Harbor Engineering Group, Second-Instance Civil Judgement on A Labor Contract Dispute] (Tianjin Second Intermediate People's Court, Oct. 25, 2017) (China Judgements Online).

severally liable. The court ruled that the subcontractor as the employer should be liable. However, the court refused to hold the contractor liable given it had no fault. The court further explained:

The contractor, based on corporate social responsibility and the humanitarian principle, signed the emergency assistance agreement with the plaintiff in order to provide help to the plaintiff. This agreement is not against any law, and instead it should be encouraged. Therefore, the court does not support the plaintiff's request to revoke the agreement and hold the contractor jointly and severally liable.⁷³

4. *Consequential*

What is most exciting to see is that the courts in four cases explicitly used CSR as an important factor in determining the legal outcome. The four cases expressly considered the CSR provision in the corporate statute.

One case in the dataset shows that a lower court imposed liability on a defendant solely based on Article 5 of the company law. In this case, an employee was on leave for mental treatment. The employer did not pay any wages during the leave. As a result, the employee applied to the local government's labor dispute arbitration committee. The committee rejected the case because the period of the statute of limitations had elapsed. The employee appealed to the court for remedy. The lower court ruled:

⁷³ See Wang Bing, *supra* note 72.

According to Article 5 of the Company Law of People's Republic of China, the corporation in the course of doing business shall conform to social morality and business ethics, act in good faith, and undertake social responsibility. In this case, the plaintiff's claim is not supported by the law because of the elapse of the statute of limitations. However, the plaintiff had worked for the defendant company and made a certain contribution to the corporation; moreover, the plaintiff now is mentally ill, financially difficult, and in need of financial supports. Therefore, from the perspectives of humanitarianism and corporate social responsibility, this court exercises its discretion and orders the defendant company to make a sustentation payment of \$35,000 to the plaintiff.⁷⁴

The defendant appealed. The higher court overturned the lower's court decision by providing:

The Company Law is the law that regulates corporate organization and behavior. Its Article 5 provides that "In the course of doing business, a company shall 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." This provision is the legal principle with regard to the corporation's social responsibility. It requires the corporation, as a business entity and as a social member, to undertake social responsibilities, such as responsibilities of assisting employment, maintaining economic order, paying taxes by law, paying employees' social

⁷⁴ See Dai Ping, Tang De Dianzi (Zhongguo) Youxian Gongsi Laodong Hetong Jiufen Er Shen Minshi Panjueshu [Dai Ping v. Tangde Electronic (China) Co., Ltd., Second-Instance Civil Judgement on A Labor Contract Dispute] (Guangdong Huizhou Municipal Intermediate Peoples' Court, Jun. 21, 2011) (China Judgements Online).

insurance by law, maintaining employee's legal rights and interests, protecting the environment, etc. In other words, *the beneficiaries of corporate social responsibility are unspecific; at least [CSR] is for the general interests of stakeholder groups*. However, this case is a labor contract dispute. The lower court applied Article 5 of the company law to force the defendant company to make a sustentation payment of \$35,000 from the perspectives of humanitarianism and corporate social responsibility, which is an incorrect application of the law....During the appeal period, the defendant company expressed sympathy to the plaintiff and from the perspective of humanitarianism voluntarily agreed to pay \$20,000 to the plaintiff for assistance. Given that the defendant was voluntary to assist the plaintiff, this court permitted the payment.⁷⁵ [emphasis added by author]

The higher court opinion suggests that CSR is not a duty owed to any particular stakeholder such as an employee but a duty owed to overall stakeholders. This interpretation raises a question about who has standing to bring an action under Article 5. Who can represent the general interests of stakeholder groups? This interpretation may significantly restrict the practical use of Article 5 in lawsuits.

In the dataset, the most insightful use of CSR probably arose in the context of judicial dissolution of a corporation. China's Company Law provides that "Whereas a company encounters serious management difficulties so that its continuance will result in significant losses to shareholders' interests and the difficulties cannot be resolved by any other means, holders of at least ten percent voting shares of the company may apply to court for dissolution."⁷⁶ The Supreme People's Court of China issued an interpretation on how to apply the judicial

⁷⁵ *Id.*

⁷⁶ Chinese Company Law (2005), art. 183; Chinese Company Law (2013), art. 182.

dissolution provision. According to the Supreme Court, courts should accept the application when the company encounters serious management difficulties and one of the following occurs: (1) the company has been unable to hold any shareholder meeting for two years or more; (2) shareholders have been unable to pass any effective resolutions due to failing to meet the required votes specified in the statute or the articles of incorporation; (3) the board has prolonged conflicts which cannot be resolved through shareholder meetings; or (4) any other serious management difficulties that make the company's continuous existence detrimental to shareholders' interests.⁷⁷ The last category gives courts broad discretion in making a judicial dissolution order.

In the dataset, four cases involved a plaintiff seeking a corporate dissolution ordered by the court. In one case, the defendant company argued against the dissolution because it would affect a large number of customers' interests and cause social instability. The court declined to order a dissolution on other grounds without any express consideration about the CSR argument.⁷⁸ However, in the other three cases, the courts expressly took CSR as an important factor when determining whether to order a dissolution.⁷⁹ For instance, in one case, the company was a real estate developer owned by two shareholders. The company took over a project to

⁷⁷ See Provisions of the Supreme People's Court on Some Issues about the Application of the Company Law of the People's Republic of China (II), No.6 [2008] of the Supreme People's Court, effective of May 19, 2008; revised on Feb. 17, 2014.

