



Socio legal outlook of corporate social responsibility and practices in India

Shrikant P Thombre

Administrative Officer, Department of Divisional Training Center, LIC, Maharashtra, India

Abstract

Corporate Social Responsibility is a self-regulatory form of corporate conscience included into business models whereby it is guaranteed that the business is keenly accommodating with the force of law and ethical standards according to national and international norms. The term (CSR) has been in use since the 1960s and maintained its usage extensively to shield legal and moral responsibility of Corporate World. Ever since its inception this sustainability strategy has been opted by companies to reflect their competitiveness. Their overall aim is to impact the society positively while get the most out of the creation of shared value for the shareholders, stakeholders and even employees. This Research Paper going to critically analysis sec. 135 of The Companies Act 2013, along with these legal Compliances the researchers look into the subject from Socio Legal Prospective. CSR is closely linked with the principle of sustainable development, which argues that enterprises should make decisions based not only on financial factors such as profits or dividends but also based on immediate and long term social and environmental consequences of its activities. CSR has a significant role in controlling the perils of uncontrolled development, satisfying the needs of the present generation and at the same time ensuring that the resources of future generations is not jeopardized.

Keywords: corporate social responsibility, legal, social, law

Introduction

Indian corporations, like those in other countries, have had a long tradition of being engaged in social activities that have gone beyond meeting a corporation's immediate financial objectives. However, since the late nineties, CSR activities have increasingly come under the lens both of policy makers as well as of corporations' stakeholders as governance issues acquired increasing prominence. In all other countries CSR efforts by corporations have been kept largely voluntary, with only a select number of countries mandating corporations to disclose such activities.

Corporate Social Responsibility is a growing and important part of an organization's overall strategy. The voluntary compliance of social and ecological responsibility of companies is called Corporate Social Responsibility. It is basically a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment. It is a concept whereby companies integrate social and environmental concerns into their business operations and their interaction with their stakeholders on a voluntary basis. It is represented by contributions undertaken by companies to society through its business activities and social investment.

Historical AND Legal Background

The first formal attempt by the Government of India to put the CSR issue on the table was in the issuance of Corporate Social Responsibility Voluntary Guidelines in 2009 by the Ministry of Corporate Affairs (MCA, 2009). Prior to this, the importance of CSR was discussed in the context of corporate governance reforms, such as in the Report of the Task Force on Corporate Excellence by the Ministry of Corporate Affairs (MCA, 2000). While the report made a

business case for CSR as well as highlighted the social benefits stemming from it, the discussion was recommendatory in nature and there were little actionable points. It is in the Voluntary Guidelines of 2009 that the core elements of a CSR policy was spelt out that included care for all stakeholders, ethical functioning, respect for workers' rights and welfare, respect for human rights, respect for the environment and activities to promote social and inclusive development^[1].

The Guidelines specifically drew a distinction between philanthropy and CSR activities, and highlighted the voluntary nature of CSR activities that go beyond any statutory or legal obligation. The Guidelines of 2009 were followed in 2011 by the National Voluntary Guidelines of Social, Environmental & Economic Responsibilities of Business, also issued by the MCA (MCA, 2011). These guidelines were reportedly based on the inputs received from 'vital stakeholders' across the country and laid down nine principles for businesses to function in a responsible manner to promote inclusive economic growth at the national level. As in the case of the 2009 Guidelines, the 2011 Guidelines were voluntary in scope wherein corporate were urged to adopt all the nine principles, and to report their adherence to the guidelines based on an 'apply-or-explain' principle. Interestingly, while one of the implementation strategies suggested in the 2009 Guidelines was to earmark "specific amount related to profits after tax, cost of planned CSR activities, or any other suitable parameter," no such suggestion was included in the 2011 Guidelines^[2].

