Corporate Social Responsibility: A Legal Framework for Socioeconomic Development in Tibet

Chris Fletcher

Despite China’s extraordinary economic prosperity, not all are benefiting: Tibet is a case in point. The Tibetan areas of China exhibit massive socioeconomic inequality. When comparing jobs, wealth, and education statistics, significant disparities between Tibetans and Chinese surface, with Tibetans faring poorly. This results in a Tibetan sense of dispossession and marginalization that was, in part, a cause of the social unrest exhibited by the 2008 protests, and, more recently, the wave of self-immolations and protests over the practices of certain companies. With Tibet’s further economic opening through new infrastructure networks to China—and thus the world—private sector involvement in Tibet’s markets will increase, not only for Chinese companies (State-owned and private) but also in the form of foreign direct investment. These business opportunities hold the potential for great value, so long as they are pursued in a way that does not continue to exclude Tibetans from the fruits of economic growth. Unless a new development strategy is created that allows for the needs and views of Tibetans to be addressed and integrated, feelings of dispossession and marginalization will only worsen with more Tibetan protests, uprisings and self-immolations to follow, thus undermining China’s highly desired social stability and companies’ ability to operate free from protests. Corporate Social Responsibility (CSR)—the business practice of integrating respect for international human rights and environmental sustainability laws and norms into company decisions and core operations—offers a potential solution in which Tibetans can take advantage of much-needed and wanted socioeconomic development and business can flourish amid new markets and opportunities. The end result is the possibility of a win-win solution in which the interests of Tibetans, the business community, and, by extension, the Chinese government can all be served.

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“As companies seek to be guided by more socially and environmentally responsible values, we need to ask what corporate responsibility means. This is an especially challenging question for the increasing number of foreign companies working in or looking at working in Chinese-ruled Tibet. This commercial and corporate interest comes at a time in Tibet’s history when ordinary Tibetans have no real say in their country’s development. Tibetans should be participating, directing and benefiting from this development especially when it concerns the exploitation of Tibet’s non-renewable resources such as gold. Therefore, I appeal to all foreign mining companies, and their shareholders, who are thinking about working in Tibet to consider carefully about the ethical values when embarking on such a venture.”

—The Fourteenth Dalai Lama, 2003

“Over the past years Tibet has made significant progress in economic and social development. But we also recognize that Tibet is still behind the central and eastern parts of China in terms of economic and social progress. The Chinese government has taken strong measures to accelerate the economic and social development in Tibet including the formulation of a new plan for that purpose, in the hope that we will be able to further promote the living standards of the farmers and herdsman in Tibet. Tibet needs to develop its economy on a sustained basis; at the same time we must pay close attention to environment conservation and the preservation of Tibet’s cultural heritage. We respect the freedom of religious belief of Tibetan compatriots, and their religious belief is protected by the law. We must treat all our Tibetan compatriots as equals and with respect and make continuous improvement in our work in this area.”

—Former Chinese Premier Wen Jiabao, 2012
INTRODUCTION

In the past few decades, China has lifted hundreds of millions of people out of poverty. The economic conditions that created China’s economic ascendancy, and thus allowed it to reduce poverty, continue to awe the international community. The reason is simple: at present, no other country has been able to produce and maintain similarly high levels of growth. For example, over the thirty-year period ending in 2007, China’s growth rate was more than 8% a year, and from 2005-2010, this accelerated to an estimated 10%, notwithstanding recessions in the wealthy countries with which China trades. As Harvard University economist Ricardo Hausmann notes, “[i]n the history of humankind, no country has ever grown for 30 years at the rate China has grown.” By comparison, the best thirty-year timeframe for the US economy was from 1960 to 1990, during which it had an average growth rate of 2.3%. Such sustained economic growth has resulted in China becoming the world’s factory floor and an extractor of significant mineral deposits. The massive exports from this production allowed China to surpass Germany in 2009 to become the number one exporter of goods, and in 2010 to triumph over Japan to become the second largest economy.

Despite China’s economic rise and prosperity, however, not all of its population is benefiting. In 2012, a study from China’s Southwestern University of Finance and Economics revealed an increasing wealth gap, suggesting China may be among the world’s most unequal countries. This inequality has long been most acute in Tibet, as Chinese government subsidies and investments have not adequately addressed socioeconomic dis-

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2. See Elizabeth C. Economy, The Game Changer: Coping with China’s Foreign Policy Revolution, 89 FOREIGN AFFAIRS 142, 143 (2010) [hereinafter The Game Changer], See also China Responsible for 75% of Poverty Reduction in the Developing World Since 1980, FINFACTS IRELAND (Oct. 12, 2005), http://www.finfacts.ie/irelandbusinessnews/publish/article_10003611.shtml (citing former World Bank President Paul Wolfowitz as saying, “China, as we all know, has been the fastest growing economy in Asia for the past 20 years and has lifted more than 400 million people above US$1 a day poverty levels in that time.”).
4. Id.
5. Id.
9. Shen Hu, China’s Gini Index at 0.61, University Report Says, CAIXIN ONLINE (Dec. 10, 2012), http://english.caixin.com/2012-12-10/100470648.html (noting that, “according to the report, the combined income of all households in eastern provinces was about 2.7 times that of the west and the central regions.”).
parities in this region. In fact, the policies appear to promoting inequality, especially in the areas of wealth, jobs, and education. In addition, there is increasing evidence that Tibetans are unhappy with the lack of proper labor, environmental, and stakeholder engagement practices of many companies operating in Tibet.

Corporate Social Responsibility (CSR)—the business practice of integrating respect for international human rights and environmental sustainability laws and norms into company decisions and core operations—can and should be used to address Tibetan socioeconomic development. The use of CSR can help promote social harmony and stability, create and enhance business opportunities for domestic and foreign companies, and allow Tibetans to participate actively in determining their own development needs.

This article describes a framework for investment in Tibet that utilizes CSR as the driving force. Part I discusses Tibetan socioeconomic disparities, with a focus on economic and educational inequality. Part II defines CSR principles and tools and puts forth the business case for CSR. Part III applies these CSR tools to the Tibetan context, with specific reference to Chinese regulations and international laws and norms, and to the CSR concepts of stakeholder engagement and community investment.

I. UNDERSTANDING THE TIBETAN CONTEXT – A LANDSCAPE OF DISPOSSESSION AND EXCLUSION

In this article, “Tibet” refers to all Tibetan administrative areas of China, and “Tibetans” refers to the ethnic, indigenous population that lives in these areas. From the Tibetan perspective, Tibet has always consisted of three main regions: Amdo (northeastern Tibet), Kham (eastern Tibet) and U-Tsang (central and western Tibet). In 1965, fifteen years after entering Tibet, the Chinese government redrew these boundaries. Currently, this area exists as the Tibet Autonomous Region (TAR), an area of 1.2 million square kilometers that is west of the Yangtze River, includes part of Kham, and is often referred to as “Central Tibet” in English. Amdo and the rest of Kham exist as Tibetan autonomous prefectures (TAPs) and Tibetan autonomous counties (TACs) and have been incorporated into the provinces of Gansu, Qinghai, Sichuan, and Yunnan. Collectively, these Tibetan areas are often referred to as “Tibet” or “the Tibetan plateau” and are about the size of Western Europe (2.5 million square kilometers) or one quarter of China’s landmass.
Top: Map of the Tibetan Plateau

Bottom: Map of All Chinese Provinces, Including the Tibetan Autonomous Region (TAR)

Corporate Social Responsibility

Top: Map of the TAR, Tibetan Autonomous Counties (TACs), and Tibetan Autonomous Prefectures (TAPs)\textsuperscript{13}

Bottom: Map of the Three Traditional Provinces Overlaid on a Map of Modern Provincial Boundaries\textsuperscript{14}


As will be discussed in further detail below, focusing on Tibet from a CSR standpoint is helpful for three chief reasons. First, addressing Tibetan socioeconomic inequalities can further the Chinese government’s sought-after goal of social stability and harmony. Second, as Tibetan areas continue to become more open through the development of new train networks and other infrastructure, the potential for new business opportunities awaits. For those companies presently in Tibet, CSR offers the ability to enhance business operations. Third, these opportunities can help promote greatly needed and wanted socioeconomic development for Tibetans.

Any discussion of the Tibetan socioeconomic context first requires an understanding of the political backdrop. The relationship between Tibetans and Chinese is complex and contested. This article does not aim to rehash this debate; however, it is necessary to briefly flag the importance of understanding the Tibetan political perspective. Since 1950, when the Chinese People’s Liberation Army entered Tibet, there has been ongoing tension between Tibetans and Chinese. The general disposition among Tibetans is a feeling of being ruled by outsiders. When this sentiment is combined with exclusionary socioeconomic forces, discussed below, feelings of dispossession deepen, resulting in mistrust between Tibetans and Chinese. Understanding this political background and its attendant economic and social context is a vital prerequisite to maximizing successful business operations in Tibet.15

Additionally, there are challenges that come with analyzing Tibetan socioeconomic data for the non-Chinese or non-Tibetan who is dependent upon readily available English sources. The vast majority of the socioeconomic data discussed here has been provided by the Chinese government in its statistical yearbooks and then analyzed by the economic development scholar Andrew Fischer. Fischer is an Associate Professor in Population and Social Policy at the Institute of Social Studies (The Hague) of Erasmus University Rotterdam. He is the only western economist researching macro development economics and its ancillary effects within the context of Tibet; as such, his work is relied upon extensively in this article.16

Furthermore, an additional challenge in working with this data is its age. The data discussed was gathered from 1997 to 2010. Socioeconomic data that is more recent than 2010 is not discussed in this article, either be-

15. For a fuller discussion, see, e.g., Elliot Sperling, THE TIBET-CHINA CONFLICT: HISTORY AND POLEMICS (2004) (offering an attempt to provide insight into both the Tibetan and Chinese historical perspectives of Tibet’s contested political status).
16. Note that there are other scholars whose work focuses on socioeconomic development in Tibet. Though this scholarship is undoubtedly helpful, these scholars typically approach their work from a different discipline — e.g. anthropology and geography — and also tend to focus on data gathered primarily thorough fieldwork focused on regions or sub-regions/cities in Tibet. By contrast, Fischer’s work is compelling because of the source of his data (Chinese government statistics) and the results of his economic analysis (macro-level implications in Tibet). For an example of an author from a different discipline who comes to similar conclusions as Fischer, see Emily T. Yeh, TAMING TIBET: LANDSCAPE TRANSFORMATION AND THE GIFT OF CHINESE DEVELOPMENT (2013) (offering analysis, particularly in Chapter 3, of China’s development policies in Tibet through data gathered by ethnographic research) [hereinafter Taming Tibet].
cause Fischer has not yet analyzed it or because the Chinese government stopped reporting and/or altered certain categories of data, thus making it impossible to track those trends over time. In addition, while Fischer’s robust analysis is extensive, its primary focus is the TAR. The majority of the estimated six million total Tibetans live outside of the TAR in Gansu, Qinghai, Sichuan, and Yunnan, which makes it difficult to offer conclusive Tibet-wide observations from Fischer’s analysis.17 Even with these data limitations, however, Fischer’s work helps to shed light onto the socioeconomic forces that are affecting many, if not most Tibetans.

Such socioeconomic forces have long plagued China. For example, in its 199718 and 199919 China reports, the United Nations Development Programme placed the TAR at the bottom20 of its Human Development by Province Index,21 and it noted vast regional development disparities that were most pronounced between eastern coastal regions on the one hand and western interior areas on the other.22 It was with these facts and context in mind that in 1999 Chinese President Jiang Zemin announced a new program called the “Great Western Development” campaign.23 The purpose of the program was to spur development in China’s poorest provinces24 and autonomous regions25 through infrastructure development and foreign investment.

Since the late 1990s, the Chinese central government has poured billions of dollars into the TAR and other western areas. Consequently, in recent years the economy of the TAR has seen incredible growth. For example, the per capita Gross Domestic Product (GDP) grew faster than 10% per year from 1997 onwards.26 Between 2000 and 2005, the GDP in the TAR doubled27, and from 1997 to 2007 the GDP more than quadrupled.28 Per cap-

17. See Tibet at a Glance, CENTRAL TibETAN ADMINISTRATION, http://tibet.net/about-tibet/tibet-at-a-glance/ (noting that the total population of Tibet is 6 million of which a little over 2 million live in the TAR).
21. UNDP’s human development index consists of a simple average of three measures: income, longevity, and education.
22. UNDP China 1999, supra note 18, at 62.
23. This is also referred to as the Western Development Strategy or the Go-West Campaign. For more information see, e.g., TIBET INFORMATION NETWORK, CHINA’S GREAT LEAP WEST (2000).
24. The provinces include Gansu, Gaizhou, Qinghai, Shaanxi, Sichuan, and Yunnan.
25. The autonomous regions include Guangxi, Inner Mongolia, Ningxia, Tibet, and Xinjiang.
ita growth rates surpassed the national average from 2001 to 2003. Moreover, these rates were the highest in western China for most of this time; among the western provinces, the TAR accelerated faster than the rest during the late 1990s and early 2000s but then fell back in line with the pack by the mid-2000s. To compare these rates to China as a whole, the aggregate real GDP of the TAR grew by roughly three times between the years 1996 and 2004, and in Qinghai by about two and a half times. In China as a whole during these years, GDP only doubled, and even this, as noted above, was one of the most unprecedented growth rates in human history.