⁷⁸ See Chen Lianming Deng Su Hainan Hongweide Shiye Youxian Gongsi Jiesan Jiufen An [Chen Minglian et al. v. Hainan Hongweide Industrial Co., Ltd., A Corporate Dissolution Dispute] (Hainan Haikou Municipal Intermediate People's Court, Dec. 11, 2013) (China Law Info). Note that this case falls into the tactical category rather than the consequential category because it was the defendant, not the court, who used CSR.

⁷⁹ See Li Ping, Huang Shaohua Deng Yu Wuhan Shi Hannan Qu Liaoyuan Yunshu Youxian Zeren Gongsi Gongsi Jiesan Jiufen Yishen Minshi Panjueshu [Li Ping et al., v. Wuhan City Hanan District Liaoyuan Transportation Co. Ltd., First-Instance Civil Judgement on A Corporate Dissolution Dispute] (Hubei Wuhan City Hanan District People's Court Jul. 28, 2017) (China Judgements Online); Li Xiuzhen Yu Qingdao Jieshang Zhiye Youxian Gongsi, Xue Xiaoming Gongsi Jiesan Jiufen An [Li Xiuzhen v. Qingdao Jieshang Properties Co., Ltd. and Xue Xiaoming, A Corporate Dissolution Dispute] (Shandong High People's Court, Oct. 23, 2015); Suzhou Shi Huguan Xinli Wuhuaajiao Youxian Gongsi Deng Su Yan Xinsen Deng Gongsi Jiesan Jiufen An [Suzhou Huguan Xinli Wuhuaajiao Company et al., v. Yan Xinsen et al., A Corporate Dissolution Dispute] (Jiangsu Suzhou Municipal Intermediate People's Court, Mar. 20, 2013) (China Law Info).

build over 560 condominium units that had already been sold to the public. Upon a shareholder's application, the lower court granted a dissolution on the basis that shareholders had serious conflicts and were unable to make any effective shareholder resolution for more than two years. However, the higher court overturned the lower's decision and instead held:

Article 5 of the Company Law expressly provides that the corporation in the course of doing business shall act in good faith, subject itself to the government and the public supervision, and undertake social responsibility. As a result, when determining whether to dissolve a company, the court shall not only consider shareholders' interests but also sufficiently take into account the impact on the public interests of the society. In this case, the company is in the real estate business, involving a large number of homebuyers....If the company dissolves at this moment, it will be unable to carry on the obligations to complete the subsequent construction work and property transfers. As a result, it will affect the normal project development and obstruct the realization of the legal interests of a large number of homebuyers, resulting in mass petitions [*shangfang*] and social instability.⁸⁰

In another case, the court expressly shared a similar concern.⁸¹ The court refused to order a dissolution partly because the corporation was a transportation company that played an important role in providing transportation services in the jurisdiction and had a large number of employees. The court held that the dissolution, if granted, would be detrimental to market stability.

⁸⁰ See Li Xiuzhen, *supra* note 79.

⁸¹ See Li Ping et al., *supra* note 79.

Note that both of the above cases affected a large number of stakeholders such as customers and employees. The large number matters, particularly within China's political context.⁸² The Chinese government takes social stability necessary to maintain its ruling.⁸³ Any negative impact on the interests of a large number of stakeholders may cause social instability, which is against the government's interests. The large number carries significant weight for the meaning of the public interests of the society. The flipside suggests that courts are more likely to grant a dissolution when it only affects a small number of stakeholders. The dataset provides an illuminating case where the court granted a dissolution with an express explanation why CSR was not a concern in this particular context. In this case, the court provided that the negative effects on the employees would be minimal and could be mitigated by other means especially given that the company had only three employees and two of them were about to retire within a year.⁸⁴

5. *Evidentiary*

CSR appeared quite often in evidentiary instruments submitted to courts to support a party's claim. The evidential instruments included corporate codes of conduct, contracts that incorporated CSR standards, and administrative orders issued by governmental bureaus. While these cases do not directly use CSR as a legal argument, they provide some evidence that CSR has been incorporated in many legal practices.

⁸² See Li-Wen Lin and Curtis J. Milhaupt, *Bonded to the State: A Network Perspective on China's Corporate Bond Market*, 3 J. FIN. REG. 1 (2017) (showing that an important motivation for the no-default norm in China's corporate bond market is "too many (bondholders) to fail (TMTF)" based on the Chinese Communist Party's overriding concern for social stability).

⁸³ "Stability maintenance" has been the Chinese government's top priority. It has a comprehensive system to maintain social order. See Yuhua Wang and Carl Minzer, *The Rise of the Chinese Security State*, 222 CHINA Q. 339 (2015).

⁸⁴ See Suzhou Huguang Xinli Wuhuajiao Company et al., *supra* note 79.

An important initiative of the modern CSR movement is that CSR has been incorporated into commercial contracts and has become a contractual obligation.⁸⁵ The contractualization of CSR may be observed in a couple of cases.⁸⁶ For instance, a corporation hired a consulting company to help it comply with the Walt Disney Company’s “Social Responsibility, Human Rights and ESH Audit and Evaluation Standards.” The company failed to pass Disney’s audit and as a result, Disney revoked its manufacturing authorization. The company sued the consulting company for damages. The court found that the consulting firm provided perfunctory services and failed to give any meaningful guidance on how to pass Disney’s audit.⁸⁷ This case epitomizes a long-observed problem of unqualified certification providers in China’s CSR assurance services market.⁸⁸

In addition, the dataset provides examples where Chinese companies adopted internal codes of conduct consistent with CSR.⁸⁹ For instance, a food chain company (the defendant) established its internal rules to ensure food safety. According to the rules, an employee’s failure to remove expired foods from the store shelves would be a serious breach of the employment agreement and could result in employment termination. The plaintiff who was discharged based

⁸⁵ See Lin, *supra* note 16.