¹ Madhumita Chatterji, Corporate social Responsibility, Oxford University Press India, Feb 2011

² <http://www.igidr.ac.in/pdf/publication/WP-2015-023.pdf>

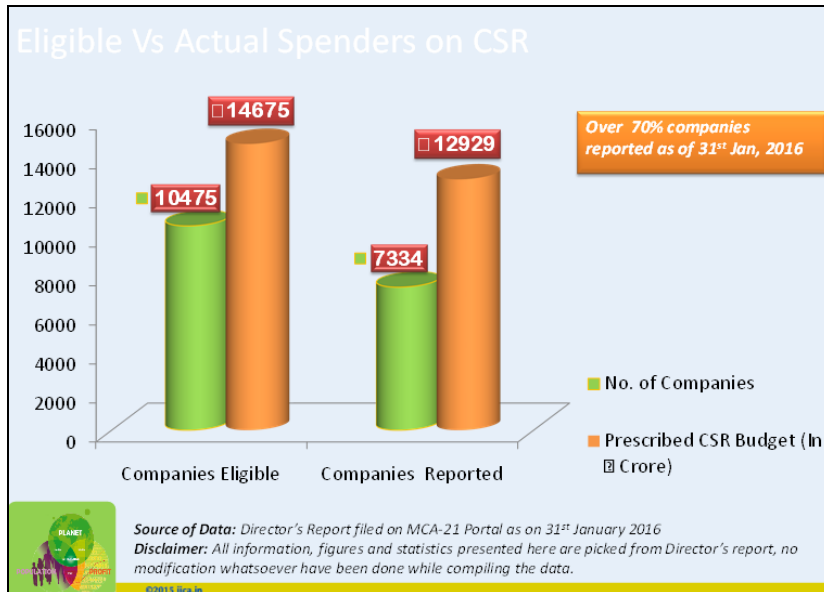


Fig 1

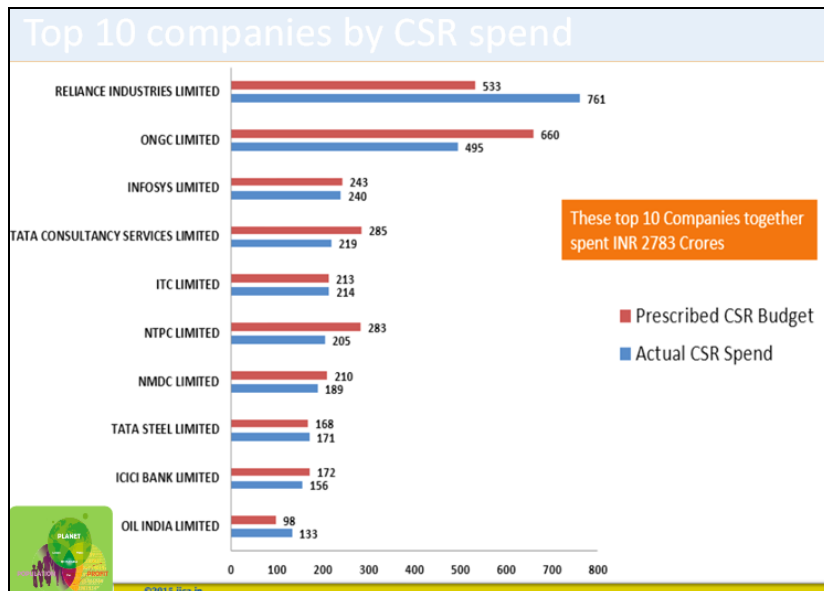


Fig 2

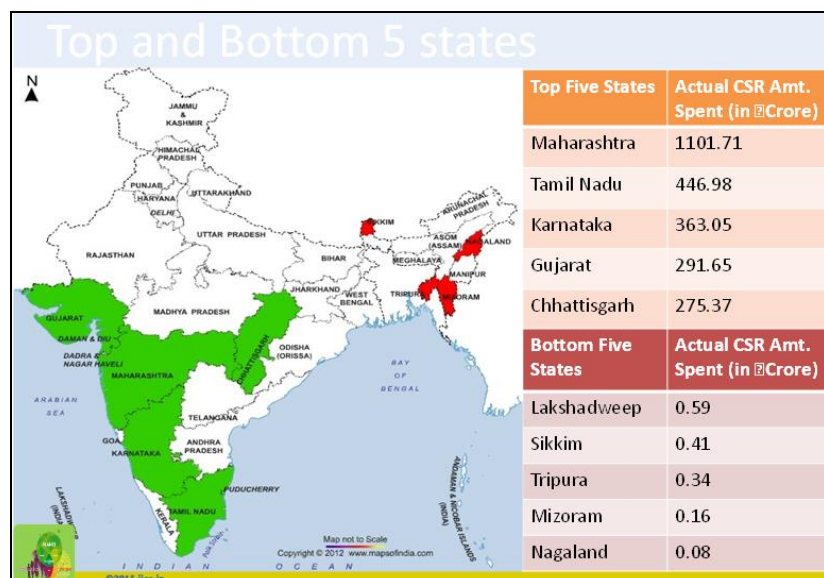


Fig 3

Satutory Provisions

Section 135 of the Companies Act 2013 (MCA, 2013) making CSR spending as well as CSR disclosure mandatory for specific types of companies.

According to section 135 of the Companies Act, 2013

“Sec. 135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,—
(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) Recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and (c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) Ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities: Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation.—for the purposes of this section “average net profit” shall be calculated in accordance with the provisions of section 198^[3].

It is applicable to every company including its holding company, subsidiary company, foreign company including its branch office or project office in India^[4].

CSR Activities

The Policy recognizes that corporate social responsibility is not merely compliance; it is a commitment to support initiatives that measurably improve the lives of underprivileged by one or more of the following focus areas as notified under Section 135 of the Companies Act 2013

and Companies (Corporate Social Responsibility Policy) Rules 2014:

- i. Eradicating hunger, poverty & malnutrition, promoting preventive health care & sanitation & making available safe drinking water;
- ii. Promoting education, including special education & employment enhancing vocation skills especially among children, women, elderly & the differently unable & livelihood enhancement projects;
- iii. Promoting gender equality, empowering women, setting up homes & hostels for women & orphans, setting up old age homes, day care centers & such other facilities for senior citizens & measures for reducing inequalities faced by socially & economically backward groups;
- iv. Reducing child mortality and improving maternal health by providing good hospital facilities and low cost medicines;
- v. Providing with hospital and dispensary facilities with more focus on clean and good sanitation so as to combat human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