GDP growth, however, does not necessarily mean an increase in well-being for all, which therefore raises important questions: what brought about these high growth rates and who are the beneficiaries? When one investigates these GDP growth rates, a complex picture emerges, characterized by increasing inequality. Breaking down the high growth rates reveals that unlike the rest of China, where the growth model is rooted in the development of local economies, most of the TAR’s GDP comes as a result of massive external government subsidies and investment. This subsidized investment is mainly aimed at government administration and construction projects, the inefficiencies of which have created extreme dependency with little to no multiplier effects in the local economy. In 2010, for example, these subsidies were so large that they made up the equivalent of almost 109% of the TAR’s GDP. The reason is that the vast majority of the subsidies are monetarily tied to entities that are outside of the TAR, many of
them state-owned or connected to the construction or tourism sectors.\textsuperscript{36} Consequently, most of the investment dollars have a boomerang effect\textsuperscript{37} wherein they simply flow into the TAR and then right back out, with little benefit to locals.\textsuperscript{38} As a result, there is very little locally-generated investment that meets local needs and which has the potential to spur future local economic growth.\textsuperscript{39} As Fischer writes, “[t]he development of locally-owned business and local expertise tends to be sidelined in the process and ownership in the economy is progressively transferred to non-Tibetan outsiders . . .”\textsuperscript{40}

The money that does stay in the TAR is mostly concentrated in the government employment sector, an area that is inaccessible to most Tibetans (the reasons for which are discussed below).\textsuperscript{41} Additionally, this investment is primarily targeted toward city centers, with rural areas seeing only modest benefits. This is important because the majority of Tibetans are farmers and nomads who do not live in urban areas. Moreover, very little of the investment is put toward social programs. In 2005, for example, 13\% of GDP went toward the government and party administration, whereas only 6\% went toward education and 1\% toward “health, social security, and social welfare.”\textsuperscript{42} This is the inverse of every other province in China; for example, investment in Sichuan for education was double the investment in government administration.\textsuperscript{43}

a. Economic Inequality

The result of this type of investment is a vast wealth disparity: in 2003–2004 the TAR had the highest rate of urban-rural inequality of any region in China.\textsuperscript{44} The total disposable income of Tibetan farmers and nomads was less than half of the average income for China’s peasants.\textsuperscript{45} In 2001, the urban-rural income ratio of the TAR peaked with urban residents retaining income that was 5.5 times higher than the average per person household income of rural residents—the highest China has ever seen at the provincial level.
level.\textsuperscript{46} This ratio fell to its lowest in 2006 but has continued to rise from 2007 onward with urban residents retaining income that ranges from 3.6 to 4 times that of rural residents.\textsuperscript{47} This picture is made starker by declining average urban household incomes. Until the early 2000s, incomes in the TAR were above the national average and the highest in western China.\textsuperscript{48} In 2002, however, they converged with the national average and then fell below the average in 2004; in 2006 they declined sharply and were the lowest in all of China.\textsuperscript{49}

An increasing wealth divide within urban areas compounds this inequality. Between 2000 and 2005, urban inequality doubled in the TAR. Average wages of the top half of urban employees in the TAR—which mainly consists of those employed by the State—almost doubled relative to average wages of all employed urban residents.\textsuperscript{50} This inequality rate increased further and reached an all-time high in 2007 after which it fell slightly.\textsuperscript{51} As Fischer notes, this data “suggests that little urban wealth in the TAR disperses outside the State sector and the wealth of those without access to State sector employment has rapidly fallen behind the rapid salary and wage rises of those in State-sector employment.”\textsuperscript{52}

A small demographic\textsuperscript{53} of Tibetans are taking advantage of this State investment because their Chinese skillset (knowledge of Mandarin, Chinese work culture, and connections to government or business) allows them to gain access.\textsuperscript{54} However, this number is declining. For example, between 2001 and 2003, there was an overall reduction\textsuperscript{55} in the number of Tibetan staff working in State-owned enterprises that was not offset by a rise in employment in non-State units; elsewhere in China such reductions in the State sector have been counterbalanced by uptakes in private sector employment.\textsuperscript{56} Within this category, the more coveted government cadre jobs saw an even steeper decline. Overall cadre employment went up from 69,927 in 2000 to 88,734 in 2003, but the number of Tibetan cadres dropped from 50,039 to 44,069 (or from 72% of total cadre employment to just less than 50%).\textsuperscript{57} Therefore, employment in the TAR, particularly Tibetan employment, has contracted in the exact area of the economy that grew most

\begin{itemize}
\item 46. \textit{The Disempowered Development of Tibet}, supra note 26, at 218, Figure 5.8.
\item 47. \textit{Id. at Figure 5.8}.
\item 48. \textit{Id. at Figure 5.8, 221}.
\item 49. \textit{Id.}
\item 50. \textit{Perversities of Extreme Dependence}, supra note 27, at 16.
\item 51. \textit{The Disempowered Development of Tibet}, supra note 26, at Figure 5.10 (noting this was the highest rate of any Tibetan area).
\item 52. \textit{Perversities of Extreme Dependence}, supra note 27, at 16.
\item 53. \textit{Authenticating Tibet}, supra note 36, at 242 (Fischer estimates that as of 2008 only 15% of Tibetans were profiting from the growth.).
\item 55. \textit{The Disempowered Development of Tibet}, supra note 26, at 233 (noting “It was only at the lowest and most subordinate levels of state-sector employment, i.e. non-permanent workers on contract, where Tibetan representation increased, from 71 percent in 2000 to 82 percent in 2003, although the total numbers employed at this level fell dramatically, from 23,453 workers in 2000 to 6,912 workers in 2003 . . . ”).
\item 57. \textit{Id.}
\end{itemize}
rapidly— the urban State sector. The end result is that urban Tibetans bore the brunt of rising inequality. They were squeezed out of the highly privileged State-sector jobs and thus, the sharp wage increases noted above were captured by non-Tibetans resulting in an exclusionary economic environment for Tibetans in the TAR.

b. Education Gaps

A driving force behind this employment exclusion is educational inequality. An acute demonstration of this is captured by illiteracy rates between provinces (among both rural and urban communities) and by sex. The illiteracy rates in the TAR are staggering. In 2004, the total rate was 44%, compared to 22.1% in Qinghai, 19.4% in Gansu, 11.5% in Sichuan, and 10.3% in China as a whole. The city rate in the TAR was higher than the rural rate, 47% versus 43% respectively. These rates are in stark contrast to those in other surrounding provinces, where the city rates were much lower than rural rates and closer to the national average. During this period, the numbers for China as a whole were 4.8% for city dwellers and 13.7% for rural populations.

By 2009, these rates had not changed significantly in the TAR. Its total rate was 39.6%, compared to 14.7% in Qinghai, 15.9% in Gansu, 9.2% in Sichuan, and 7.1% in China as a whole. Unlike in 2004, the city rate in the TAR was slightly lower than the rural rate, at 37.2% versus 40.9% respectively. However, the 2009 rates for the TAR are exceptional because no other province in China had city and rural rates that were almost at parity. The next highest rate of city illiteracy was in Gansu at only 5.6% versus its rural rate of 19.6%. Moreover, the city rates in every other province were only a fraction of rural rates, within close range of the national average, and

58. Id. at 14.
59. The Great Transformation of Tibet, supra note 28, at 74 (noting that it is unclear whether these trends have continued since 2003 because this particular data set is no longer disaggregated by the Chinese government in its statistical yearbooks, which ceased doing so in 2004); The Disempowered Development of Tibet, supra note 26, at 234.
60. The Disempowered Development of Tibet, supra note 26, at 253 (noting that “Because literacy in any official language qualifies someone as literate in the Chinese surveys, this measure does not necessarily offer a good evaluation of Chinese literacy: the government itself estimated sometime in the early 2000s that about 80 percent of the rural population of the TAR did not speak or understand Chinese, meaning that a significant proportion of literate rural Tibetans were illiterate in Chinese.”).
61. Educating for Exclusion, supra note 29, at 18.
62. Id.
63. Id.
64. Id. For example, in Qinghai the rates in 2004 were 32% (rural) to 5.9% (city); in Gansu 25.4% (rural) to 5.6% (city); and Sichuan 14.4% (rural) to 3.6% (city).
65. Educating for Exclusion, supra note 29, at 18.
66. The Disempowered Development of Tibet, supra note 26, at Table 6.1.
68. The Disempowered Development of Tibet, supra note 26, at 257.
69. Id. at Table 6.1.
(with the exception of Gansu) had all made steady improvements since 2001.\footnote{Id. at 258.} Thus, the working age permanent city resident population in the TAR is burdened with China’s highest level of illiteracy, which is the highest not only among cities but also when compared to rural areas.\footnote{Id.}

The inequalities come into greater relief when the numbers are broken down by sex across provinces. For example, data from 2004 shows that a Tibetan woman moving from the rural areas of the TAR was about 35 times more likely to be illiterate than a male city resident migrating from Sichuan.\footnote{Educating for Exclusion, supra note 29, at 19. See below chart from Fischer: Table 6.2. See below chart from Fischer:} In contrast, a woman in rural Sichuan was almost 1.7 times more likely to be literate than a male permanent-resident in Lhasa, despite the fact that such a woman was less than half as likely to be literate than her male counterpart in the rural areas of Sichuan.\footnote{The Disempowered Development of Tibet, supra note 26, at Table 6.2.}

By 2009, these patterns largely remained in place. A Tibetan woman migrating from the rural areas of the TAR was almost 37 times more likely to be illiterate than a male city resident migrating from Sichuan.\footnote{The Disempowered Development of Tibet, supra note 26, at 259.} Taking the inverse, a male city resident in Lhasa or Shigatse was about one-third times more likely to be illiterate than a woman in rural Sichuan, despite the fact she was almost three times as likely to be illiterate than her male counterpart in rural Sichuan.\footnote{Id.} These numbers improved somewhat for the average male city resident of the TAR between 2004 and 2009 (from 1.7 to 1.3 respectively), but they got slightly worse for the average rural Tibetan woman of the TAR.\footnote{Id.}

These inequalities between provinces are important because migrants from Qinghai, Gansu, and Sichuan are competing for employment in the

\begin{table}[h]
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\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
 & Total & Rural & City & Total & Rural & City \\
\hline
TAR & 33.5\% & 54.0\% & 33.5\% & 51.8\% & 33.2\% & 58.8\% \\
Qinghai & 13.6\% & 30.9\% & 20.1\% & 44.1\% & 2.8\% & 9.1\% \\
Gansu & 13.1\% & 26.0\% & 17.7\% & 33.4\% & 2.1\% & 9.2\% \\
Sichuan & 7.2\% & 15.8\% & 9.3\% & 19.7\% & 1.5\% & 5.6\% \\
China & 5.8\% & 14.9\% & 8.0\% & 19.4\% & 2.2\% & 7.4\% \\
\hline
\end{tabular}
\caption{Illiteracy rates among the population aged 15+, by sex, 2004 survey}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
 & Total & Rural & City & Total & Rural & City \\
\hline
TAR & 31.6\% & 47.2\% & 33.6\% & 48.0\% & 24.3\% & 47.2\% \\
Qinghai & 7.8\% & 21.6\% & 11.1\% & 28.8\% & 1.2\% & 5.2\% \\
Gansu & 10.0\% & 21.9\% & 12.7\% & 26.6\% & 2.7\% & 8.6\% \\
Sichuan & 4.9\% & 13.4\% & 6.4\% & 17.5\% & 1.3\% & 4.2\% \\
China & 3.8\% & 10.5\% & 5.4\% & 14.2\% & 1.1\% & 4.2\% \\
\hline
\end{tabular}
\caption{Illiteracy rates among the population aged 15+, by sex, 2009 survey}
\end{table}
TAR. As Fischer writes, “the anomaly of the Tibetan areas is to be noted: the most educated local cohort (male city permanent residents) is much less educated on average than even the least educated cohort of inter-provincial migrants coming to Tibet and competing in local urban labor markets (female rural residents from Sichuan).”77 This asymmetry is not seen in any other province in China, and its severity has not improved significantly over the past decade.78

The problem is exacerbated by the lack of schooling beyond the primary level in the TAR.79 For instance, 16% of the TAR population had some type of secondary education in 2004 versus 45% in Qinghai, 48% in Gansu, 50% in Sichuan, and 59% in China as a whole.80 This indicates not only a high level of illiteracy in the TAR, but also that skilled labor (with Chinese-fluency) was in short supply.81 Furthermore, the rate for those that had tertiary education in the TAR (junior college, university, and postgraduates)82 was far lower compared to surrounding provinces. Therefore, using another cross-province example, a woman from Qinghai was more than twice as likely as a male in the TAR to have some type of secondary schooling, and almost three times as likely to have some type of tertiary education.83

As with the other data sets, by 2009,84 the numbers in the TAR had not changed significantly, whereas the other provinces saw much greater improvements.85 In 2009, 24% of the TAR population had some type of secon-

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77. Educating for Exclusion, supra note 29, at 19.
78. The Disempowered Development of Tibet, supra note 26 at 260.
79. Educating for Exclusion, supra note 29 at 20.
80. Id. See below table from Fischer:

<table>
<thead>
<tr>
<th>6+ population with education including and above:</th>
<th>Primary</th>
<th>Secondary</th>
<th>Tertiary</th>
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<tbody>
<tr>
<td>Sub-Total</td>
<td>Male</td>
<td>Female</td>
<td>Sub-Total</td>
</tr>
<tr>
<td>TAR</td>
<td>62.8%</td>
<td>71.4%</td>
<td>54.0%</td>
</tr>
<tr>
<td>Qinghai</td>
<td>80.2%</td>
<td>87.4%</td>
<td>72.6%</td>
</tr>
<tr>
<td>Gansu</td>
<td>83.3%</td>
<td>88.6%</td>
<td>77.7%</td>
</tr>
<tr>
<td>Sichuan</td>
<td>89.9%</td>
<td>93.6%</td>
<td>85.9%</td>
</tr>
<tr>
<td>China</td>
<td>90.8%</td>
<td>94.7%</td>
<td>86.8%</td>
</tr>
</tbody>
</table>

81. Educating for Exclusion, supra note 29 at 20.
82. Fischer believes that Tibetans who have a tertiary education are likely to have a functional degree of both written and spoken Chinese fluency. Thus, the percentage of those who attended college is the same as those with this skillset. See The Disempowered Development of Tibet, supra note 26, at 266.
84. Although the below chart shows 2010 census data, the census tabulation was not was available at the time of Fischer’s writing so the ethnic decomposition of the schooling levels could not be calculated. Thus, the 2009 data is most accurate as a means of comparison.
dary education versus 64% in Qinghai, 66.6% in Gansu, 67.3% in Sichuan, and 83.9% in China as a whole. The number of those with a tertiary education in the TAR continued to be much lower than those in surrounding provinces; and between 2000 and 2009, the percentage of those in the TAR with this education only increased from 1.5–1.7%.86

Breaking down these numbers by rural and urban populations87 demonstrates that a rural person from Sichuan in 2009 was more likely to have a junior secondary level of schooling than a TAR city resident.88 The only areas of advantage for a TAR resident were at the senior secondary and tertiary levels; here TAR city residents outperformed their rural counterparts in Sichuan.89 However, a city resident from Sichuan was more than three times as likely to have a tertiary education than his or her city Tibetan counterpart in the TAR.90 Such disparities are not seen across any other prov-

85. The Disempowered Development of Tibet, supra note 26, at Table 6.3. See below table from Fischer:

Table 6.3 Levels of schooling among the population aged six and older in the 2000 census, 2009 survey and 2010 census (2010 census results with respect to the entire population)

<table>
<thead>
<tr>
<th></th>
<th>6+ population with a level of schooling of at least:</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Primary</td>
</tr>
<tr>
<td>2000/0c</td>
<td>2009/9s</td>
</tr>
<tr>
<td>TAR</td>
<td>47.1%</td>
</tr>
<tr>
<td></td>
<td>7%</td>
</tr>
<tr>
<td></td>
<td>65.6%</td>
</tr>
<tr>
<td>Qinghai</td>
<td>72.8%</td>
</tr>
<tr>
<td></td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>96.1%</td>
</tr>
<tr>
<td>Gansu</td>
<td>80.2%</td>
</tr>
<tr>
<td></td>
<td>9%</td>
</tr>
<tr>
<td></td>
<td>94.3%</td>
</tr>
<tr>
<td>Sichuan</td>
<td>89.1%</td>
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<tr>
<td></td>
<td>8%</td>
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<tr>
<td></td>
<td>96.7%</td>
</tr>
<tr>
<td>China</td>
<td>90.5%</td>
</tr>
<tr>
<td></td>
<td>9%</td>
</tr>
<tr>
<td></td>
<td>97.0%</td>
</tr>
</tbody>
</table>

Source: calculated from CSY (2002, table 4-12), CSY (2010, table 3-12) and CSY (2011, table 3-10).