⁸⁶ See *Xinke (Foshan) Baozhuang Youxian Gongsi Yu Shenzhen Xinyi Qiye Guanli Zixun Youxian Gongsi Fuwu Hetong Jiufen An* [Xinke (Foshan) Packaging Company v. Shenzhen Xinyinlong Enterprise Management Consulting Company, A Service Contract Dispute] (Guangdong Foshan City Shuande District People’s Court, Feb. 15, 2016) (China Law Info); *Beijing Guozheng Baihong Wangluo Xinxi Jishu Youxian Gongsi Yu Beijing Zhongtie Dadu Gongcheng Youxian Gongsi, Tian Long Deng Hetong Jiufen Er Shen Minshi Panjueshu* [Beijing Guozheng Baihong Internet Information Technology Company v. Beijing China Railway Dadu Engineering Company et al., Second-Instance Civil Judgement on A Contract Dispute] (Beijing Municipal Second Intermediate People’s Court, Jun. 26, 2017) (facts showing that the parties entered into a strategic cooperation agreement which required one of the parties comply with the law and undertake associated social responsibility when performing its contractual obligations).

⁸⁷ See *Xinke (Foshan) Packaging Company*, *supra* note 86.

⁸⁸ See Lin, *supra* note 17, at 344-347.

⁸⁹ See *e.g.*, *Chen Mouji Yu Zhuhai Xingfa Shoudai Chang Youxian Gongsi Laodong Hetong Jiufen Er Shen Minshi Panjueshu* [Chen Mou Ji v. Zhuhai Xingfa Handbag Factory Company, Second-Instance Civil Judgement on A Labor Contract Dispute] (Guangdong Zhuhai Municipal Intermediate People’s Court, Apr. 6, 2016) (China Judgements Online); *Wang Shemei Su Shanghai Laiyifen Shipin Liansuo Jingying Youxian Gongsi Laodong Hetong Jiufen An* [Wang Shemei v. Shanghai Yilai Food Chain Company, A Labor Contract Dispute] (Shanghai Songjiag District People’s Court, Aug. 1, 2014) (China Law Info).

on the rules challenged the dismissal. The court supported the defendant company and held that “the defendant’s enactment of the internal rules that strictly require employees to take care of food safety is an embodiment of corporate social responsibility...and consistent with fundamental interests of the public.”⁹⁰

The court cases also revealed that Chinese regulators played an important role in promoting CSR particularly tied with the idea of social stability.⁹¹ For instance, when a company planned to lay off its employees, it should submit a notice to the relevant bureaus. The government’s response notice typically reminded that the corporation should try its best to avoid any layoffs and if a layoff would be unavoidable, the corporation should “make a timely payment in full amount of wages and economic compensation, and should sufficiently undertake corporate social responsibility, protect labor rights and maintain labor relationships and social stability.”⁹²

F. Summary

Some general patterns may be observed from the court cases in China. First, the CSR law presents not only expressive and exhortatory functions but also adjudicative value. Chinese courts have taken CSR as an important factor in the determination of a judicial dissolution under the corporate law. Moreover, some courts have used CSR among other legal grounds to impose

⁹⁰ See Wang Shemei, *supra* note 89.

⁹¹ See *e.g.*, Lian Guoxin Yu Shanghai Shi Huanqiu Lengdong Ji Chang Jingji Buchangjin Jiufen Er Shen Minshi Panjueshu [Lian Guozin v. Shanghai City Global Refrigerator Factory, Second-Instance Judgement on An Economic Compensation Dispute] (Shanghai Municipal Second Intermediate People’s Court, Jul. 22, 2014) (China Judgements Online); Shanghai Minxing Yingtenai Guoji Zhiye Baozhuang Youxian Gongsi Su Feng Yuchang Laodong Hetong Jiufen Yi An Er Shen Minshi Panjueshu [Shanghai Minxing Yingtenai International Paper Packaging Company v. Feng Yuchang, Second-Instance Civil Judgement on A Labor Contract Dispute] (Shanghai First Intermediate People’s Court, Nov. 24, 2015); Jin Guangming Su Tianyu Jianshe Youxian Gongsi Deng Jianshe Gongcheng Fenbao Hetong Jiufen An [Jin Guangmin v. Tianyu Construction Company et al., A Dispute on Construction Subcontracting] (Hangzhou Bingjiang District People’s Court, Jan. 7, 2014) (China Law Info).

⁹² See *e.g.*, Shanghai Minxing Yingtenai International Paper Packaging Company, *supra* note 91.

legal liabilities arising outside the corporate law. Still, the CSR provision under the corporate statute itself does not constitute an independent cause of action. Second, the meaning of CSR is tied with the social, economic and political realities in China. In particular, courts have viewed maintaining social stability as part of CSR, a view consistent with the government's political policy. In addition, courts have expressly expected that state-owned enterprises should undertake greater social responsibility as they exercise dominant powers in many sectors of China's economy. Third, while existing CSR literature mainly focuses on public companies, most of the court cases are concerned about closely held corporations. This empirical study indicates that CSR is legally relevant to not only public companies but also private firms. Fourth, while the CSR provision under the company law is stipulated as a behavioral standard for companies, it is also a review standard for the court. Some courts have creatively applied CSR when exercising their equitable power to grant judicial dissolutions. The implementation of CSR requires not only socially responsible behavior of corporations but also social consciousness of courts. In addition, CSR has been creatively used by not only courts but also plaintiffs and defendants. In some cases, plaintiffs and defendants invoked CSR to impose liability on the other party or avoid liability for themselves. Finally, CSR may intersect with fundamental legal concepts such as good faith and public policy in contract law. In practice, legal compliance remains the major part of CSR in China.