- vi. Ensuring environmental sustainability, ecological balance, protection of flora & fauna, animal welfare, agro forestry, conservation of natural resources & maintaining quality of soil, air & water;
- vii. Employment enhancing vocational skills
- viii. Protection of national heritage, art & culture including restoration of buildings & sites of historical importance & works of art; setting up public libraries; promotion & development of traditional arts & handicrafts;
- ix. Measures for the benefit of armed forces veterans, war widows & their dependents;
- x. Training to promote rural sports, nationally recognized sports, sports & Olympic sports;
- xi. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development & relief & welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities & women^[5];
- xii. Contributions or funds provided to technology incubators located within academic institutions, which are approved by the Central Government;
- xiii. Rural development projects, etc
- xiv. Slum area development.

Explanation. — For the purposes of this item, the term ‘slum area’ shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.]

The Above list is illustrative not exhaustive.

Practices of CSR in India

CSR is not new to India. Development of CSR can be traced back in different phases which are as follows:

The first phase of CSR was predominantly determined by culture, religion, family tradition and industrialization. Business operations and CSR engagement were based mainly on corporate self-regulation. Being the oldest form of CSR, charity and philanthropy still influence CSR practices, especially in community development. In the pre-industrial period up to the 1850s, merchants committed

³ Sec. 135 of the Companies Act 2013

⁴ Madhumita Chatterji, Corporate social Responsibility, Oxford University Press India, Feb 2011

⁵ finance.bih.nic.in/documents/csr-policy.pdf

themselves for the religious reasons, sharing their wealth, for instance, by building temples.

The second phase of Indian CSR (1914-1960) was dominated by country's struggle for independence and influenced fundamentally by Gandhi's theory of trusteeship, which aimed to consolidate and amplify social development. During this period, Indian businesses actively engaged in the reform process. Not only the companies saw the country's economic development as a protest against colonial rule; but also they participated in its institutional and social development.