86. The Disempowered Development of Tibet, supra note 26, at Table 6.3.

87. Id. at Table 6.4. See below table from Fischer:

Table 6.4: Levels of schooling among the population aged six and older in the 2009 survey by rural and city residency (town residency not included)

<table>
<thead>
<tr>
<th></th>
<th>6+ population with a level of schooling of at least:</th>
</tr>
</thead>
<tbody>
<tr>
<td>TAR</td>
<td>61.6%</td>
</tr>
<tr>
<td>Qinghai</td>
<td>81.7%</td>
</tr>
<tr>
<td>Gansu</td>
<td>81.7%</td>
</tr>
<tr>
<td>Sichuan</td>
<td>88.3%</td>
</tr>
<tr>
<td>China</td>
<td>90.5%</td>
</tr>
</tbody>
</table>

Source: calculated from CPEY (2010, tables 2-25 and 2-27).

88. Id. at 265.

89. Id.

90. Id. at 266.
inces in China.91

The steep illiteracy rates and under-education among most Tibetans has resulted in a lack of Chinese-related work skills that would allow them to gain entry into the formal workforce.92 Tibetans are unable to compete in large numbers in the formal employment sector, government or otherwise, vis-à-vis migrants who come from the surrounding provinces, most of whom are migrating from Sichuan, Qinghai, and Gansu.93 While migrant labor occurs all over China, these workers tend to have lower levels of education94 and thus fill the lowest-skilled jobs. What makes Tibet unique is that these same low-skilled and undereducated migrant workers are on average more educated and better skilled than the vast majority of Tibetans. This marginalization therefore places Tibetans at an extreme disadvantage. With the opening of the Qinghai-Tibet railway, migration to Tibet has only increased,95 further intensifying the employment disparities for Tibetans.96 And, as discussed below, this situation is made even more challenging for those who are able to secure employment in the corporate sector because the improper practices of some companies have led to Tibetan protests by workers and surrounding communities who are airing a range of grievances.

c. Consequences of Socioeconomic Inequality

The convergence of these educational inequalities and attendant economic effects are not without consequence. Lack of economic opportunity

91. Id.
92. Educating for Exclusion, supra note 29, at 21-25; The Disempowered Development of Tibet, supra note 26, at 266-268.
93. Educating for Exclusion, supra note 29, at 15; Ma Rong, Population Structure and Changes in the Tibet Autonomous Region: An Analysis of the Recent Census Data 5, 16, Presentation at the International Conference on “Tibet Autonomy” at Harvard University (Nov. 28-29, 2007), http://www.case.edu/affil/tibet/tibetanSociety/documents/TAR-Census2.pdf (noting “The in-migrants [to TAR] mainly come from nearby provinces such as Sichuan and Gansu” and “Han construction workers…moved into Tibet for employment opportunities and a higher income. Some other ethnic groups (especially Hui from Gansu and Salar from Qinghai) also joined this flow”).
94. Sophie Song, China Now Has More Than 260 Million Migrant Workers Whose Average Monthly Salary Is 2,290 Yuan ($374.09), INT’L. BUSINESS TIMES (May 28, 2013), http://www.ibtimes.com/china-now-has-more-260-million-migrant-workers-whose-average-monthly-salary-2290-yuan-37409-1281559 (noting that “Most migrant workers have not completed more than middle school-level education. In 2012, 1.5 percent of migrant workers were illiterate, 14.3 percent completed elementary school, 60.5 percent middle school, 13.3 percent high school, and 10.4 percent completed higher education.”).
for Tibetans has led to unrest. \(^97\) In March of 2008, the world’s attention focused on Tibet as riots and protests ignited across the Tibetan plateau from Lhasa and Shigatse to Chengdu and Xining, and many rural villages and towns in between. \(^98\) Conservative estimates suggest the number of uprisings across Tibet reached at least 125. \(^99\) Some of the protests in Lhasa turned violent with Hui Muslim and Chinese shops being burned\(^100\) to the ground, an indication that the main target of the Tibetan grievance was aimed not necessarily at symbols of State power, but rather at the economic actors who exclude Tibetans from the employment arena: non-Tibetan migrants. \(^101\)

More recently, a wave of self-immolations has swept across Tibet. As of the date of publication, the number stands at 133. \(^102\) While the vast majority of the self-immolated individuals conveyed messages calling for greater political freedom, two immolators \(^103\) carried out their protests near the entrance of a mining site. Reporting \(^104\) on these two deaths does not provide further detail as to the motivation of the immolators, but the mere fact that the mining area was chosen as the site for the immolation suggests that these immolators viewed the consequences of mining in these Tibetan areas as highly problematic. By extension, one might also presume that this sentiment is shared by the communities in which the immolators lived, as the

\(^97\). See Sino-Tibetan Dialogue, supra note 33, at 16 (noting the 1993 protest in Lhasa over similar issues having to do with economic exclusion).


\(^99\). Id. at 5.

\(^100\). Tibet: Pilgrims and Progress, THE ECONOMIST (Feb. 4, 2010), http://www.economist.com/node/15452843 (noting that the Chinese government said losses from the protests amounted to 280m yuan/$41million US dollars). See also Taming Tibet, supra note 16, at ix (noting that in “March 2008, Tibetan protestors set fire to, damaged, and destroyed roughly one thousand shops run by Han and Hui migrants in Lhasa, killing nineteen people and sending much of the capital of the Tibetan Autonomous Region up in flames.”).

\(^101\). The Illusion of Calm in Tibet, THE ECONOMIST (July 10, 2008), http://www.economist.com/node/11706247 (noting that “Migrants from elsewhere in China, mainly neighboring Sichuan, are indeed flocking to the region. . . . Tibet’s problem is the pace of this influx. No official figures are published. But it appears to have accelerated rapidly in recent years thanks to a rapid growth in tourism, which has received a big boost from the railway”).


\(^104\). The difficulty of gaining access to independent journalist coverage in Tibet must be highlighted. See, e.g., Max Fisher, North Korea is More Accessible to Foreign Journalists than Tibet is, WASHINGTON POST (Dec. 17, 2013), http://www.washingtonpost.com/blogs/worldviews/wp/2013/12/17/north-korea-is-more-accessible-to-foreign-journalists-than-tibet-is/ (noting “[t]he Associated Press even has a tiny bureau in Pyongyang; a deal with the devil, some critics charge, but if nothing else it produces an awful lot of very good photos of life in North Korea. There is nothing close to an analogous foreign media presence in Tibet.”).
location where one self-immolates is of significance because it is often a symbolic act reflecting grievances shared by the larger community.

Other forms of protest have also occurred, largely against the practices of Chinese extractive companies. The chief Tibetan grievances in these cases have focused on poor labor and environmental practices and religious and cultural insensitivities, which have presumably arisen because extractive projects are planned and implemented without the consultation and consent of the local Tibetan communities. These protests have resulted in arrests, injuries, and deaths to the protestors, and to the blockading of sites and damaging of equipment belonging to the companies. Furthermore, as the illustrative examples below demonstrate, the size of the protests appears to have increased in recent years, presumably as a result of increased company activity.

The spring of 2009 saw a several month standoff in which Tibetans protested the opening of a goldmine in Chamdo prefecture (TAR) that was to excavate at a site considered sacred by the local Tibetan community. At one point as many as 500 Tibetans blocked the road to the mine to prevent security forces from arriving. A year later, in May 2010, thousands of villagers protested at the same mine when the company resumed mining. Thirteen Tibetans were arrested and five were injured as a result.

Later in August of 2010, Tibetans held a demonstration outside of a government building in Palyul (Sichuan province) over concerns that the excavation at a nearby mining site was disturbing an area of spiritual significance and polluting the environment. During this confrontation, Chinese security forces shot into an open crowd, killing four Tibetans and wounding thirty more.

In September of 2011, Tibetans were involved in a dispute over payment of wages with a Chinese mining company in Kardze (Sichuan province). Four Tibetan laborers were wounded after the clash escalated and the company fired upon the protestors.

In February of 2012, after a year of back-and-forth confrontations be-

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105. It must be mentioned that the examples discussed are those found in independent media sources outside China. However, foreign reporters are often banned from travelling to the TAR, which makes it difficult to obtain more comprehensive coverage on the types of protests and companies involved. Although the examples discussed here exclusively address Chinese extractives companies, it is certainly plausible that protests of a similar nature have also occurred against foreign companies or Chinese companies from other sectors.

106. As is discussed infra in Section III(a)(ii), companies operating in Tibet should be using Free, Prior, and Informed Consent (FPIC) as they pursue their investments. Given the large-scale protests discussed here, one has to assume FPIC was not used.


between a local village and a mining company in Yunnan province, the local government ordered the mine to be closed. Among the incidents that led to the closure were threats and violence from agents hired by the company, harassment and arrests by local police, riots by the local Tibetan community, and the destruction of $300,000 worth of mining equipment by Tibetans who pushed it into a nearby river in protest. The chief complaint was that the company was mining near Mount Kawagarbo, one of Tibet’s most sacred mountains.111

In August of 2012, 1,000 Tibetans in Markham County (TAR) protested at a mining site that they said was environmentally hazardous. Chinese security responded by firing tear gas and live rounds into the crowd, resulting in the death of one protestor.112 In May of 2013, 5,000 Tibetans in Driru (TAR) protested against mining activities in an area that they consider sacred.113 Most recently, in August of 2013, 4,000 Tibetans protested against diamond mining in Gedrong Zatoe County (Qinghai province).114 At least 500 Chinese security personnel responded by firing tear gas into the crowds, injuring at least eight individuals.115

Such protests and self-immolations indicate not only the long-building and ongoing Tibetan discontent, they also demonstrate policy failure. However well intentioned the Chinese government-sponsored Western Development policies may have been, the protests and self-immolations are a clear signal that China has failed to bring about sufficient socioeconomic opportunities for Tibetans. Making matters worse is the fact that the protests and self-immolations have occurred despite vigorous efforts by the Dalai Lama and his representatives to prevent Tibetan unrest by engaging the Chinese government over issues not just of political autonomy, but also those relating to education, migration, and the economy, among others.116

Having successfully completed the Qinghai-Tibet railway in July 2006, China is now constructing additional railway networks and other infrastructure projects throughout Tibet.117 The result will be further integration of Tibet not only to the Chinese economy but also the larger South Asian

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116. See Memorandum on Genuine Autonomy for the Tibetan People, INT’L CAMPAIGN FOR TIBET (2008), https://www.savetibet.org/policy-center/memorandum-on-genuine-autonomy-for-the-tibetan-people/ (the latest iteration elaborating upon issues that have been presented from the beginning of the Sino-Tibetan dialogue starting with *Five-Point Peace Plan and the Strasbourg Proposal of 1988*).
117. This is the first railway to link eastern China to the western Tibetan areas.
markets. Explicitly stated reasons for the railway construction are tourism and resource extraction. As tourists increasingly roam the streets of Lhasa and beyond, and Tibet’s more than 3,000 mineral reserves are extracted, investment in other areas of the economy is sure to occur simultaneously. This will result in an opening of Tibet’s markets allowing for further private sector involvement not only for Chinese companies (State-owned and private), but also in the form of foreign direct investment.

These business opportunities hold out the potential to bring great benefit to Tibetans so long as they are pursued in a way that does not continue to exclude Tibetans from the fruits of economic growth. A model of development that further increases educational and economic gaps for Tibetans, disrespects their religious and cultural customs, and disregards the need to seek their consultation and consent for investment projects will only deepen social disharmony. Therefore, Tibetans must be empowered to make the major decisions that drive development in Tibetan areas. Unless a new strategy is pursued that allows for the needs and views of Tibetans to be addressed and integrated, feelings of Tibetan dispossession and marginalization will only worsen with more Tibetan protests, uprisings and self-immolations to follow, thus undermining not only China’s highly desired social stability, but also the ability for companies to have stable operations that are free from protests.

118. Mount Everest is Singing for Joy, supra note 95.
119. Work Starts on Tibet Railway Extension, RAILWAY GAZETTE (Sept. 30, 2010), http://www.railwaygazette.com/nc/news/single-view/view/work-starts-on-tibet-railway-extension.html (quoting the Minister of Railways Liu Zhijun as saying, the railway “will play a vital role in boosting tourism in the southwestern part of Tibet and promoting the rational use of resources along the line”).
120. Tracking the Steel Dragon, supra note 44, at 21 n.44 (“A report published by China Bidding stated that the Chaida’er-Muli Railway control project was launched ‘recently’ in Gangcha County in Qinghai province, involving a total length of 142.04 km. ‘Two years later, the transportation capacity of coal of Chaida’er-Muli Railway will increase to 14 million tonnes, and the coal reserves along Chaida’er-Muli Railway is 3.3 billion tonnes.’”) (quoting China Bidding, April 28, 2006, available at www.chinabidding.com).
123. China’s Money and Migrants Pour into Tibet, supra note 96.
124. There is also the possibility that factories in eastern China will move westward as wages on the eastern seaboard are viewed as too high; this opens up the prospect of manufacturing moving to Tibet once the transportation infrastructure is in place. See, e.g., David Barboza, China Shifts Away from Low-Cost Factories, N.Y. TIMES (Sept. 15, 2010), http://www.nytimes.com/2010/09/16/business/global/16factory.html (noting that in an effort to seek lower costs, “some Pearl River Delta factories are relocating to poor inland regions of China where wages are as much as 30 percent lower than in coastal provinces.”).
125. For an example from Peru of proactively engaging with stakeholders to identify small problems before they turn into big problems see JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013) at xxxvi-xliii [hereinafter Just Business].
CSR offers one potential solution in which Tibetans can take advantage of much needed and wanted development and business can flourish amid new markets and opportunities. The end result is the possibility for a win-win solution in which the interests of Tibetans, the foreign and domestic business community, and by extension, the Chinese government, can all be served.

II. CSR Defined

CSR is often subject to misunderstanding because its meaning is intensely debated. This confusion can be attributed to an evolving definition where each user often defines CSR differently. Even so, an emerging consensus defines CSR not as peripheral add-on activities or one-off exercises such as public relations, marketing, or philanthropy, but as going to the core ways in which a company operates and makes business decisions.