IV. EVALUATION

A. Comparative Law Perspectives

The emergence of CSR law is related to two big debates in the field of comparative corporate governance since the turn of the century: whether different national corporate

governance systems will converge on a single shareholder-centered model, and whether legal origins matter. The analytical frameworks of these debates rely on taxonomies of countries. In the convergence debate, scholars separate the world into the shareholder-oriented and stakeholder-oriented regimes. In the legal origin debate, the seminal work divides the world into the common law countries (i.e. countries of the English origin) and the civil law countries (i.e. countries of the French, German, Scandinavian origins). The common law regime corresponds to the shareholder-oriented model while the civil law regime is oriented toward the stakeholder model. The stakeholder-oriented model allows non-shareholders such as employees to have institutionalized powers within corporate governance structure. The civil law model is viewed as prioritizing the rights of the state over the rights of private property owners.⁹³ Accordingly, it is postulated that stakeholder-oriented/civil law countries are more likely to give legal recognition of CSR. China provides a good example for this proposition. Its corporate governance system recognizes board representation by employees. China is often characterized as “state capitalism” in which the state exercises comprehensive powers through different institutional channels to drive the market toward its favored ends.⁹⁴ Yet, not all countries that have adopted a version of (ostensibly) mandatory CSR law fit the hypothesis. For instance, Mauritius, which requires all companies to allocate funds for CSR activities, has a hybrid legal system based on the French Code Napoleon and the British common law and it remains a member of the Commonwealth.⁹⁵

⁹³ See Thorsten Beck et al., *Law and Finance: Why Does Legal Origin Matter?*, 31 J. COMP. ECON. 653 (2003).

⁹⁴ See e.g., Li-Wen Lin and Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013).

⁹⁵ In 2009, the Mauritian government amended the Income Tax Act 1995 to require all companies to set up a fund equivalent to two percent of profits of the preceding year for permitted CSR activities. In 2016, the government revisited its CSR policy and announced a new CSR framework. The government created the National CSR Foundation jointly managed by the public and private sectors. Under the new rules, every company in every year is required to set up a CSR fund equivalent to two per cent of its chargeable income of the preceding year and at least 50% (75% starting from 2018) of its CSR fund shall be remitted to the National CSR Foundation. After contributing the requisite amount to the National CSR Foundation, companies are allowed to manage the remaining CSR money according to their own CSR policies. The money endowed to the National CSR Foundation will be

India is a common law country of the English origin. India's move toward the stakeholder perspective was partly influenced by the United Kingdom's recent turn to the enlightened shareholder approach that requires directors to consider impact on stakeholders while pursuing shareholders' interests.⁹⁶ That is, even a traditional model country of shareholder wealth maximization is shifting. The recent emergence of the CSR law is a telling piece of evidence that the shareholder-centered model has not won out over the alternative(s).

Although the CSR law that recently emerged in developing countries is not simply a legal transplant but carries some elements of indigenous innovation, the transplant experience of similarly vague fiduciary duties in civil law countries is illuminating for the newly minted CSR law. As Professors Hideki Kanda and Curtis Milhaupt noted, a successful transplant requires "macro-fit" and "micro-fit."⁹⁷ Macro fit is how well the concerning law complements the existing political-economic institutions in the country. Micro fit is how well the concerning law complements the existing legal infrastructure. The Chinese experience suggests the CSR law has some macro and micro fit with the current institutional conditions of China.

As to macro fit, CSR coincides with China's developmental needs. China is seeking to transform itself into a technology-intensive economy in which employees are valuable assets and environmental quality is essential to attract talent. Additionally, CSR is consistent with Chinese

channeled to programs in six priority areas: poverty alleviation; educational support; social housing; assistance to persons with severe disabilities; dealing with health problems resulting from substance abuse and poor sanitation; family protection. For an overview of the CSR legislative development in Mauritius, see Ministry of Finance and Economic Development of the Republic of Mauritius, *The New Corporate Social Responsibility (CSR) Framework*, available at <http://mof.govmu.org/English/Documents/New%20CSR%20Framework%202016.pdf>. The relevant statutory provisions include Section 50L, Section 27(n), Sixth Schedule and Tenth Schedule under the Finance Act (2016). For research about CSR development in Mauritius, see Renginee Pillay, *THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY: CSR AND DEVELOPMENT – THE CASE OF MAURITIUS* (2015).

⁹⁶ See Afsharipour, *supra* note 8. For the UK development, see Thomas Clarke, *The Long Road to Reformulating the Understanding of Directors' Duties: Legalizing Team Production Theory?*, 38 SEATTLE U. L. REV. 433 (2015); Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach*, 29 SYDNEY L. REV. 577 (2007).

⁹⁷ See Hideki Kanda and Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887 (2003).

government's political interests in social stability.⁹⁸ Unemployment, unsafe food, environmental degradation may bring large-scale protests that threaten the stability of the government's ruling. The CSR law has a political backing from the state. This political support is important especially where the state directs significant economic resources and enforcement apparatus. The state interests motivate courts to raise CSR concerns when exercising judicial powers.