The paradigm of the "mixed economy", with the emergence of PSUs and ample legislation on labour and environment standards, affected the third phase of Indian CSR (1960-1980). This phase was also characterized by shift from corporate self-regulation to strict legal and public regulation of business activities. In this scenario, the public sector was seen as the prime mover of development. The 1960s was described as an "era of command and control"^[6],

In the fourth phase (1980 until the present) Indian companies and stakeholders began abandoning traditional philanthropic engagement and to some extent integrated CSR into a coherent and sustainable business strategy, partly adopting the multi-stakeholder approach. In the 1990s, the Indian government initiated reforms to liberalize and deregulate the Indian economy by tackling the shortcomings of the "mixed economy" and tried to integrate India into the global market. Consequently, controls and licence system were partly abolished, and the Indian economy experienced a pronounced boom, which has persisted until today.

In India as in the rest of the world there is a growing realization that business cannot succeed in a society which fails. An ideal CSR has both ethical and philosophical dimensions, particularly in India where there exists a wide gap between sections of people in terms of income and standards as well as socio-economic status.

Critical Analysis

Section 135 of Companies Act, 2013 violates Article 14 of the Constitution: Article 14 of the Constitution guarantees to every person, equality before law and equal protection of law within the territory of India. Moreover Article 14 allows reasonable classification of the legislation. In Re: Special Courts Bill the Supreme Court has consistently ruled that classification is valid only if

- i) It is founded on an intelligible differentia and
- ii) The differentia has a rational relation to the object sought to be achieved by the statute in question.

CSR spending is made mandatory to only company form of organization. CSR is not applicable to partnership firm or LLP or any other form of organization, even though it's net worth or profit or turnover is more than the prescribed limit. Since, test for classification is not met, as Section 135 treats unequal's as equals is violates Article 14.

Section 135 violates Article 19 (1) (g) of the Constitution of India: Article 19 (1) (g) of the constitution of India, vest freedom of trade, commerce and profession. By section 135 of companies Act 2013, CSR activity is made mandatory to certain companies which meet the required criteria

CSR is a restriction: Section 135 constitutes such a

restriction since it requires the company to divert the money which could have otherwise been reinvested into the company's business for incremental returns or paid as dividend to shareholder, for being spent on CSR activities.

CSR does not fall under reasonable restriction: Article 19(1) (g) is subject to the provisions of Article 19(2) to 19(6) which permit the state to make laws which impose reasonable restrictions on the exercise of the right granted by Article 19(1) (g), inter alia, 'in the interests of the general public'^[7]. The Supreme Court has, by and large, given an expanded meaning to the language of Article 19(6). The fundamental principle that the Supreme Court has enunciated in the matter of interpreting Article 19(6) is that the reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of the general public and not from the standpoint of the persons upon whom the restrictions are imposed^[8].

There has been no study or empirical evidence to suggest that the benefits of mandating a CSR spend as stipulated in Section 135 will outweigh the benefits of not mandating such spend at all Voluntary form of spending made mandatory does not fall within reasonable restriction. Therefore CSR violates Article 19(1) (g) of the constitution.

CSR violates Corporate Democracy: Shareholders are owners of the company. Management is entrusted to Board of Directors. By virtue of introduction of CSR, board of directors is given unrestricted power to decide the CSR expenditure, the CSR activity to be undertaken.

Board of directors can spend company's money in a CSR activity for their own personal benefit. For Example: A director can approve CSR activity, relating to construction of building in a school/or college where he need to get admission for his son. In such case, shareholders cannot prevent the action of director, to use company's fund for his personal benefit, as shareholders do not have say relating to CSR activity.

Moreover, each area has certain needs to be fulfilled if the nature of CSR activity is left to the board to be decided, it will neither benefit the society and shareholders fund will be misused thereby shareholders right is affected. Since shareholder do not have a say in CSR and board of directors have unrestricted power and there in no check and Balance. Therefore Shareholders rights are affected.