At its most fundamental level, CSR involves the methods and business practices through which a company addresses its social and environmental impact by integrating respect for internationally recognized human rights and environmental sustainability standards into company management decisions and core operations.

In more basic terms, CSR addresses the ways in which a company not only spends its money, but also how a company makes that money. CSR involves both sides of this coin because even if a company has great philanthropic initiatives, such largess will ring hollow if the company’s profits are secured in an irresponsible manner, as attempts to offset irresponsible behavior through philanthropy will be viewed by stakeholders as untenable. To achieve these measures CSR typically employs the concurrent use of several tools, each of which can be amplified at different levels depending on the needs of the individual situation.

These tools include:

- **Integrated Decision Making.** Those in charge must consider environmental and social issues in addition to economic considerations.

- **Stakeholder Engagement.** The practice of engaging all stakeholders
Corporate Social Responsibility

within a corporation’s sphere of impact\textsuperscript{132} about environmental and social issues.

\textit{Transparency.}\textsuperscript{133} The notion that corporations must provide public reports and disclose material information on the environmental and social impact of their company’s operations within their sphere of impact.

\textit{Consistent Best Practices.}\textsuperscript{134} The custom of a corporation consistently applying the highest social and environmental standards to all business operations irrespective of the global business location.

\textit{The Precautionary Principle.}\textsuperscript{135} The idea that even in the absence of conclusive scientific evidence pointing toward serious and irreparable harm, corporations must take precautionary measures within their sphere of impact; and when corporations desire to promote a potentially harmful project/product, they have the onus of proving the harm is socially acceptable.

\textit{Accountability.}\textsuperscript{136} The simple notion that corporations—and those responsible for corporate decisions—must be held accountable for the social and environmental harms they create and for breaches of their own proclaimed ethical standards. And finally,

\textit{Community Investment.}\textsuperscript{137} The notion that corporations must contribute to the social, cultural, economic, and/or environmental enrichment in the communities in which they operate.

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\textsuperscript{132} Defined by the author as the areas of a company’s business activities and relationships in which it has a direct impact. With respect to business activity, this would involve a company analyzing its potential and actual impacts arising from its own activities on groups such as employees, communities, and consumers. It would determine which policies and practices may harm human rights and the environment and adjust those actions to prevent harm from occurring. Examples of activities with direct impact might include the production process itself; the products or services the company provides; its labor and employment practices; the provision of security for personnel and assets; and the company’s lobbying or other political activities. With respect to business relationships, a company would work to ensure that it is not implicated in third party harm to human rights/environment through its relationships with such parties. This possibility can arise from a company’s business activities, including the provision or contracting of goods, services, and even non-business activities, such as lending equipment or vehicles. Therefore, a company would need to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm caused by entities with which it conducts, or is considering conducting business or other activities. This analysis of relationships would also include looking at instances where the company might be seen as complicit in abuse caused by others. For more on this, see Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, ¶¶ 5-25, U.N. Doc. A/HRC/8/16 (15 May, 2008), available at [http://www.business-humanrights.org/Links/Repository/446573/jump](http://www.business-humanrights.org/Links/Repository/446573/jump) (wherein John Ruggie states why he disfavors the commonly used UN Global Compact phrase “Sphere of Influence”).

\textsuperscript{133} Pitts, \textit{supra} note 126, at Ch. 7.

\textsuperscript{134} \textit{Id.} at Ch. 8.

\textsuperscript{135} \textit{Id.} at Ch. 9.

\textsuperscript{136} \textit{Id.} at Ch. 10.

\textsuperscript{137} \textit{Id.} at Ch. 11.
These tools are interdependent and mutually reinforcing, each building off one another. As the authors of Corporate Social Responsibility: A Legal Analysis write in explaining how these tools work together in conjunction:

The principle of integrated, sustainable decision-making represents a body of knowledge, skills, and an attitude or frame of mind that sets the stage for effective implementation of all the other principles. It promotes the corporation to take a system perspective, assessing business value not merely from a truncated financial point of view, but also considering the more holistic ‘triple-bottom-line,’ which takes non-financial, social, and environmental results into account. Stakeholder engagement … provides an important pathway and methodology for strengthening those triple-bottom-line results. The principle of transparency is both a key expectation forming a prominent feature of the new global business landscape, and an enabler of all the other principles. The principle of consistent best practices emerges as a result of the first three principles…forming a substantive core of standards that in turn will continue to evolve along with the other CSR principles. Like all the other principles, the precautionary principle puts a healthy check on what could otherwise be imprudent action. But if it and the others fail, the accountability principle steps in as the final incentive for the business to ‘walk its talk.’ Community investment…is perhaps the principle most subject to future evolution, promoting business not just to avoid harm but to invest resources in helping to address pressing social and environmental challenges.138

a. Business and Human Rights Under the UN Framework

In 2005, then Secretary-General Kofi Annan appointed Harvard University Professor John Ruggie as Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, with the mandate of creating a new global framework for business and human rights.139 Starting in 2005, Ruggie released several annual reports relating to various aspects of his mandate.140 In 2008 he released the first iteration of his three-pillar “Protect, Respect, and Remedy” framework, which the UN Human Rights Council adopted unanimously.141 Ruggie re-

138. Id. at 536.
139. Just Business, supra note 125 (offering Ruggie’s account of the process of his mandate and the results it produced).
140. For the collection of Ruggie’s work pursuant to his mandate see http://www.business-humanrights.org/SpecialRepPortal/Home.
fined the framework in subsequent reports and submitted his final report, the UN Guiding Principles for Business and Human Rights, to the UN Human Rights Council in March 2011.\footnote{142} In June 2011, the Human Rights Council—whose membership included China—endorsed the principles unanimously.\footnote{143} As such, the UN framework and Guiding Principles represent the first instance in which the UN has provided an authoritative global reference point for business and human rights.\footnote{144}

The UN framework rests on three independent yet mutually reinforcing pillars. These include:

…the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which includes acting with due diligence to avoid infringing on the rights of others, and to address such adverse impacts as may occur; and greater access to effective remedies by victims, judicial and non-judicial.\footnote{145}

The framework therefore looks at the relationship between the State and the corporation with an eye toward avoiding human rights abuses at the hands of business, along with what to do when situations go awry and abuses arise.

Under the first pillar, Ruggie explains that States must protect against human rights abuses within their territory and/or jurisdiction by third parties, including companies. This includes: enforcing laws that require businesses to respect human rights; ensuring that other laws and policies that govern the creation and ongoing operation of companies (e.g. corporate law) do not constrain but enable business respect for human rights; providing effective guidance to companies on how to respect human rights throughout their operations; and encouraging and, where appropriate, requiring, companies to communicate how they address their human rights impacts.\footnote{146}

\begin{footnotesize}


146. Special Representative of the Secretary-General on the Issue of Human Rights and Trans-
In the case of State-owned business enterprises, Ruggie explains that States must take additional steps to protect against human rights abuses. He writes:

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations.\textsuperscript{147}

Furthermore, Ruggie notes that State-owned companies are also subject to the corporate responsibility to respect, which includes requiring State-owned companies to engage in human rights due diligence, discussed below.

Under the second pillar, Ruggie states that corporations must avoid causing or contributing to adverse human rights impacts through their own activities, and address those impacts when they occur. In addition, companies must seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.\textsuperscript{148}

Ruggie offers \textit{human rights due diligence} as the method through which companies can achieve this goal.\textsuperscript{149} His conception of this has four main parts, which are not to be viewed as one-time activities, but as sustained and ongoing throughout a company’s existence.\textsuperscript{150} Human rights due diligence must include:

\begin{itemize}
  \item …a statement of policy articulating the company’s commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance.\textsuperscript{151}
\end{itemize}


\textsuperscript{147} Ruggie, 2011 report, supra note 146, at 9.
\textsuperscript{148} Id. at 14.
\textsuperscript{149} Id. at 16.
\textsuperscript{150} Ruggie, 2010 report, supra note 145, at 17.
\textsuperscript{151} Ruggie, 2011 report, supra note 146, at 16-17; Ruggie, 2010 report, supra note 145, at 17.
affected groups and other relevant stakeholders. Additionally, Ruggie notes that conducting human rights due diligence is context-specific, where the goal is “to understand the specific impacts on specific people, given a specific context of operations.” Furthermore, to undertake accurate human rights due diligence, Ruggie urges companies to understand the concerns of potentially affected stakeholders by consulting them directly in a way that takes into account language and other potential barriers to effective engagement.

When carrying out human rights due diligence assessments, Ruggie urges companies to use as a reference point all internationally recognized human rights instruments. At a minimum, this includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, along with the International Labor Organization core conventions. In addition, Ruggie states that companies will need to consider additional UN human rights standards for projects that affect groups of people who are “at-risk or vulnerable” (e.g. “indigenous peoples”).

Companies should look to these various human rights instruments even when they do not necessarily impose direct legal obligations because, as Ruggie notes, “companies can and do infringe on the enjoyment of the rights that these instruments recognize [and] those rights are the baseline benchmarks by which other social actors judge companies’ human rights practices.”

b. The Business Case for CSR: Positive and Negative Drivers

At the present moment, most CSR concepts are grounded in law, but the level of grounding differs for each of the above-mentioned tools and by global location, with some countries having strong legal mandates and others having virtually none. In Europe, CSR’s presence and acceptance seem strongest, whereas it is in a relatively nascent state in the United States. In

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153. Id.
154. Id. at 18.
155. Ruggie, 2010 report, supra note 145, at 13 (“Because companies can affect virtually the entire spectrum of internationally recognized rights, the corporate responsibility to respect applies to all such rights.”).
156. Id.
157. Id. (internal quotations omitted).
158. Id. See also Pitts, supra note 126, at Ch. 2 (discussing the various drivers of CSR).
Asia and elsewhere in the developing world the opportunities for CSR creation are vast; but as will be discussed below, China has legislation requiring CSR. However, even where CSR is not legally mandated, a wise company should err on the side of caution so as to maintain its “social license to operate.”

As corporations occupy an increasingly large role within everyday life, they face pressure from a variety of arenas to act responsibly. These drivers of CSR can be categorized as positive drivers and negative drivers, though many overlap and could exist in both.

i. Positive Drivers

There are mixed views on what one may term “the business case for CSR,” in that it is unclear whether the relationship between CSR and profitability exists, and if so, whether that relationship is causal. Even so, there are drivers related to what is often termed “enlightened” self-interest.

Risk Management. Companies are increasingly beginning to understand that utilizing CSR principles helps them to avoid risk. Among others, this risk can take the form of legal compliance, regulatory costs, litigation, and the need to maintain a social license to operate.

Employee Recruiting, Retention, and Morale. There is evidence that employees increasingly want to work for responsible companies and therefore seek out those that have a reputation for having strong CSR practices. Related is the idea that employees who value CSR will stay at companies longer, allowing for greater employee morale and therefore greater retention.

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160. See supra Part III(a)(i).
161. While there is not yet an agreed-upon definition, it is often said that “a social license to operate” derives not from a government or legal body, but rather only from broad acceptance of a company’s activities by society or local communities. Without this endorsement, a business may not be able to operate without incurring serious delays and costs. For a fuller discussion, see supra note 125, at 10, 17, 18, 94, 138.
162. See Elizabeth C. Kurucz, Barry A. Colbert & David Wheeler, The Business Case for Corporate Social Responsibility, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 83 (Andrew Crane et al. eds., 2009) (discussing the mixed data in this area); see also Joshua Margolis & Hillary A. Elfenbein, Do Well by Doing Good? Don’t Count on It, 86 HARV. BUS. REV. 19 (Jan. 2008) (describing results of the largest meta-study looking at the relationship between CSR and profitability, in which the authors found a slight positive correlation).
164. See e.g. Cone Communications, 2006 Millennial Cause Study, available by request at http://www.conecomm.com/2006-millennial-cause-study (discussing the millennial generation and its attitudes toward companies. Among other things, the study found that nearly eight out of ten want to work for a company that cares about how it contributes to society, while more than half would refuse to work for an irresponsible corporation).
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**Cost Savings.** Similarly, by retaining employees, companies can reduce the costs associated with hiring and training new employees. Moreover, some companies believe that CSR makes them more innovative and therefore profitable. As the clothing giant Gap, Inc. has stated:

> When factories treat workers well, they also tend to produce a higher-quality product and deliver it on time. The more we respect and empower our own employees, the more creative and innovative our products and marketing tend to be.\(^{165}\)

**Moral Imperative.** A smaller number of companies argue that there is a need to be responsible for CSR/sustainability purposes or otherwise. Typically these companies have been engaging in CSR for years because of forward-thinking leaders who believe deeply in the benefits of CSR.\(^{166}\)

**Competitive Advantage.** If CSR is adopted, it can then serve to give the individual company a competitive advantage over its peers. Its marketing department can vigorously promote the company’s commitment to CSR to increase customer loyalty and profits.

**Value Creation.** Looking more broadly at the business case, corporations must realize (as some have) that they exist not only to make a profit but also to create broader types of value within society. Through the production of their product(s) or offering of their service(s), corporations are always meeting a societal need and in doing so creating social value. The key is for the individual corporation to ask itself the following question: in meeting that societal need, how can the corporation maximize social value and minimize societal harm for all affected community members, recognizing the corporation is an integral part? From this perspective, the individual company can begin to understand that so long as the social need it is addressing is met in the most socially beneficial way, the end result will be that when the community benefits, so does the company.

**ii. Negative Drivers**

**Reputation/Brand Image.** The preservation of a positive brand image and/or reputation is crucial for many corporations, as it keeps afloat customer loyalty and by extension a social license to operate. While it may not be possible to quantify the effect of CSR (or a lack thereof) on a company’s brand, there certainly are tangible results.\(^{167}\)

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165. Pitts, *supra* note 126, at 42.
166. Examples include: Ben and Jerry’s, Burt’s Bees, Newman’s Own, Patagonia, Stonyfield, Timberland, and Tom’s of Maine, among others.
167. Recall the infamous story of Kathy Lee. The National Labor Committee alleged that Lee’s
Civil Society and NGO Pressure. As NGOs rise to alleviate unmet societal needs, one of their tactics for promoting social change is to target the transgressions of corporations. NGOs benefit from specialized expertise and a focus on single issues. The scope of NGOs’ impact on the corporate environment can be attributed to their efficiency in utilizing inexpensive, efficient web tools that enable them to instantly mobilize a global army of stakeholders with the mere click of a mouse. As such, NGOs have become effective in placing pressure on corporations and in many instances corporations have been forced to change behavior the NGOs or community finds objectionable.