As to micro fit, the judicial application of the highly vague CSR law puts great demands on legal infrastructure. The groundwork includes practical legal proceedings such as derivative actions and oppression remedies; incentives for plaintiffs and attorneys to bring actions; judges and attorneys (probably plaintiffs and defendants as well) familiar with the application of broadly stated principles rather than narrow bright-line rules; courts capable of fashioning remedies without clear judicial guidance.⁹⁹ It requires courts to possess adequate capacity to apply the law. The empirical evidence in this article suggests that Chinese courts have certain capacity to handle the vague CSR law. As some empirical studies have found elsewhere, Chinese courts have been quite competent in dealing with cases that require the exercise of equity and discretion, such as cases involving fiduciary duties, piercing the corporate veil and oppression actions.¹⁰⁰ These related practical experiences provide the courts with complementary skills to apply the CSR law. In this regard, as more experiences that are relevant accumulate over time, Chinese courts will be more capable to apply the law in the future. As shown in the empirical findings, until now the meaningful application of the CSR law remains very limited. To assist lower courts in applying the law, the People's Supreme Court of China may issue interpretive

⁹⁸ See *supra* notes 82 and 83.

⁹⁹ See Kanda and Milhaupt, *supra* note 97, at 897.

¹⁰⁰ See Robin Hui Huang, *Piercing the Corporate Veil in China: Where is it Now and Where is it Heading?*, 60 AM. J. COMP. L. 743 (2012); Colin Hawes, *The Chinese "Oppression" Remedy: Creative Interpretations of Company Law by Chinese Courts*, 63 AM. J. COMP. L. 559 (2015); Guangdong Xu et al., *Directors' Duties in China*, 14 EUR. BUS. ORG. L. REV. 57 (2013); Clarke and Howson, *supra* note 14.

rules and select model cases to guide lower courts on how to apply the vague CSR provision, similar to the way that the high court has done to other vague provisions of corporate law. Moreover, the Chinese experience indicates that additional legal infrastructure conducive to the judicial application of the CSR law exists outside the corporate law. As discussed, since the enactment of the CSR provision in the company law, the Chinese government has implemented various regulatory measures to promote CSR. The CSR provision under the corporate statute is a not a stand-alone law. It is part of a greater CSR scheme, which creates an environment to promote CSR awareness and increases the chances of judicial application.

The empirical evidence in this article shows that Chinese courts often treat legal compliance as CSR. This compliance usage seems similar to Indonesian Constitutional Court's view when ruling the constitutionality of the mandatory CSR provision under Indonesia's Limited Liability Companies Act: "CSR has been implicitly regulated by other laws and regulations such as Forestry Law, Environmental Law, Water Resources Law and the Law on Gas and Oil" and administrative sanctions imposed under such laws serve an important way to punish companies failing to perform the CSR obligation under the company law.¹⁰¹ This compliance usage of CSR is also consistent with a commonly accepted view even in traditionally shareholder-oriented jurisdictions that profit maximization should still occur within the confines of law.¹⁰²

¹⁰¹See Indonesian Constitutional Court Decision No. 53/PUU-VI/2008. See also Laurensia Andrini, *Mandatory Corporate Social Responsibility in Indonesia*, 28 MIMBAR HUKUM 512 (2016) (analyzing the constitutional case with a focus on whether there is sanction for the violation of the CSR provision under the company law).

¹⁰²Milton Friedman, a leading advocate of profit maximization, maintained that "That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom." See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N. Y. TIMES MAG., September 13, 1970. Also see e.g., Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 411 (2001) (observing that profit maximization should be within the confines of law).

Meanwhile, China's empirical experience shows its own features. CSR as a broad and vague notion may have the capacity to accommodate any possible institutional demands. Similar CSR laws in different countries may carry different substantive meanings. As a result, any analysis of CSR laws should be mindful of different institutional settings. As noted, CSR in China incorporates the maintenance of social stability in support of the Chinese state's interest. The meaning of CSR is shaped by China's peculiar political realities. In addition, existing legal scholarship on the corporate purpose debate mainly refers to the experiences of English law countries such as Australia, Canada, the United States and the United Kingdom. Their court cases and relevant statutes are typically concerned about directors' fiduciary duties.¹⁰³ For example, the Supreme Court of Canada expressly declared in two landmark cases that directors in discharging their fiduciary duties may consider the interests of shareholders, employees, consumers, creditors, suppliers, the government, the environment, etc.¹⁰⁴ In the United States, the oft-cited corporate purpose cases including *Ford*, *Revlon*, *EBay*, etc. deal with whether the directors breached their fiduciary duties.¹⁰⁵ The constituency statutes in the United States allow directors to consider non-shareholders' interest in the context of hostile takeovers.¹⁰⁶ The UK 2006 Companies Act imposes directors a fiduciary duty to consider the interests of stakeholders for the benefit of shareholders.¹⁰⁷ However, as this study shows, none of the Chinese court cases involves directors' fiduciary duties. Instead, the CSR law in China has been applied in a variety

¹⁰³ See e.g., Benedict Sheehy and Donald Feaver, *Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed?* 37 DALHOUSIE L. J. 345 (2012).

¹⁰⁴ *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

¹⁰⁵ *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *eBay Domestic Holdings, Inc. v. Newmark*, C.A. No. 3705-CC (Del. Ch. Sept. 9, 2010).

¹⁰⁶ See Edward S. Adams and John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L. J. 1085 (2000) (providing a good review and comparison of the statutes in different states).