Defining CSR: (Corporate social responsibility policy) Rules, 2014 has defined the term "corporate social responsibility (CSR)" as follows: "corporate social responsibility means and includes but is not limited to:

1. Projects or programs relating to activities specified in schedule VII to the Act; or
2. 2.projects or programs relating to activities undertaken by the board of directors of a company (board) in pursuance of recommendations of the CSR committee of the board as per declared CSR policy of the company subject to the condition that such policy will cover subjects enumerated in schedule VII of the Act.

Amendments in the Schedule: Section 467 of the Companies Act gives power to the central government to alter the provisions contained in any of the Schedules. The section is similarly worded as Section 641 of the Companies

⁶ K S Ravichandran, Corporate social Responsibility-Emerging Opportunities and Challenges in India,35-45, Lexis Nexis, Aug 2016

⁷ Article 19 of the Indian Constitution

⁸ Amudha Murthy, Constitutional Validity of CSR, Lawmantra, April 5, 2015

Act, 1956 which gave power to the central government to make changes in the Schedules.

The notification dated February 27, 2014 is a delegated legislation issued under a statutory provision, namely Section 467 of the Companies Act which provides that the Central Government may, by notification, alter any of the regulations, rules, tables, forms and other provisions contained in any of the Schedule to the Act. Since the Schedule forms an integral part of Section 135, the power to alter the Schedule needs to be exercised with an abundant caution. Delegated legislation is a means by which the legislature delegates part of its legislative function to an executive authority. However, there are well-settled constitutional limits on the scope of delegated legislation. In the case of *In Re the Delhi Laws Act, 1912* the legislature cannot delegate essential legislative functions such as the determination of legislative policy and cannot delegate its power to repeal or modify its essential features. The question is what constitutes essential legislative function (which cannot be delegated by Parliament). In *Raj Narain v. Chairman, Patna Administration Committee*^[9] the Supreme Court accepted that “exactly what constitutes an essential feature cannot be enunciated, in general terms”. The court held change in policy is not ancillary function^[10].

The Court however, attempted to spell out it in *Harishankar Bagla v. M.P. State*^[11] as follows: “The essential legislative function consists in the determination of choice of the legislative policy and of formally “enacting that policy into a binding rule of conduct”. And to declare what the laws shall be in relation to any particular territory or locality, is an essential legislative act.

Social business projects forms the core philosophy of corporate social responsibility and Schedule VII of the original Companies Act, 2013 contained ‘social business projects’ among the list of various activities that a company could undertake. The Central Government vide notification dated February 27, 2014 made amendments to the Schedule while deleting ‘social business projects’ from the list of activities enlisted under the Schedule. Although Section 467 empowers the government to amend the Schedule through delegation, the power to amend under this section is meant to make simple alterations without affecting the legislative policies enshrined in the Companies Act, 2013. Deletion of ‘social business projects’ through the notification seems to override the CSR policy as envisaged under the Companies Act. By deleting ‘social business projects’ through the notification, the central government seems to have exceeded its legislative mandate and the same may be subject to judicial review in future. This was observed in the case of *J.K. Industries Ltd. v Union of India and Ors*^[12].

Voluntary vs. Mandatory:

1. Deciding the allocation of funds for the purpose for CSR i.e. 2% of the net profits must be done through shareholders voting and not through any legislative powers.
2. All the efforts taken by the government seems to be like forcing the companies to contribute, rather than it being voluntary. For example legislation can be in the form of stopping child labour in the factories and it cannot force

any factory or a company to build schools or provide education.

3. Moreover with the concurrence to the present case article 21-A which is right to education already enforced by law and its make so clear that CSR is not the only way to bring it into practice.
4. The above point makes it corporate compulsion responsibility and not corporate social responsibility^[13].

Conducting all those activities which are either specified under Schedule VII to the Companies Act, 2013 or those which are recommended by the CSR Committee of the Board as per the CSR Policy and are undertaken by the Board of directors of the Company will be covered under the scope of activities of Corporate Social Responsibility. Amend schedule VII to include a board definition of CSR. The legislature cannot delegate essential legislative functions such as the determination of legislative policy and cannot delegate its power to repeal or modify its essential features. Equal treatment has to be given to all companies. There should not be any distinction between big or small companies. Moreover it is pertinent to note that Section 135 does not empower the Central Government to notify any subordinate legislation. There is no legislative competence to enact this provision under the said Act^[14].