Social Media and Technology. Related, individuals around the world increasingly have at their disposal technological tools with which to document human rights/environmental abuses and corporate misconduct. Coupled with the explosion of social media, this means that companies face growing pressure to be transparent and responsible. Consequently, irresponsible companies will increasingly find it more difficult to hide their wrongdoings, as activists and consumers will challenge them by exposing their bad corporate behavior on the Internet.

An example of an American company and its poorly thought out behavior toward Tibetans is illustrative. In February of 2011, the coupon company Groupon ran a series of commercials during the Super Bowl with the purported goal of raising awareness about its Save the Money campaign, an effort to donate money to charitable causes. One of its commercials instructed consumers to support Tibetan restaurants and thereby Tibetans themselves. However, the ad missed its intended mark and...
deeply offended many viewers because it suggested that the suffering of Tibetans is acceptable so long as consumers can eat cheaply in their restaurants. Consequently, consumers took to social media and criticized the company. Some announced their departure as customers; others demanded corporate contrition. Within four days of the advertisements airing, and under mounting pressure, Groupon’s CEO issued a public apology and retracted the ad. In the end, Groupon had spent several million dollars airing its ads and yet lost countless customers because of its faux pas.

Litigation. As corporations increase their presence in people’s lives, so too will litigation aimed at keeping companies in line. In addition to being hugely distracting, human rights and environmental-related litigation can be expensive, as it costs the company money both in trial and settlement. These cases can protract for years and even decades. One can only imagine how long BP will be in court dealing with the aftermath of the US gulf-coast oil spill disaster.  

175. Note the litigation between a California citizen and Nike over allegations that Nike engaged in false advertising and misrepresentation about working conditions in its factories. After a five-year court battle, the suit settled with Nike paying out 1.5 million. Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002).  
176. The Exxon Valdez oil spill occurred in 1989, and it was not until 2008, almost 20 years later, that the Supreme Court finally ruled on the amount of punitive damages Exxon owed. See Frank Langfitt, Supreme Court Cuts Damages in Exxon Valdez Spill, NPR.ORG (Jun. 25, 2008), http://www.npr.org/templates/story/story.php?storyId=91881057.  
177. See, e.g., Are the Odds Against BP in Appeal Over Damage Claims?, PBS NEWSHOUR (July 9, 2013), http://www.pbs.org/newshour/bb/nation/july-dec13/bp2_07-09.html; Jef Feeley, BP Seeks to Halt Some Gulf Oil-Spill Settlement Payments, BLOOMBERG (April 1, 2013), http://www.bloomberg.com/news/2013-04-01/bp-seeks-to-halt-some-gulf-oil-spill-settlement-payments.html (noting that “the [BP settlement] resolved most private plaintiffs’ claims for economic loss and property damage related to the explosion of the Deepwater Horizon rig in April 2010 and the ensuing spill…. [But it] excludes claims of financial institutions, casinos, private plaintiffs in parts of Florida and Texas, and residents and businesses claiming harm from the Obama administration’s moratorium on deep-water drilling prompted by the spill. It also doesn’t cover federal government claims and those of Gulf Coast states Louisiana and Alabama, or lawsuits against co-defendants.”).
Consumer Pressure. In a world that is ever captivated by international issues (poverty, disease, climate change and its related weather disasters, etc.), consumers are increasingly looking for ways to “vote with their wallets” when business practices are seen to contribute negatively to these issues. Companies are aware of these consumer desires and therefore the need to be “green” and socially responsible. Many are now taking steps (genuine and otherwise) to be better environmental stewards and/or CSR advocates. Moreover, given rising attention to conditions in factories around the world, many brands are being forced to disclose more information about their sourcing practices and improve conditions that do not meet minimum human rights standards.

Government Mandates. Regulations governing CSR differ by country and by sector. Some countries require CSR, but most only mandate some element of it. It is beyond the scope of this article to offer a global survey of CSR regulations; however, suffice it to say that CSR laws will inevitably increase as corporate scandals emerge. For example, the United States passed financial reform shortly after its economic recession hit its nadir in the fall of 2008. Such domestic CSR laws will undoubtedly draw from international CSR norms in general, and the UN Guiding Principles in particular. Thus, given that these norms and principles will increasingly be embedded in State, national, and international legislative and regulatory frameworks, sophisticated and prudent companies are taking measures “to get ahead of the legal curve.”

Discussing these above-listed drivers in combination, John Sherman, Senior Fellow at the Corporate Social Responsibility Initiative at Harvard’s University’s Kennedy School of Government and a member of Ruggie’s team, puts forth reasons for why using CSR, particularly human rights due diligence, is beneficial for companies. Sherman notes that from a broader company perspective, human rights due diligence should be viewed as


180. See, e.g., Stephanie Clifford, Some Retailers Say More About Their Clothing’s Origins, N.Y. TIMES (May 8, 2013), http://www.nytimes.com/2013/05/09/business/global/fair-trade-movement-extends-to-clothing.html (discussing how the factory fire that killed 1,127 factory workers in Bangladesh is forcing brands to be more transparent about sourcing practices).


182. See, e.g., Mark Nordstrom, Myanmar (formerly Burma) and Human Rights, GE CITIZENSHIP BLOG (Feb. 12, 2013), http://www.gecitizenship.com/blog/2013/02/ myanmar-formerly-burma-and-human-rights/ (giving an example of a company that adheres to the UN Guiding Principles because as “a business enterprise, under the UN Guiding Principles, GE is obligated to respect human rights” [and] “as a practical matter, [because] governments around the globe are enacting regulations and statutes that are turning human rights into hard law”).
proactive risk management where the goal is to create a stable operating environment and thus retain cost savings. He writes:

[In order to exercise human rights due diligence, Ruggie] has noted that a company should engage with those who might be adversely affected by the company’s operations in order to determine those potential impacts and how best to address them. Due diligence is not a unilateral company exercise but a two-way conversation. . . . Viewed wholly from a shareholder perspective, the risks of infringing on human rights can cost a company big money, and so should be included in any company risk analysis. As . . . [Ruggie] . . . noted in his 2010 report to the UN Human Rights Council, a study of the oil and gas industry found that the risks to exploration from disputes between oil explorers and external stakeholders has been growing much faster than the technical risks of getting oil out of the ground. And one oil & gas company estimated that over a two-year period, it lost $6.5 billion in value from such “above ground” disputes with communities. These disputes can cause disruption and delay in financing, construction, and operations, greatly distract senior leaders’ attention, swiftly trash a company’s reputation, and lead to the loss of its legal and social license to operate. And that list doesn’t include the obvious risk of litigation, which is hugely expensive and distracting regardless of who wins. 183

III. APPLYING CSR TO TIBET

In the Tibetan context, using all of the above-mentioned CSR tools is vital, but two tools in particular deserve special focus: stakeholder engagement and community investment.

a. Stakeholder Engagement

When a company, whether State-owned, private, or foreign, wishes to start a new investment or improve upon an existing operation, stakeholder engagement is crucial. It allows the company to understand how the business opportunity will be received in the community in which it will take root and the associated benefits and challenges. If done properly, it can allow the investment to occur in ways that meet the concerns and desires of both the company and the community of stakeholders with the end result of maximizing social value while minimizing societal harm.

Tibet is no different than any other locale in that Tibetans want to have agency and a voice in determining how business investments where they live will transpire. Therefore, companies seeking to do business in Tibet must engage Tibetans around the best ways to approach the business opportunity in each local Tibetan area. The goal is to create a space in which Tibetans can be active, ongoing participants whose consultation and consent is a prerequisite to the creation, implementation, and monitoring of any business opportunity which affects them. The key is to produce mechanisms for stakeholder engagement that focus on the importance of utilizing local knowledge to create successful business ventures. As noted above, Ruggie states that conducting human rights due diligence (by utilizing stakeholder engagement) must be context-specific, and must take into account differences in local language. Therefore, a business plan designed in Lhasa for a Tibetan community will not work for a Chinese community in Shanghai; similarly those plans developed in Beijing will not work in Shigatse. Rather, successful plans must grow out of the area in which they will later operate and must therefore be location-specific. For many companies in China this is a new concept; for others there is a desire to learn how to use international best practices to respect human rights. In either

184. See discussion infra, Part III(A)(2) (companies operating in Tibet should be using Free, Prior, and Informed Consent (FPIC) as they pursue their investments).
185. The process of identifying relevant stakeholders (what is often referred to as “stakeholder mapping”) can be complex and challenging. As Ruggie indicates in his 2011 report, supra note 146, companies should draw on internal and/or external independent human rights experts in order to assess any actual or potential human rights impacts. For Tibet, this necessarily means creating partnerships between outside experts and local Tibetans who together can map out the relevant stakeholders for a given business venture.
187. This necessarily means that stakeholder engagement in Tibet must be conducted in whatever language/dialect the local Tibetan population speaks.
case, utilizing this concept is vital for business ventures to maximize the chance for success.

The promotion of stakeholder engagement can be found in numerous sources, but those most applicable to Tibet are found in both Chinese and international law and norms.

i. Chinese Legal Sources for CSR and Stakeholder Engagement

The emergence of Chinese CSR law must be understood within the context of socioeconomic challenges associated with economic development, cultural values and norms, and China’s desire to be part of global economic norms. These challenges (including, among others, land confiscation by companies and local governments, the release of unsafe products into the marketplace, illegal labor practices, and uncontrolled pollution) have led to increased protests and unrest throughout the country.190 According to Chinese data, these “mass group incidents”—which include all types of group protests from sit-ins, strikes, group petitions, rallies, demonstrations, marches, traffic-blocking and building seizures, public melees, riots, and inter-ethnic strife—have ballooned from about 8,700 incidents in 1993, to 32,000 in 1999, to about 50,000 in 2002, surpassing 58,000 in 2003,191 and to 87,000 in 2005.192

In an effort to alleviate this social tension, the government (in addition to passing new legislation and promoting economic and social programs) began a public campaign for Social Harmony in 2005.193 From a cultural perspective, this campaign signaled a desire to restore order and balance within the country by drawing on the traditional Confucian values of social harmony.194 Toward this end, Chinese business leaders began to view CSR as a central tool to utilize in this effort.195 Also at play was Chinese awareness about the need to align China with global business developments or during which a Chinese company indicated that, due to a lack of experience, Chinese companies must attend these types of conferences to learn how to manage their human rights impacts.


193. China Begins to Take Corporate Social Responsibility Seriously, supra note 190, at 3.


195. China Begins to Take Corporate Social Responsibility Seriously, supra note 190, at 3 (noting that at a 2006 CSR conference in Beijing, “the honorary chairman of the China Daily CEO Roundtable remarked that ‘the concept of a harmonious society is really China’s rephrasing of the concept of CSR, sustainable development and human rights in China’”).
else risk diminishing China’s competitive advantage, as failing to embrace CSR could result in a variety of sanctions.\textsuperscript{196}

Out of this confluence of forces came two sources\textsuperscript{197} of Chinese law that promote CSR principles in general, and stakeholder engagement in particular. The first source applies to those companies that are listed in the Chinese Securities Market, while the second applies to Chinese State-owned companies.

The first source, Chapter 6 of the Code of Corporate Governance for Listed Companies\textsuperscript{198} requires that companies respect the interests of stakeholders. The English translation reads:

Chapter 6. Stakeholders

81. A listed company shall respect the legal rights of banks and other creditors, employees, consumers, suppliers, the community and other stakeholders.

82. A listed company shall actively cooperate with its stakeholders and jointly advance the company’s sustained and healthy development.

83. A company shall provide the necessary means to ensure the legal rights of stakeholders. Stakeholders shall have opportunities and channels for redress for infringement of rights.

84. A company shall provide necessary information to banks and other creditors to enable them to make judgments and decisions about the company’s operating and financial situation.

85. A company shall encourage employees’ feedback regarding the company’s operating and financial situations and important decisions affecting employees’ benefits through direct communications with the board of directors, the supervisory board and the management personnel.

86. While maintaining the listed company’s development and maximizing the benefits of shareholders, the company shall be concerned with the welfare, environmental protection and public interests of the community in which it resides, and shall pay attention to the company’s social responsibilities.

\textsuperscript{196}Current Status and Future Evolution, supra note 194, at 399 (discussing these potential sanctions as consumer boycotts, divestment actions, and trade sanctions).

\textsuperscript{197}There are additional sources of CSR laws in China; however, the ones presented here are those that are accessible to the author and/or available in English. See infra note 202.

While this code contains broad pronouncements that are vague as to implementation, it is encouraging because all companies listed in China must not exclusively focus on shareholder primacy, as western countries often demand, but instead also engage with the full range of their stakeholders, including Tibetans for those companies operating in Tibet.

The second source of law is the revision of the Company Law of the People’s Republic of China, which took effect on January 1, 2006. Article 5 requires companies to comply with “social morality and business morality” and to “bear social responsibilities.” On January 4, 2008, this general CSR prescription was strengthened through implementation guidelines issued by the State-owned Assets Supervision and Administration commission (SASAC), the Chinese oversight organization for State-owned enterprises. The guidelines reinforce the overarching need to develop a harmonious society through the use of CSR. Section 2(7) states that integrating CSR into business practices will help “build a harmonious relation between the enterprise and its employees . . . [and] . . . contribute to the China’s [sic] undergoing program of building a harmonious society.”

Stakeholder engagement is placed at center stage in sections 3(9) and 4(18). Section 3(9) states that corporate governance should be improved through “democratic decision-making” and section 4(18) requires “...a regular communication and dialogue mechanism concerning CSR...[to]... be established, so that the enterprise can have feedback from its stakeholders and give its response quickly. All the information and feedback should be publicized to receive supervision from stakeholders and society.”

It goes without saying that what will give the above legislation value and meaning is proper implementation and enforcement, and it is unclear to what extent this has occurred. Widespread problems are frequently encountered in factory settings in China, suggesting that implementation and enforcement will be challenging. For example, CSR codes of conduct are normally used, “but double-bookkeeping, fraud, and audit manipulation and evasion are common.” At the same time, however, having the outer


201. Id.

202. Chinese CSR law is not limited to these two. See China Begins to take Corporate Social Responsibility Seriously, supra note 190, at 12-13 (discussing other laws related to Foreign Invested Enterprises, Banking, etc.).

203. There may be secondary sources in Chinese that evaluate this; however, nothing in English could be located that provides insight into this area.

204. Current Status and Future Evolution, supra note 194, at 398. See also Dexter Roberts et al., Secrets, Lies and Sweatshops, BUSINESSWEEK (Nov. 27, 2006), http://www.businessweek.com/stories/2006-11-26/secrets-lies-and-sweatshops (discussing the extensive fraud some Chinese factories engage in so as to prevent auditors from uncover-
parameters of the legal framework in place is a significant first step toward CSR promotion and practice and something that very few western countries have achieved.205 The existence of these Chinese laws should allow for a harmonization with the international legal concepts of stakeholder engagement discussed below, and thus utilization in the Tibetan context.

ii. International Law: Free, Prior, and Informed Consent

In human rights terms, stakeholder engagement is often referred to as Free, Prior, and Informed Consent (FPIC): the principle that a community has the right to give or withhold its consent to proposed projects that may affect it.206 “Consent must be freely given, [acquired] prior to implementation of activities and be [established] upon an understanding of the full range of issues implicated by the activity or decision in question.”207 FPIC is found in several international regulatory instruments, some of which China has ratified and others to which China is not yet a party.