¹⁰⁷ UK Companies Act (2006), art. 172.

of contexts unrelated to directors' fiduciary duties. Akin to the experience of other areas of corporate law, Chinese courts have applied the CSR law in some innovative ways that go beyond the conventional scope perceived by legal scholars.¹⁰⁸ The most insightful use is that Chinese courts take CSR as an important factor for equitable remedies such as judicial dissolution. This consequential use of CSR for the sake of "social stability" in judicial dissolution appears a Chinese characteristic in comparative corporate law perspective.¹⁰⁹ China's use of CSR in contexts other than directors' fiduciary duties is probably because China's CSR law is stated as a general principle for the existence of the corporation, much broader than directors' fiduciary duties. On the one hand, the CSR law as a general corporate principle holds a great potential for unrestrained applications. On the other hand, the lack of an express connection between CSR and fiduciary duties in the statutory language demands higher capacity of the courts to perceive the linkage.

B. Policy-making Perspectives

With increasing risks of climate change and social inequality across the world, it is possible that more and more countries will follow suit to enact a statutory provision that

¹⁰⁸ See *supra* note 100; see also Jiangyu Wang, *Enforcing Fiduciary Duties as Tort Liability in Chinese Courts*, in ENFORCEMENT OF CORPORATE AND SECURITIES LAW: CHINA AND THE WORLD (Robin Huang and Nicholas Howson eds., 2017).

¹⁰⁹ This author conducted a case law search in the LexisNexis (Quicklaw) database that covers five English law countries including US, UK, Canada, Australia and New Zealand. In the database, each jurisdiction has tens of thousands of court cases with the keyword of "judicial dissolution" or "winding-up by the court." However, none of such dissolution cases includes any keywords of "corporate social responsibility," "CSR," "social stability" or "employee interest (protection)." Available practitioner's guides and treatises of corporate law in US, UK and Canada also suggest a similar result. For the statute and case law on judicial resolution under Canada's Business Corporations Act, see Wayne Gray, THE ANNOTATED CANADA BUSINESS CORPORATIONS ACT (2015) I473-I494.4 (providing a detailed discussion of more than 100 important Canadian court cases in which courts granted or denied dissolutions); for US, see William Meade Fletcher and Carol A. Jones, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS VOLUME 16A, 96-145 (2003) (providing detailed discussion on when courts in different states of US would grant or deny dissolution applications); for UK, see PALMER'S COMPANY LAW VOLUME 1, 8277-8286 & VOLUME 4, 15051-15092 (Geoffrey Morse ed., 2018).

expressly recognizes CSR as part of the corporate purpose or to introduce many other forms of CSR law. Until now, there appears a regional diffusion of CSR law. China and India are geographically connected. India, Indonesia and Mauritius are all located around the Indian Ocean. Besides, in July 2018, Taiwan passed a revised corporate law that expressly authorizes the corporation to engage in CSR activities.¹¹⁰ The geographical proximity seems to play a role in the diffusion of the law. However, mimetic diffusion without institutional sensitivity is problematic. Policymakers who wish to make companies more socially responsible have multiple legal choices. CSR may become part of law in various forms. Given a variety of legal options on the table, it is important to examine the function of each option, the relationship among the options, and their relationships with institutional environments.

One mode of CSR legislation, as demonstrated in the Article 5 of China's Company Law, is to include in the corporate statute a general CSR provision that requires the company to incorporate CSR into its daily business management. An important technical challenge of this approach is how to define CSR. The Chinese corporate statute does not provide any definition for CSR. Critics often say that undefined CSR leaves unclear what constitutes CSR and as a result inoperable in practice.¹¹¹ Given that scholars and international organizations have offered many CSR definitions ready to choose from, Chinese legislators could have simply adopted one with or without modifications. Nevertheless, why did they fail to do that? The definitional gap is

¹¹⁰ In early 2014, a legislator proposed a CSR law that required mandatory CSR reporting and mandatory CSR budget equivalent to 2% of the average net profit of the past 3 years or 0.1% of the prior-year revenues. The proposal was strongly opposed by associations of big companies. CSR advocates were also concerned about this externally imposed CSR action. In 2016, another legislator proposed a special CSR section for the corporate law, which defines different levels of CSR for firms of different sizes and nature. As of December 12, 2017, the Executive Yuan of Taiwan passed the proposed amendment to the corporate law and the Legislative Yuan of Taiwan finally passed the amendment on July 6, 2018. Now the Article 1 of the amended company law stands as: "In the course of doing business, the corporation shall comply with laws and ethical rules, may undertake actions promoting public interests to adequately discharge its social responsibility."

¹¹¹ See *supra* note 11.

not necessarily a result of legislative failure.¹¹² CSR is an evolving concept, historically equivalent to corporate philanthropy and now expanding to a comprehensive system of daily business management in global scope.¹¹³ Moreover, as the Chinese experience illustrates, the meaning of CSR varies with the political, economic and cultural factors at the national, sectoral, and organizational levels. A one-size-fits-all definition of CSR is unrealistic and inappropriate.¹¹⁴ In this regard, the legal definition of CSR, if provided at all, will be very broad and abstract in order to accommodate different needs of business organizations. Alternatively, the law may specify CSR activities through bright-line rules. For instance, the law may enumerate specific CSR activities.¹¹⁵ However, this approach is probably problematic. CSR activities are context specific. Different business organizations have different CSR strategies. It is impossible for legislators or regulators to foresee all possible situations. If the law provides categories of specific CSR activities, it will always need to include a residual category to capture all other unspecified activities.¹¹⁶ The residual category will be broad and inevitably vague. In short, no matter how legislators define CSR, a great degree of definitional vagueness remains and it requires the capable judiciary to fill in the content on a case-by-case basis. Policymakers shall

¹¹² See Michael Kerr et al., *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS* 5 (2009) (holding a similar view that “This definitional gap could be explained by the fact that CSR is in a constant state of evolution and, arguably, should never be subject to a fixed, universal definition”).