Suggestions and Conclusion

Suggestions

1. Provide greater incentive for companies to focus on first keeping the law. Corporate leaders and their general counsels would give compliance issues a higher priority if they recognized the risk of increased scrutiny on the legal angle of their global operations. In *Timberland's* case, its sole performance indicator for monitoring is "percentage of factories assessed." If the company were mandated to report legal compliance, this would be a much stronger indicator of actual working conditions.
2. Give greater accuracy to CSR ratings. Company CSR assessment questionnaires frequently put more emphasis on aspirational issues. While legal compliance is also included, it is not meaningfully probed. The socially responsible investment community would do well to separate out legal requirements and form one assessment on these, and then evaluate a company on "beyond compliance" issues.
3. Support company compliance staff, who must often make unpopular requests. In the experience of many staff, it seems as if upper management must be persuaded to support not only CSR goals, but regulatory recommendations as well, e.g., factory reimbursement of workers who were not paid legally.
4. Increase the number of companies engaged in these issues. If companies regard factory monitoring as a potential legal liability, they are more likely to attend to it whether or not they have a penchant for CSR.
5. CSR spending is also made mandatory not only to company form of organisation but also to partnership firm or LLP or any other form of organization, whose

⁹ AIR 1954 S.C. 569

¹⁰ Amudha Murthy, Constitutional Validity of CSR, Lawmantra, April 5, 2015

¹¹ AIR 1954 S.C., 468

¹² 165 TAXMANN 323 (SC)

¹³ Amudha Murthy, Constitutional Validity of CSR, Lawmantra, April 5, 2015

¹⁴ Amudha Murthy, Constitutional Validity of CSR, Lawmantra, April 5, 2015

net worth or profit or turnover is more than the prescribed limit.

6. As Shareholders are owners of the company and not the Board of Directors, so shareholder must decide where to spend company's money in a CSR activity and not by Board of Directors.

In India, till very recently, the focus was on charity, which is not really CSR. Sustainable CSR programmes mean a cohesive mix of economic, legal, ethical and philanthropic tenets. In today's changed business scenario, there is an increased focus on giving back to society and creating a model which works long term and is sustainable and it is imperative that the best practices for inclusive growth are shared with the stakeholders. Getting multinationals to comply with local laws is not an easy task. Many countries, north and south, do not direct sufficient resources to enforcement. Management practices that evade regulations persist. Furthermore, labor laws can indeed be difficult to interpret. But suppliers, companies, and countries can't point to these difficulties to elude legal accountability. Legal compliance will be hard to achieve, whether within the CSR rubric or not, but extracting legal compliance from CSR has the advantage of bringing to light a range of workplace and wage issues that companies are required by law to attend to. Finally the author of this paper hopes that the companies' attitude towards CSR is more on transformation rather than giving information in web sites.

Corporate Social Responsibility is a self-regulatory form of corporate conscience included into business models whereby it is guaranteed that the business is keenly accommodating with the force of law and ethical standards according to national and international norms. The term has been in use since the 1960s and maintained its usage extensively to shield legal and moral responsibility. Ever since its inception this sustainability strategy has been opted by companies to reflect their competitiveness. Their overall aim is to impact the society positively while get the most out of the creation of shared value for the shareholders, stakeholders and even employees. However CSR has two threads – the first type holding the common definition of CSR by the public in general. For example, companies providing funding for valuable social causes. The second type is more headed for laying down a real plan like employment creation and economic development through environmental initiatives, manufacturing products, using safe materials, etc. To site a bright example of this, we may bring in light the “cola wars” between Coke and Pepsi, one of the oldest rivalries in business. Both have a vigorous approach towards market share yet their CSR strategies are slightly different, if not all similar, like introduction of sustainable packaging as well as policy of zero net water usage.

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