*International Convention on the Elimination of All Forms of Racial Discrimination*

FPIC is addressed in the International Convention on the Elimination of All Forms of Racial Discrimination, to which China is a member country.208 Like other conventions, this treaty has a committee body—the Committee on the Elimination of Racial Discrimination (CERD)—that offers general recommendations and comments as authoritative interpretations of the treaty’s meaning. Although these do not have binding legal effect, they are nevertheless instructive as to the ways the treaty should be utilized and implemented. CERD therefore provides a legal basis for the obligation of China, Chinese companies, and foreign investors to adopt an FPIC approach to investment in Tibet.

205. For example, Denmark recently passed legislation that requires companies to report on their CSR efforts. See *Law on CSR Reporting*, *infra* note 181; Danish Commerce and Companies Agency, *About the Danish Law: Report on Social Responsibility for Large Businesses* (2008), www.eogs.dk/graphics/Samfundsansvar.dk/dokumenter/about%20the%20Danish%20law.pdf.


In 1997, CERD offered general recommendations on State obligations and indigenous rights with respect to FPIC by calling upon States to “ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”

CERD elaborated upon indigenous rights under FPIC in a series of decisions relating to specific countries. When discussing Australia in 2000, for example, it recognized indigenous peoples’ right to “effective participation … in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples.” Furthermore, in subsequent years CERD stated that:

As to the exploitation of the subsoil resources located subjacent to the traditional lands of indigenous communities [in Ecuador], the Committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in the Committee’s General Recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured…

[in the case of Guatemala] [T]he Committee notes with concern that mining licences have been granted by the Ministry of Energy and Mines to concession enterprises and regrets that indigenous peoples were not consulted or informed that the permission to exploit

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The Committee recommends that when taking decisions having a direct bearing on the rights and interests of indigenous peoples the State party endeavour to obtain their informed consent, as stipulated in paragraph 4(d) of its general recommendation 23 . . . [212]

[and in the case of Guyana] . . . that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee’s General Recommendation No. 23[;]213 [and that] the State party undertake environmental impact assessments and seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities.214

While these individual decisions relate to incidents in specific countries, they suggest that China, like other countries with indigenous populations, has an obligation to consult Tibetans and to share the benefits of mineral extraction with them.

*International Labor Organization Convention No. 169*

Perhaps the most well-known source of international law containing the FPIC principle is the International Labor Organization Convention No. 169 (ILO-169).215 As part of the ILO’s labor standards, this convention specifically addresses the rights of indigenous peoples.216 The convention re-

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214. Id. at ¶ 19.


216. As stated below, China is not a signatory to ILO 169. However, ILO 169 provides the most comprehensive definition of indigenous peoples, which broadly reflects customary international law. Indigenous is defined in relevant part as: “... peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of...the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” C169, supra note 215, at Article 1(1). See Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, U.N. Doc PFII/2004/WS.1/3 (Jan. 19-21, 2004). See also Amy K. Lehr and
requires a commitment to good faith negotiations, cooperation, and consent when States are interacting with indigenous peoples. Article 7(1) speaks broadly of the right for indigenous peoples to determine their development priorities:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.217

Moreover, with respect to land and resource exploitation, Articles 15(2) and 6(2) can be read in conjunction. Article 15(2) mandates that governments:

[E]stablish or maintain procedures through which they shall consult [indigenous peoples] . . . with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities. 218

Article 6(2) requires that this consultation process be carried out “…in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent.”219

While China is a member of the ILO,220 it has not yet signed and ratified ILO-169,221 and thus does not have a legal duty to comply with ILO-169. However, the Convention is a “persuasive authority” for non-member

Gare A. Smith, Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges 10 (Foley Hoag LLP eds., 2010), http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx [hereinafter Implementing FPIC] (“[T]he development of rights specifically for indigenous peoples is due to the need to address the historic marginalization of indigenous peoples in many societies, including a failure to recognize their historical use of land and a lack of opportunity for them to participate meaningfully in national political systems due to geographic, linguistic, and cultural barriers.”).
218. Id. at Article 15(2).
219. Id. at Article 6(2).
countries with respect to FPIC. Furthermore, as noted above under Ruggie’s second pillar, companies have the responsibility to respect all internationally recognized human rights; and China’s endorsement of the UN Guiding Principles indicates its implicit expectation that companies operating inside its borders will respect human rights. When this is taken in combination with the principle of consistent best practices (from the CSR tools laid out above), domestic and foreign companies operating in Tibet must take ILO-169 into consideration both prior to and during an investment undertaking. Not doing so—that is, adhering to the principles of the Convention in an ILO member country while denouncing them when operating in non-member country—has the potential to undermine a company’s brand/reputational image; and, its social license to operate may be adversely affected both in China and abroad. The reason is simply because as FPIC increasingly becomes accepted as a global standard, Tibetans (in Tibet and abroad) may question why ILO-169 does not apply to them and may protest over its lack of utilization in Tibet.

UN Declaration on the Rights of Indigenous Peoples

Another legal instrument that suggests an obligation for China to create a process for consulting and gaining consent of the Tibetan community in connection with direct investment in Tibet is the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples (DRIP) in September 2007, with China voting in favor. Article 32(1) and (2) state, respectively:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

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222. Implementing FPIC, supra note 216, at 11.
223. See supra Section II.a
224. See supra note 143.
225. Implementing FPIC, supra note 216, at 72
As a declaration, it is technically a form of soft law and therefore not binding on States. However, by voting for it, China has publicly and implicitly indicated a willingness to consider the priorities of Tibetans in developing their natural resources, even though China has yet to operationalize this into specific action. Moreover, adoption of the convention by 143 member countries signifies building momentum and broad international support for the rights of indigenous peoples.

**FPIC as “Hardening” Law**

For a variety of reasons, both legal and practical, the distinction between FPIC as soft versus hard law is dissolving. FPIC is “hardening” into binding law as States use it as the foundation for legal decisions and regulations. When soft law becomes part of the “consistent conduct of States acting out of the belief that the law requires them to act that way,” it becomes customary international law and therefore binding on States, a process that has begun to happen with DRIP.

In addition, FPIC is now mandatory for those companies seeking financing from the International Finance Corporation (IFC). The IFC’s Performance Standards are intended to help ensure that IFC-funded projects are pursued within a sustainable development framework. The Performance Standards not only incorporate the UN Guiding Principles, they also

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229. See Major Step Forward, supra note 226.
231. Implementing FPIC, supra note 216, at 70 (“Although the Declaration is not binding, domestic and regional human rights courts have already begun to reference it in their rulings, and have found that States violated their human rights obligations by handing out concessions without FPIC. Such legal cases create a risk that companies could lose their concessions, even though companies have no direct, legally binding duty under international law to obtain FPIC. These judgments are particularly likely to be applied to countries that voted for the Declaration.”).
232. Id. at 12 n.20 (noting that domestic courts such as Belize have started to refer to DRIP in their legal decisions, citing it as persuasive authority).
234. INT’L FINANCE CORP., UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND IFC
require an FPIC approach. In 2002, the IFC opened an office in Chengdu “to help spur development in the country’s less-developed western regions,” presumably to help China with its Great Western Development campaign. China is now the IFC’s third largest portfolio country. If the IFC has not already funded companies to work on projects in Tibet, this will likely occur in the future. Such companies will therefore be contractually obligated to use an FPIC approach for their investments.

Beyond such legal mandates, companies are increasingly adhering to FPIC through their own volition. For example, the International Council on Mining and Metals (ICMM) released a position statement in May of 2013 in which member companies committed to using a FPIC approach for future investment projects. The statement indicates that companies will “work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples…” ICMM companies and others using an FPIC approach are doing so presumably because it will help reduce their legal, operational, and reputational risk.
they find it easier to administer a single business approach across all global operations, and because they take their responsibility to respect human rights seriously. As such, FPIC can be seen as an emerging normative/legal obligation that requires consultation and consent prior to and during investing.

Therefore, CERD, ILO-169, DRIP, and the IFC’s Performance Standards in combination suggest a series of obligations that would apply in the following manner to companies operating within an FPIC framework in Tibet. If, after consultation with a company, Tibetans believe the business investment (from the extractive industries or otherwise) will benefit the local community, Tibetans then have the right to accept the project. The converse is similarly true; if after consultation Tibetans reject the project, the company must respect this decision. The right to such rejection is further grounded in the International Covenant on Civil and Political Rights (ICCPR), a treaty to which China is a signatory. Alternatively, if Tibetans believe a project will be more beneficial for the local community if pursued in a way that is different from the company’s initial plan, this decision too must be respected and a mutually beneficial solution must be crafted involving all affected parties. In addition, there must also be space for continued consultations throughout a project’s existence that allows for changes to be made at any time. The key point is that under an FPIC framework Tibetans must be empowered to determine the direction of any business investment that affects them anywhere on the Tibetan plateau.

social unrest, and may face risks to the investments they have made in the area. Therefore, to protect themselves from operational, reputational, and even legal risk, a small number of companies are voluntarily seeking consent after they are granted concessions.” (emphasis added).

244. See Myanmar (formerly Burma) and Human Rights, supra note 182. See also Implementing FPIC, supra note 216, at n.21 (“Soft law standards can be linked to practical implications for those who violate them. In the area of business and human rights, such standards can have concrete effects because national law incorporates them, socially responsible investors use them to screen companies, and advocates utilize the standards to shame wrong-doers.”).

245. U.N. GAOR Human Rights Council, Special Rapporteur on the Rights on Indigenous Peoples, Extractive Industries and Indigenous Peoples, 24th sess., ¶ 19, U.N. Doc A/HRC/24/41 (July 1, 2013) available at http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf (“The rights to freedom of expression and to participation are firmly established in international human rights law. By virtue of these rights, indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects, both in the context of State decision-making about the projects and otherwise, including by organizing and engaging in peaceful acts of protest. States are bound to respect and protect rights of freedom of expression and participation, and may impose limitations on the exercise of those rights only within narrow bounds and for reasons of public order.”).

246. China signed the ICCPR on October 5, 1998. Although China has not ratified the ICCPR, as a signatory it is obliged to refrain from acts that would defeat the treaty’s object and purpose. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty”).

247. Like stakeholder mapping, engaging in FPIC can be challenging and companies are encouraged to seek outside expertise. See, e.g., Christina Hill, Serena Lillywhite and Michael Simon, OXFAM AUSTRALIA, GUIDE TO FREE, PRIOR, AND INFORMED CONSENT (June 2010), available at http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformed-consent_0.pdf.
From the company perspective, obtaining this consent is crucial because it will help mitigate potential company infringement on human rights by avoiding the likelihood of Tibetan protests against company projects that can lead to the intervention of Chinese security forces, attacks on protestors, and the consequent loss of life.

These FPIC obligations are situated among the several layers of stakeholder engagement legal obligations discussed above, depending on who the actor is. To summarize, foreign companies and private Chinese companies must comply with Chapter 6 of the Chinese Code of Corporate Governance, and the FPIC obligations which are grounded in Ruggie’s second pillar that requires companies to respect all internationally recognized human rights by utilizing human rights due diligence. Chinese State-owned companies must meet these same three obligations with two in addition: they must also comply with the Company Law of the People’s Republic of China, and its associated SASAC implementation guidelines, and with Ruggie’s first pillar. As Ruggie indicates, “Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations.” Finally, underpinning all of these is the Chinese government’s duty to protect human rights; it must do this by ensuring all three business types (foreign, domestic, and State-owned) respect human rights pursuant to Ruggie’s first pillar by guaranteeing that proper regulation is implemented and enforced.

248. See Just Business, supra note 125.
249. Implementing FPIC, supra note 216, at 19.
250. This assumes the companies are listed on the Chinese Securities Market.
251. The three obligations being: 1) Chapter 6 of the Chinese Code of Corporate Governance, 2) all internationally-recognized human rights in general, and 3) FPIC in particular.
### SUMMARY OF POTENTIAL LEGAL RESPONSIBILITIES AND OBLIGATIONS

<table>
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<tr>
<th>Company Type</th>
<th>Foreign</th>
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iii. Application to Individual Companies

This article is intended to provide an overall CSR framework with reference to specific tools and laws, some (or all) of which apply to individual companies operating in Tibet. Determining which are relevant to a particular company must necessarily be evaluated on a case-by-case basis. However, for illustrative purposes, the below high-level analysis is intended to demonstrate how operating within a CSR framework might work for companies that are currently in Tibet. Toward that end, the below discussion centers on two examples, one company that is foreign and has not encountered any public-facing human rights challenges, the St. Regis Hotel, and the other which is domestic and has encountered human rights problems, China Gold International. In looking at each company, it is helpful to classify the risks each faces into three categories: legal, operational, and reputational.

The St. Regis Hotel is one of nine hotel brands owned by its United States publicly-traded parent company, Starwood Hotels and Resorts Worldwide, Inc. In November 2010, it entered Tibet by opening its first...
hotel in Lhasa. At present, there is no public indication that the hotel has encountered any human rights problems. Before it opened, however, there was concern about it displacing Tibetan residents in order to build its facilities. If this did in fact occur, the company will have to rectify such abuse pursuant to pillar three of the UN Guiding Principles. Going forward, the St. Regis should utilize CSR for a variety of reasons.

From a legal perspective, the hotel will need to carry out human rights due diligence in order to identify actual and potential adverse human rights impacts, pursuant to pillar two of the UN Guiding Principles. The St. Regis will have to carry this out not only because this is the new international norm that China has endorsed, but also because the Starwood Hotels and Resorts group explicitly holds itself to this standard. Carrying out human rights due diligence will require assessing the hotel’s operations against all international human rights, but particular attention will have to focus on forced labor and human trafficking, two of the hotel industry’s biggest challenges.