¹¹³ See Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 19-46 (Andrew Crane et al., eds., 2008).

¹¹⁴ See Antonio Argandoña, *Corporate Social Responsibility: One Size Does Not Fit All. Collecting Evidence from Europe*, 89 *J. BUS. ETHICS* 221 (2009); Marcel van Marrewijk, *Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communication*, 44 *J. BUS. ETHICS* 95 (2003) (arguing that “a ‘one solution fits all’ definition of CSR should be abandoned, accepting various and more specific definitions matching the development, awareness and ambitions levels of organizations”).

¹¹⁵ India’s CSR regulations adopt this approach. Although India’s corporate statute does not define CSR, the implementation regulations provide a list of permitted and non-permitted CSR activities. See *The Ministry Of Corporate Affairs of India, The Companies (Corporate Social Responsibility Policy) Rules, 2014*, R. 5(1) (Feb. 27, 2014).

¹¹⁶ India’s CSR regulations provide a negative example. The rules do not include a residual category. To the contrary, India’s CSR regulations exclude “activities undertaken in the normal business course of the company.” See Afra Afsharipour and Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 *UC DAVIS BUS. L.* 175, 223-224 (2014) (criticizing the regulations unreasonably narrowing the scope of CSR and falling short of an expansive stakeholder view of CSR).

not be fixated on the definitional construction of CSR but shall be attentive to the capacity building of the judiciary.

Moreover, China's corporate law does not provide non-shareholders with any rights to enforce the CSR provision against the corporation or directors. It significantly limits the compulsory nature of the law. Without any enforcement rights given to non-shareholders, the function of the CSR provision under the corporate statute will be largely extra-judicially, non-adjudicative and expressive. The dominance of compliance and exhortatory cases in China suggests that as a standard of conduct, the CSR provision expressly legitimates activities that do not maximize shareholder wealth but it does not impose any additional legal obligation on the corporation. Meanwhile, as a judicial review standard revealed in the consequential cases, the CSR law gives an additional legal ground based on which the court may justify its decision in favor of the interests of society. From a legal perspective, the importance of the CSR provision under the Chinese corporate statute is more for a court ruling standard than a corporate behavior standard.¹¹⁷ This approach of turning CSR into law places high demands on judicial capacity.

Compared with a general CSR duty stated in the corporate statute, a stronger form of CSR in the corporate law context is to give non-shareholders such as employees the right to participate in the central decision-making institution of the corporation, i.e., the board of directors. Many countries including China have long allowed or required employee representation in the boardroom. A recent cross-national empirical study suggests that firms with a two-tier board structure that includes employee representation have better CSR performance.¹¹⁸

¹¹⁷ A standard of conduct specifies how an actor should conduct a given activity or play a given role while a standard of review is the rule with which the court determines whether to impose liability or grant relief. *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 *FORDHAM L. REV.* 437 (1993) (discussing the importance to recognize the differences between standards of conduct and standards of review as they sometimes may differ especially in corporate law).

¹¹⁸ *See* Hao Liang and Luc Renneboog, *On the Foundations of Corporate Social Responsibility*, 72 *J. FIN.* 853 (2017).

However, the adoption of dual boards has been significantly declining over the years.¹¹⁹ In China, empirical evidence shows that employee representation on the supervisory board remains decorative.¹²⁰ The absence of evidence of active enforcement of the general CSR duty raises a concern that the vague general CSR duty may be a rather weak substitute for or complement to preexisting employee participation rights that are unpopular or unenforced.

Another approach to CSR legislation related with corporate governance is to adopt a special business form called the social enterprise, a new and increasingly popular type of business organization that combines profit seeking with public benefit purposes. The United States, Canada, the United Kingdom and many other European countries have introduced a kind of social enterprise legislation.¹²¹ Such social enterprise laws usually provide an array of specific mechanisms such as benefit enforcement proceedings, third-party certification, assets locks, dividend caps and exit restrictions to ensure the company's commitment to the dual goals. China has not yet adopted a comparable form of social enterprise law.¹²² Many Chinese scholars are

¹¹⁹ The two-tier board that includes employee representatives is mandatory in Germany and Austria while it is optional in countries such as France and Finland. The vast majority (77 %) of listed companies included in the France's SBF120 index use a unitary board while only 18% have opted for a two-tier board. See The French Institute of Directors, *French Corporate Governance In Listed Companies: Driving Growth and Attractiveness* (September 2012), http://campus.hec.fr/club_finance/wp-content/uploads/2014/07/ven.pdf.

¹²⁰ See e.g., Weian Li and Chen Hao, *Zhongguo Shangshi Gongsi Jianshahui Zhili Pingjia Shizheng Yanjiu [An Empirical Study of Supervisory Board Governance in China's Listed Companies]*, 2006 J. SHANGHAI U. FIN. ECON.78 (2006); Limin Wang and Shiquan Wang, *Zhongguo Mingying Shangshi Gongsi Jianshahui Zhili Pingjia Ji Shizheng Fenxi [An Evaluation and Empirical Analysis of Supervisory Board Governance of China's Listed Private Companies]*, 11 INQUIRY INTO ECON. ISSUES 120 (2007).