Failure to respect human rights will expose the St. Regis not only to a breach of its own self-proclaimed legal standards, but also to operational and reputational risk. Disregarding the rights of its workers, for example, could result in a labor strike, and thus make it difficult, if not impossible for the hotel to function and serve its guests. The discovery of human rights abuse at the hands of the hotel could also result in reputational challenges that could harm business competitiveness. In this instance, by using social media, activists could highlight the abuse(s) and steer potential customers away from the St. Regis to competitors that have a better reputation. This could culminate in a boycott that could result in a loss of business for the St. Regis, and in a worse case scenario force it to leave Tibet, as occurred with the InterContinental. Conversely, by carrying out human rights due diligence (which includes reporting publicly on such efforts), the St. Regis could gain a competitive advantage by being a leader among its peers. Besides potentially benefitting the St. Regis, such actions could serve as a model to other international and domestic companies around the impor-

256. See First St. Regis in Tibet, supra note 121. See also Four Points by Sheraton – Lhasa, http://www.starwoodhotels.com/fourpoints/property/overview/index.html?propertyID=3182 (indicating that Four Points by Sheraton, another Starwood hotel brand, also has a hotel in Lhasa).
257. See Starwood Hotel Global Citizenship Policies and Reporting, http://www.starwoodhotels.com/corporate/about/citizenship/policies.html [hereinafter Starwood Policies and Reporting] (indicating that the hotel group has several human rights policies in place, but no reporting on the utilization or effectiveness of those policies).
258. Andrew Yeh, Lhasa to be Given the Five Star Hotel Treatment, FINANCIAL TIMES, Feb. 23, 2007, http://www.ft.com/cms/s/0/95f58a4-c2cd-11db-9e1c-000b5df10621.html#axzz2z2pN2cvj00 [hereinafter Five Star Treatment].
259. See Ruggie 2010 report, supra note 145.
260. See Starwood Policies and Reporting, supra note 257 (indicating in its Human Trafficking Position Statement that it supports “the Guiding Principles outlined in the UN’s ‘Protect, Respect and Remedy’ Framework for Business and Human Rights by taking a zero tolerance approach to human trafficking within our spheres of influence’
261. Five Star Treatment, supra note 258 (“Western multinationals involved in previous projects in Tibet have drawn the ire of overseas activists . . . InterContinental Hotels stopped managing a Holiday Inn in Lhasa in 1997 after years of boycotts and other protests”).
tance of utilizing CSR and thus help promote its presence in Tibet.

The challenges China Gold International faces are different than those faced by the St. Regis, but China Gold International could also benefit from using CSR. China Gold International is a copper and gold mining company headquartered in Canada and dually listed on the Hong Kong and Toronto stock exchanges. Although it is based in Canada, it presently only operates two mines, both of which are in China (and one of which is in Tibet). Several of its senior leadership and board directors also work for China National Gold, a Chinese State-owned company that is the largest gold producer in China and also China Gold International’s principal shareholder. China Gold International calls itself “the overseas flagship company of China National Gold Group Corporation.” For these reasons, China Gold International can arguably be characterized as a Chinese domestic company that has international ambitions.

On March 29, 2013, China Gold International faced a mining disaster at its Tibet mine in which 83 workers (eighty-one Chinese and two Tibetans) were buried and killed by a landslide. The miners worked for Huatailong Mining Development, a subsidiary of China Gold International. In the initial aftermath, the official government explanation was that a natural disaster caused the landslide. Like the Chinese Government, China Gold International pointed to natural causes and offered few specifics, initially telling reporters to refer to “the news” because it was a “sensitive issue.” On April 7, 2013, a little more than a week after the disaster, China Gold International issued its final statement on causality, reaffirming its belief that it was geological. In response, foreign experts and advocates called...

269. Id.
270. Did China Cover Up a Mining Disaster, supra note 267.
272. Dave Petley, So was the Tibet Landslide, which Killed 83 People, Really “Natural”? You be the Judge, AGU BLOGOSPHERE (Apr. 13, 2013), http://blogs.agu.org/landslidesblog/2013/04/13/so-was-the-tibet-landslide-which-killed-83-people-really-natural-you-be-the-judge/; Did China Cover Up A Mining Disaster?, supra note 267 (quoting Petley as saying the “[P]roperties of the landslide are consistent to what you’d expect to see from mining rather than from natural processing”).
into question this explanation, suggesting the landslide was manmade. To
date, there has been no further elaboration by China Gold International on
the landslide’s cause.

Focusing squarely on this incident reveals the risks and liability the
company faces, even taking the company at its word that the disaster hap-
pened as a result of geological factors. Because the right to life has been vi o-
lated, one has to question the prudence of putting its workers in such a
dangerous location.

From a legal perspective, China Gold International is subject to Chi-
inese, international, and even Canadian law. Given the close relationship
with China National Gold—in management, share ownership, and its self-
proclaimed connection—there is a strong argument that China International
Gold is a State-owned company and therefore must comply with
Chinese State-owned CSR laws, namely those that focus on stakeholder en-
gagement, such as the Company Law of the People’s Republic of China and
its SASAC implementation guidelines. Section 4(18) of the SASAC guide-
lines requires “...a regular communication and dialogue mechanism con-
cerning CSR...[to]... be established, so that the enterprise can have feed-
back from its stakeholders and give its response quickly...”274

Based on public information from its website, it is unclear whether
China Gold International had this type of mechanism in place when the
disaster struck. The experience of other mining companies275—that have
also experienced massive landslides, but which averted worker injury pre-
cisely because they used an early warning stakeholder engagement sys-
tem—suggests that China Gold International was not using such a system
and thus may be in violation of Section 4(18). Because there is a lack of clarity
around whether China has implemented and is enforcing its CSR
laws,276 China Gold International may face no repercussions in China for its
workers’ deaths.

Regardless, the company may face liability under Canadian law. In the
summer of 2013, a ruling by a Canadian court suggested a willingness by
Canadian courts to use tort law to hold domestic companies liable for hu-
man rights violations committed overseas by subsidiaries. The plaintiffs in

273. See, e.g., Central Tibetan Administration: Environment and Development Desk, Assessment
Report of the Recent Landslide Event in the Gyama Valley: Its Possible Cause and Impacts, 7-11, April
274. See Guidelines to the State-owned Enterprises, supra note 200; China Begins to Take Corporate
275. See, e.g., McKenzie Romero and Andrew Adams, Massive Landslide Stops Production at
Bingham Canyon Mine, DESERET NEWS (Apr. 11, 2013),
http://www.deseretnews.com/article/865578042/Kennecott-confirms-significant-landslide-
at-Bingham-Canyon-Mine.html (discussing the first of two landslides that occurred in 2013 at
the Bingham Canyon Mine, the largest mine in the world, during which no workers were in-
jured because the company had anticipated the landslide and thus “[A]ll employees were
evacuated in pre-emptive measures”); Alex Haber, Second Landslide Hits Rio’s Bingham Canyon
Mine, 100 Workers Evacuated, AUSTRALIAN MINING (Sept. 16, 2013),
mine-10 (discussing the second of two landslides at the Bingham Canyon Mine in which no
workers were harmed because the company had predicted the landslide would occur and was
prepared).
276. See supra note 203.
the case are indigenous Mayans from Guatemala who brought suits against Hudbay (a Toronto-based mining company) and its wholly controlled subsidiaries for alleged atrocities committed in Guatemala by the subsidiaries. Should the court ultimately find Hudbay to be liable, China Gold International could then also be liable under the same theory for its workers’ deaths at its mine in Tibet.

In addition to these obligations, China Gold International still has a responsibility to respect international human rights pursuant to pillar two of the UN Guiding Principles. Due to the deaths of the workers, the company failed to respect the right to life as required by the ICCPR, and thus the company has an obligation to provide an adequate remedy to the family members of the dead.

Furthermore, there is evidence that China Gold International failed to use an FPIC approach when it initially secured its mining site. The area in which its Tibet mine is located is the Gyama Valley, a place revered by Tibetans because it was the birthplace in the seventh century of Songtsen Gampo, the first king of the Tibetan empire. As such, the area is popular among Tibetan pilgrims who traditionally flocked to the area to see its sacred mountains, caves, shrines, and rock paintings. Due to mining, however, much of the area is closed. Consequently, local Tibetans have been protesting the mine for years. In addition to complaints over disrespect of religious traditions, Tibetan protests have also been grounded in labor and environmental concerns. In 2009, China Gold International used villagers’ water because of a drought, which led to protests by the locals and the detention of many villagers by the police.


278. See ICCPR, supra note 246, at Part III (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

279. Id.

280. Id.

281. Id.

282. Id.

283. Id.

284. Interview by Author with Staff of Voice of America Tibet Service–Identity Withheld for Protection (January 25, 2014) (indicating that in addition to protests over the environmental and religious mistreatment, Tibetans also regularly protested at not being offered employment by China Gold International; instead these jobs went to migrant workers imported to Tibet by the company).
fered to Tibetans, displaying resentment that employment went almost exclusively to migrant workers.\textsuperscript{285} Given that China Gold International did not halt its operations, it appears these community objections were never taken into consideration, but instead were dismissed—all in violation of an FPIC approach.

Even if China Gold International is not held liable in China, under Canadian law, or even for its violation of FPIC, it could still face reputational challenges that could result in business difficulties. As FPIC and the UN Guiding Principals further crystalize and take root internationally, stakeholders will reward companies that abide by these standards and laws and punish those that do not. For China Gold International, this could manifest itself most acutely through shareholder resolutions calling for divestment. Two of its largest, current shareholders, The Vanguard Group and The Canada Pension Plan Investment Board,\textsuperscript{286} routinely face shareholder resolutions by activists.\textsuperscript{287} Here, a successful campaign by Tibet supporters could result in Vanguard and the Canada Pension fund wanting to distance themselves from China Gold International; the companies could then pressure China Gold International to change its practices or risk divestment. A loss of investment could prove destabilizing to China Gold International, particularly since its share price fell 13% the day after its mining disaster.\textsuperscript{288}

This reputational risk exists on top of operational risks. If China Gold International does not use FPIC going forward, and if it does not enhance (or start using for the first time) a stakeholder engagement mechanism, it could face strikes by workers and surrounding communities for its failure to secure and maintain a social license to operate.\textsuperscript{289} These strikes could result in mine closures with the ancillary disruption to revenue streams, causing an inevitable drop in share prices and profit margins.\textsuperscript{290} Worst of all, the company could be liable for additional worker deaths if security personnel are called in to break up crowds through gunfire that results in protestors dying.\textsuperscript{291}

As indicated, the above analysis on both companies is high level and

\begin{itemize}
\item \textsuperscript{285} China Releases Names of Tibet Landslide Victims, XINHUA (Apr. 3, 2013), http://news.xinhuanet.com/english/china/2013-04/03/c_132283267.htm (indicating that of the 83 workers covered by the landslide, only two were from Tibet; the rest were migrant workers).
\item \textsuperscript{286} See China Gold International Resources Corp, supra note 262.
\item \textsuperscript{289} See supra note 161 (defining social license to operate); Implementing FPIC, supra note 216, at 72.
\item \textsuperscript{290} See infra notes 301-302.
\item \textsuperscript{291} See Implementing FPIC, supra note 216, at 19.
\end{itemize}
based on publicly available information in English; an actual human rights impact assessment would have much more breadth, depth and rigor. It is therefore possible that either or both companies have used CSR tools centered on stakeholder engagement (as required by Chinese law, international law, human rights due diligence, and FPIC). However, given that these tools require public reporting on human rights performance, their utilization by each company remains an open question. As these responsibilities and obligations gain greater currency and traction, laggard companies who do not use CSR tools will be in greater danger of legal liability, and thus will also risk undermining their operations and tarnishing their reputations. Conversely, those companies that take a leading role will see their legal liability—and therefore their operational and reputational risk—diminish. Ultimately, the St. Regis, China Gold International, and any other company operating in Tibet will be most successful when they approach their impact on human rights as a problem to be solved, rather than an issue to be managed. 292

iv. Environmental Considerations

Although the focus of this article centers on promoting respect for human rights, CSR’s other focus is environmental sustainability. A brief discussion of how this relates to international law vis-à-vis China and Tibet is therefore of great importance.

China is a party to several multilateral environmental agreements, some of which incorporate the FPIC principle. For example, the Convention on Biological Diversity293 aims to promote development that is environmentally sustainable. Article 10(c) of the Convention requires State parties to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or . . . sustainable use requirements.” 294 This legally binding article gets coupled with consideration of indigenous rights and protection and management of traditional lands in a recommendation adopted by the 7th Conference of the Parties295 to the Convention in Decision VII/28 on Protected Areas. In relevant part it states that, “the establishment, management and monitoring of protected areas should take place with the full and effective

292. This is simply to say that many companies take a reactive approach to human rights, rather than proactively addressing challenges. The ability of companies to reduce the potential for a negative impact is greatly enhanced when they proactively address challenges. See Just Business, supra note 125.


295. The Conference of the Parties (COP), like CERD noted above, exists to help guide member countries on the implementation and utilization of the Convention on Biological Diversity. While its decisions are not legally binding, they do provide persuasive authority for how parties should act, and in many cases are intended to deepen the existing legal obligations embodied in the Convention.
participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.”

In 2004, The Secretariat of the Convention put forth the Akwe: Kon Guidelines to support the Convention. They are intended to serve as “voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.” The Akwe: Kon Guidelines call on governments or the “proponent of a development proposal”—which presumably includes business entities—to establish “a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.” The Akwe: Kon Guidelines are not binding on States or companies, but they do provide persuasive support for FPIC principles and their relevance when the impact of a project is on land that is sacred or used ceremonially.

For Tibet, sustainable environmental development raises issues of both domestic and international concern. In the Tibetan context, taking seriously the need to “protect and encourage customary use of biological resources in accordance with traditional cultural practices” necessarily requires an understanding of how Tibetans view the natural environment in which they live. For many Tibetans, much of the land they live on has attached to it a sacred or religious importance. Working with Tibetans to understand this is therefore vital, as not doing so can lead to tension and protest between local communities and business operations, as discussed in the illustrative examples above.

In addition to being distracting to business operations, one has to presume such demonstrations also disrupt revenue streams. As noted by Sherman above, engaging in proactive stakeholder engagement can result in creating a stable operating environment and therefore substantial cost savings.

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299. Implementing FPIC, supra note 216 at 15.

300. See supra section I(c).

301. Sherman, supra note 183. See also Just Business, supra note 125 at 137-139 (noting the cost of conflict associated with stakeholder pushback “can include delays in design, siting, granting of permits, construction, operation, and expected revenues; problematic relations with local labor markets; higher costs for financing, insurance, and security; reduced output; collateral impacts such as diverted staff time and reputational hits; and possible project cancelation, forcing a company to write off its entire investment and forego the value of the lost reserves, revenues, and profits, which could run into several billion dollars for large-scale operations”).

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savings, a situation which one has to assume did not occur in the above-discussed examples between the companies and local Tibetan communities. Furthermore, unless stakeholder engagement has occurred subsequent to these incidents, protests of a similar nature will likely reoccur.

From an international perspective, the Tibetan environment is of great importance to the rest of the world, particularly to Asia. The Tibetan glaciers are the source of many of Asia’s largest rivers including the Brahmaputra, the Indus, the Sutlej, the Karnali, the Arun, the Salween, the Mekong, the Yangtze, the Yellow River, and the Irrawaddy. These rivers flow into eleven mega-deltas in coastal zones around Asia, which are also connected to seven mega-cities. The millions of people that live in these areas outside China’s borders are dependent upon these water sources.

However, these glaciers are melting, which will increasingly result in floods and water shortages. Liu Shiyin of the Chinese Academy of Science’s Cold and Arid Regions Environment and Engineering Research Institute has stated that “the shrinking of glaciers has picked up speed in the past decades. . . . While there might be more water in the rivers at present because of the increased melting, in the long run, the glacier water will decrease, and droughts will follow.” Shortages are occurring in Tibet due to increased tourism and development, and elsewhere in China due to increased household and industrial consumption. Consequently, China is now diverting rivers in an attempt to alleviate this problem within its borders, much to the consternation of downriver countries including Bangladesh, India, and Kazakhstan, among others.

From the CSR perspective, companies must appreciate this challenge. Those companies working on water diversion projects must understand the consequences of their actions and the potential for social tension the projects entail. Those companies working in Tibet (but in industries unrelated to water diversion) must also be aware of their business operations’ environmental consequences. In both cases, working toward sustainable usage

302. From the corporate finance perspective, stakeholder engagement in conjunction with human rights due diligence can also be viewed as a way of decreasing unsystematic risk. As such, this can lead to an increase in profits, and ultimately, valuation. Conversely, not engaging in human rights due diligence has the potential to be a liability that greatly impacts the costs of company operations.
307. The Game Changer, supra note 2 at 146.
308. Id.
of these water resources is vital, not only to appease Tibetan sentiment\textsuperscript{309} but also to avoid regional conflict among the countries in Asia that are dependent upon this water.

b. Community Investment

As previously stated, using all CSR tools in Tibet is vital, but two in particular deserve special attention. The first is stakeholder engagement, discussed above\textsuperscript{310} and the second is community investment, discussed below.

For many companies, especially those in the west, community investment is not a new concept. While it is similar to philanthropy, it goes beyond check writing or one-time charitable activities\textsuperscript{311}. Instead, it is a form of investment whereby companies partner with governments and/or NGOs to identify community challenges and then offer long-term resource assistance to help alleviate those difficulties. As such, it is not the case of companies blindly handing over money as a philanthropic gesture, but it is rather a means of engaging in strategic, targeted giving with a specific aim in mind, all while ensuring accountability mechanisms that ensure the resources are used appropriately. In all cases the end goal is to improve the community in which the company operates.

Community investment can be promoted through legal mechanisms—in China, community investment is required for State-owned companies\textsuperscript{312}, though the precise mechanism for doing so is unclear—and it can be accomplished on a voluntary basis. Legal promotion can exist using responsible contracting\textsuperscript{313} through what are commonly referred to as “impact and benefit agreements” or “socioeconomic agreements.”\textsuperscript{314} These contracts contain within them negotiated agreements between the company and the local community where the investment will occur. The idea is to address any adverse environmental or social impacts the business operation may engender and to ensure that local communities will benefit.\textsuperscript{315} The range of topics in such contracts is long, but can include, among others: employment hiring policies that give preference to locals with training programs included; clauses that ensure local communities receive economic benefits such as royalties or profit shares; environmental considerations that aim to mini-

\footnotesize{\textsuperscript{309} Tibetans also view many of the water sources as sacred.}
\footnotesize{\textsuperscript{310} See supra Part III (A)(i-iii).}
\footnotesize{\textsuperscript{311} For a fuller discussion see Pitts, supra note 126, at Ch. 11.}
\footnotesize{\textsuperscript{312} See Guidelines to the State-owned Enterprises, supra note 200, at Art. 15 (“Participating in social public welfare programs. [State owned enterprises] ought to encourage their employees to volunteer for social services, and actively participate in community and social welfare program, such as charity, donations, and giving support to schools, cultural or hygiene activities. Upon the occurrence of major natural disasters and emergency accidents, [State owned enterprises] also need to provide financial, material and manpower support.”).}
\footnotesize{\textsuperscript{313} Ruggie, 2010 report, supra note 145, at ¶ 24.}
\footnotesize{\textsuperscript{314} See generally Pitts, supra note 126, at 503-10 (giving an overview of these types of contracts).}
\footnotesize{\textsuperscript{315} Id. at 504.}
mimize or mitigate environmental harm; and social and cultural clauses aimed at respecting areas of cultural significance and developing social programs.\textsuperscript{316} In some cases these are viewed as private contracts entered into voluntarily, but in other situations they are a precondition to obtaining an operating license or permit.\textsuperscript{317} In the case of Tibet, these agreements could cover hiring Tibetan management, using the Tibetan language in the workplace, offering skills training to Tibetans, and engaging in efforts to preserve the natural environment, among others.\textsuperscript{318}

While the law plays a role in community investment, much of the worldwide work in this area currently comes from companies who voluntarily take on individual initiatives in innovative ways by partnering with governments and NGOs. In Tibet there are many community development needs. Two in particular deserve elaboration. As indicated above, a large percentage of Tibetans are undereducated and therefore illiterate. In addition to preventing these individuals from gaining formal employment, lacking education results in the prevention of self-empowerment and enrichment in all areas of life. Corporate community investment therefore has the potential to make great strides in this area by partnering with others to determine educational needs and solutions.\textsuperscript{319} Furthermore, while voluntary efforts would be welcomed, Chinese law requires Chinese State-owned companies to provide employee education.\textsuperscript{320}

Health care is another significant difficulty facing Tibetans on the plateau. Among other serious challenges, problems include: high child and infant mortality rates,\textsuperscript{321} iodine deficiency,\textsuperscript{322} malnutrition in children,\textsuperscript{323} rickets in children due to vitamin D deficiency,\textsuperscript{324} and even the plague.\textsuperscript{325} There are also fears that the Qinghai-Tibet railway will increase the HIV/AIDS rate as migrants from provinces with higher rates travel to the TAR.\textsuperscript{326}

\textsuperscript{316} Id. at 505-06.
\textsuperscript{317} Id. at 507 (This is what occurs with mining companies in Canada that operate in indigenous communities, and is offered as an example of a possible model because it is unclear whether similar initiatives are being used in China/Tibet).
\textsuperscript{319} See Machik as an example of an NGO working to empower rural Tibetans by creating better educational opportunities, http://www.machik.org/ (last visited Mar. 10, 2014).
\textsuperscript{320} See Company Law of People’s Republic of China, supra note 199, at Art. 17 (requiring companies to “...reinforce the vocational education and in-service training of its employees so as to improve their personal quality”). This is reinforced in the Guidelines to the State-owned Enterprises, supra note 200 at Art. 14 (requiring companies to “...provide on-duty education and training, as well as equal opportunities of personal development”). Although employee education is narrower than education for the community as a whole, it lends support for the broader need to provide education to all Tibetans.
\textsuperscript{321} TIBET INFORMATION NETWORK, Delivery and Deficiency: Health and Health Care in Tibet 70 (2002).
\textsuperscript{324} Id.
\textsuperscript{326} Tracking the Steel Dragon, supra note 44 at 69.
While working to alleviate health and education challenges is primarily the duty of the State, the current unsustainable Chinese government investment in the TAR is not meeting the needs of Tibetans and therefore partnering with the foreign and domestic business community is necessary.

Furthermore, two additional reasons support corporate community investment as they enhance business opportunity. Most obvious is that a healthy and educated workforce is more efficient and able to perform at higher levels. More significant is that working to alleviate these challenges can also result in the creation of new business opportunities through Base of the Pyramid (BoP) initiatives. BoP is a concept coined by economist C.K. Prahalad in his book *The Fortune at the Bottom of the Pyramid*. BoP refers to the largest but poorest socioeconomic group in the world. In global terms, it is the 2.5 billion people who live on less than $2 per day. The concept is used by people who seek to develop new models of doing business that deliberately target this demographic so as to create new markets while concurrently working toward poverty alleviation.

Prahalad published his book in 2004 and since then many commentators have worked to refine his vision. From among these critiques arise a few common themes separating those business enterprises that have succeeded from those that have failed. The first is that companies must understand the customer. Business cannot assume to know what the poor will buy and must not confuse what they think the poor need with what the poor actually want. Therefore, companies must partake in rigorous stakeholder engagement to understand what the ‘wants’ are from the perspective of those in poverty. The other major challenge is pricing. Companies who failed did not take into account the fact that the poor have cash flow irregularities, little savings, little access to credit, and therefore a difficult time paying off purchases in installments. The solution is either a very low price or to link pricing with microfinance options. Also important is to view the poor not solely as customers but also as suppliers; this encourages productive linkages in the local economy by promoting local economic ownership and labor. While the BoP markets will vary in size and scope depending on the industry, the potential for new customers and suppliers holds out the promise for enlarged business opportunities, especially in Tibet.

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327. Authenticating Tibet, supra note 36, at 267; see also Sino-Tibetan Dialogue, supra note 33.
329. This number sometimes gets quoted as high as 4 billion. See, e.g., Erik Simanis and Stuart Hart, *The Base of the Pyramid Protocol: Toward Next Generation BoP Strategy Cornell Center for Sustainable Global Enterprise* 1 (2008), available at http://www.baseofthepyramid.nl/BoPProtocol2008.pdf (defining BoP as “the more than four billion people globally with per capita incomes below $1,500 (purchasing power parity”)).

i. Additional Reasons Why Business Should Invest in Tibet In Particular

Notwithstanding the challenges that Tibetans face, Tibet, like any other emerging market, holds out great potential for business investment. This is due to the abundance of human and natural resources, and because of the region’s underdevelopment gap compared to neighboring provinces that China desires to close.

As such, Tibet provides a wealth of business opportunities. It has vast natural resources including minerals such as gold and rare earth metals, oil and gas, arable land, forest products, and freshwater resources. It also has vast potential for renewable energy, including wind and solar. It is strategically placed against neighboring Chinese regions and other countries such as India that are on a rapid path of development. Moreover, it has untapped human potential with a population of an estimated 6 million individuals, many of whom are largely unconnected to international markets and therefore lack access to numerous services, including reliable electricity, financial services, and cell phone and internet connections, among others. Collectively, these 6 million individuals represent potential consumers, employees, and suppliers.

Companies can therefore bring a number of substantial benefits to Tibetans such as decent and healthy employment opportunities, higher levels of income, access to new technologies, and sustainable economic development. They can help foster growing the economy in a way that has more equitable socioeconomic results than those that presently exist. Companies can also help develop Tibetan capacity around much-needed business skills, competencies, and capabilities. If done in a careful and considered way, this responsible investment could improve livelihoods, help to protect Tibet’s natural environment and rich biodiversity, and address key development needs. In turn, such investment could provide healthy returns for investors, boosting both the business community and Tibetans.

Investment in Tibet, therefore, is needed both in general terms (providing standard goods and services) and in specialized ways (investment that has development goals in mind). Toward the latter type, by pursuing BoP measures in Tibet, companies could help overcome community challenges—under education, health care, etc.—that are not necessarily created by business but are barriers to business entry and success and which also detract from the general welfare of the Tibetan community. The end result would be the creation of new markets that meet unfulfilled socioeco-

For companies that presently invest in Tibet, utilizing CSR will help enhance business operations. Given the Tibetan protests and self-immolations over the mining practices of some companies, this sector stands to make the biggest gains at present. Undoubtedly, using stakeholder engagement and community investment will help extractive companies better understand the various Tibetan contexts in which they are operating, the associated benefits and challenges, and thus help them realize a more stable operating environment and cost savings.

Furthermore, for foreign companies that wish to enter Tibet, using CSR will help minimize risk and thus ensure smoother operations and likelihood of business success. This is particularly true with respect to reputational risk. Many foreign companies have foregone investment in Tibet because they believe it involves too much political risk that would harm their corporate reputation. This is not an unfounded concern given the widespread international support Tibetans receive that focuses close attention on human rights and environmental issues in the region; often this support takes the form of protests and campaigns against companies. These foreign protests exist because at present there are no examples of foreign companies that abide by CSR standards in Tibet. Therefore, if foreign companies invested responsibly in Tibet under a CSR framework, such companies would surely receive backing from Tibetan supporters abroad and thus overcome the reputational/political risk that many companies currently find to be a barrier to market entry. In turn, these frontrunner companies would also help promote CSR in Tibet and serve as a model for other foreign and domestic companies to follow suit. By contrast, those foreign companies that invest without the use of CSR will find the concentrated attention of foreign Tibet supporters focusing a spotlight on the negative environmental and human rights impact of their company operations.

CONCLUSION

Tibetans are in great need of socioeconomic development. However, the past and present government-initiated development approaches have not worked effectively. The result is that Tibetans live in under-developed conditions. This gives rise to Tibetan social instability and unrest with the further consequence that business opportunities are unable to be maximized. New tools for development must therefore be utilized.

With the expansion of Tibet’s infrastructure, business opportunities await. Where these opportunities can further the social and economic needs

332. China Begins to take Corporate Responsibility Seriously, supra note 190, at 15.
333. See, e.g., UN body asks InterContinental Group to Respond to Tibet Campaigners, PHAYUL (Jan. 27, 2014), http://phayul.com/news/article.aspx?id=34491&article=UN+body+asks+InterContinental+g roup+to+respond+to+Tibet+campaigners (describing a campaign against the InterContinental group by Tibet supporters regarding the hotel’s plan to open a hotel in Lhasa).
of Tibetans by using CSR tools—especially stakeholder engagement and community investment—the potential for value creation is greatest, not only for Tibetans but also for business, and by extension the Chinese government.

Toward this end, CSR pilot projects and case studies will need to be explored, developed, and applied in Tibet.334 At present CSR efforts in China are almost exclusively focused in the eastern parts of the country and not in Tibet.335 Working toward this will require each actor to play its proper role. As such, Tibetans will need to view themselves as stakeholders and help companies of all types understand Tibetan socioeconomic needs and desires. Companies, in turn will have to design business plans in accordance with the diverse range of Tibetan perspectives. Companies will likely find that drawing upon the lessons learned from the successes and failures of CSR experiences in eastern China will be vital for helping to develop Tibetan models of CSR, but they will also have to craft initiatives that focus on the unique Tibetan context(s) and draw upon international best practices.

These business prospects and related CSR opportunities have little chance at succeeding, however, unless the Chinese government creates the space for them to take root and flourish. If the new Chinese leadership wishes to assist Tibet in developing responsibly through business investment, it will have to create additional CSR laws and regulations and ensure the existing legislation is implemented and enforced. Baring this and other new approaches, alleviating Tibetan social unrest—and therefore obtaining the social stability that the Chinese government so greatly desires—seems like a distant prospect. For the benefit of Tibetans, the business community and the Chinese government, one hopes a new approach336 will be tried.