¹²¹ For US, see J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543-555 (2016) (providing an overview of the social enterprise laws in the United States); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345 (2014) (evaluating mechanisms to hold directors responsible under the Delaware law). For UK, see David Cabrelli, *A Distinct "Social Enterprise" Law in the UK: The Case of the CIC*, (2016) Edinburgh School of Law Research Paper No. 2016/27, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888486. For Canada, see Gail Elizabeth Henderson, *Could Community Contribution Companies Improve Access to Justice?*, 94 CAN. B. REV. 209 (2016); Carol Liao, *A Critical Canadian Perspective on the Benefit Corporation*, 40 SEATTLE U. L. REV. 683 (2017). For Europe, see European Council, *A Map of Social Enterprises and Their Eco-System in Europe: Synthesis Report* (2015), available at <https://ec.europa.eu/social/BlobServlet?docId=12988&langId=en>.

¹²² The "social welfare enterprise" (shehui fuli qiye) in China is arguably a form of social enterprise. However, it is not a modern business corporation and has its historical roots in the 1950s. The purpose of the social welfare enterprise is legally defined, i.e. to provide disabled people with employment. The social welfare enterprise is not a corporation and it does not have governance features anywhere comparable to the so-called "benefit

enthusiastic about transplanting a social enterprise law.¹²³ Given that China's Company Law explicitly states that CSR is a general duty for all corporations, a social enterprise law appears redundant. Nevertheless, China's Company Law is unclear about how to enforce the general CSR duty (i.e., Article 5). As one Chinese court opined that the beneficiaries of Article 5 are unspecified,¹²⁴ it is bewildering about who has the legal standing to sue when the CSR mandate is breached. More importantly, most Chinese courts simply treat CSR under Article 5 no more than a duty of legal compliance or use it as a legal space to encourage socially responsible behavior. They generally refrain from imposing any additional legal burden on corporations based on Article 5. In this regard, the adoption of a social enterprise law in China may provide an option for Chinese firms that wish to hold themselves to a higher CSR standard and signal serious commitment to CSR.

The various forms of CSR law are not mutually exclusive but often complementary. For instance, an imposition of the general CSR duty under the corporate statute does not preclude the conservative approach of mandatory CSR by directly raising legal standards for labor and environmental performance. Policymakers should be clear about what can be achieved through the law. For example, given that corporate law already requires corporations to engage in CSR, is it necessary to introduce social enterprises? Also, given employees already have the right to board representation but such right is often neglected and ill enforced, how does a general CSR duty add any help? Finally, no matter which legal policy is chosen, enforcement is the key. Like other legislations, mandatory CSR laws will be a result of compromise among different interest

corporation" in the US, the community contribution company in Canada, or the community interest company in the UK.

¹²³ See e.g., Rebecca Lee, *The Emergence of Social Enterprises in China: The Quest for Space and Legitimacy*, 2 TSINGHUA CHINA L. REV. 79 (2009); Yunhui Fan, Lun Woguo Shehui Qiye Falu Xingtai de Gaige [*On The Reform of China's Social Enterprise Law*] 34 L. REV. 105 (2016).

¹²⁴ *Supra* note 74.

groups.¹²⁵ Concessions may be made in the use of statutory language, the scope of companies covered by the law, the implementation rules and enforcement institutions, etc. This article takes China as an example to illustrate whether and how the highly vague CSR law has been applied in court cases. The practical application of the law depends on the capacity of related legal infrastructure as well as socio-political institutions.

Conclusion

The recent emergence of (ostensibly) mandatory CSR law mainly in developing countries raises controversies. Critics of CSR denounce the law as a serious violation of the sacred corporate principle of profit maximization. Even advocates of CSR embrace the law with great caution. As the statutory language of CSR is vague and open-ended, courts play a particularly important role in interpreting the meaning of CSR. Considered that countries that have adopted the CSR law are primarily those without mature legal institutions, it is commonly believed that the CSR law has no practical use in the courtroom. The empirical experience in China indicates some promises and lessons of the vague CSR law. Among various findings, this article shows that the CSR law is not entirely useless in the courtroom and the legal meaning of CSR is context-specific and sensitive to institutional settings. The expressive function of the CSR law is relatively easy to come by; however, the adjudicative function of the law intensively depends on

¹²⁵ India and Indonesia offer vivid examples of the politics of CSR legislation. See Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 ASIAN PAC. L. & POL'Y J. 270, 295-297 (2012) (explaining the Indian government made many concessions in the face of immense pressure from big corporations); Andrew Rosser and Donni Edwin, *The Politics of Corporate Social Responsibility in Indonesia*, 23 PAC. REV. 1 (2010) (providing a detailed account of Indonesia's CSR lawmaking process: political parties and the bureaucracy supported mandatory CSR because they intended to redistribute wealth from large foreign and ethnic Chinese companies to themselves and indigenous Indonesian businesses that make up their patronage; while dominant foreign and ethnic Chinese companies failed to stop the passage of the mandatory CSR law, they were successful in delaying the promulgation of implementation rules).

the capacity of related legal infrastructure and the macro socio-political conditions. Given that a vague and open-ended CSR definition is inevitable, the critical legal question is concerned about the legal infrastructure capacity to deliver the concrete CSR meaning sensitive to the context of each case rather than the obsession with drafting a perfect and encompassing definition of CSR in the legislation.