

# Corporate Social Responsibility: A Business Essential and Legal Imperative

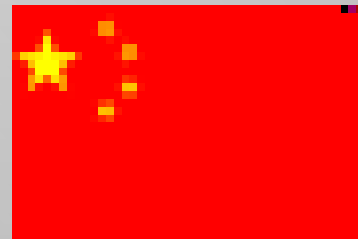
ABA Section of International Law  
China Committee

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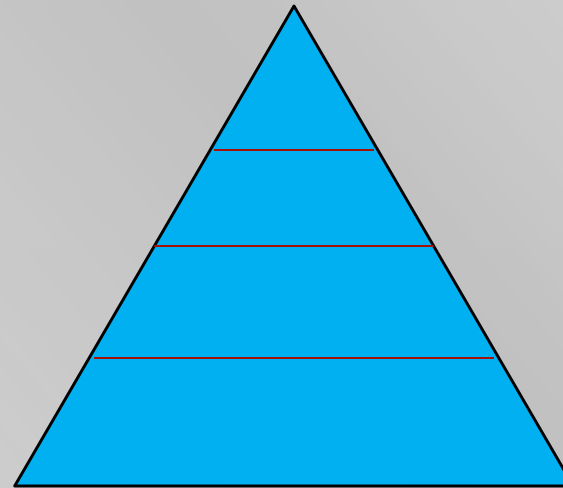
# CSR-Law Contexts

- The Lawyer's (Firm's) role in the Client's CSR
- The Lawyer's (Firm's) own CSR

# The Role for Legal Counsel

## Risk Management (continuing role)

- Carroll's Pyramid of CSR:
  - Philanthropic or discretionary
  - Ethical
  - Legal
  - Economic
- Compliance with domestic law (Counsel)
- Beyond Compliance
  - What's ahead regarding compliance (Counsel)
  - The rest of the Client's environment (economic, ethical, discretionary)





# Historical Context

## Regarding the Development of Economic/Social/Environmental Public Policy

- Business-Society (Social Contract) Questions regarding “value creation” (“CSR” issues fall into one or more)
  1. What value (form of wealth) is created?
  2. How is that value created?
    - a. What inputs/costs
    - b. Where to create it?
  3. Who Pays for the costs to create it?
    - a. Internalized
    - b. Externalized
  4. Who shares in the value created?



Historical context, continued

## Overarching Question

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

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



Historical context, continued

## Domestic vs. Global Context

U.S economic history:

- *laissez faire* to economic recovery acts
- responses to business or market failure (Commerce Clause adjustments)

+ Globalization (reduced barriers to trade, open markets)

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



# Addressing the “GAP” (International)

## Compliance Related:

- An aside regarding GATT/WTO Market Access commitments (MFN) and limitations on direct control over production processes
- International Law
  - “Hard” (treaties, conventions related to CSR-type issues)
  - “Soft” (resolutions, guidelines, guiding principles)
- Domestic US Law with extraterritorial applications

## Non-compliance Related:

- NGO/Industry Action
  - Standards, Codes of Conduct, Certifications
- The Client’s Stakeholders and their expectations



Historical context, continued

## Addressing the “GAP”

An Aside regarding Market Access (and direct regulation)

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





# International Law

Firms not subject to but may be impacted by treaty implementation

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

# “Soft” international law

- not legally binding
- non-“treaty” though normative
- potential impact on customary law
- Intergovernmental initiatives
  - UNGA Resolutions (e.g. environment, human rights)
  - UN Global Compact: 10 Principles
  - 2000 Millennium Declaration (environment, development)
  - UN Guiding Principles on Business and Human Rights
  - WTO Doha Round Ministerial Declaration
  - OECD Guidelines for MNCs (revised 2000)
  - OECD Risk Awareness Tool for MNEs in Weak Governance Zones
- Non-Governmental /Industry Initiatives
  - ISO 26000 Guidance on Social Responsibility
  - Global Reporting Initiative
  - Fair Labor Association



Addressing the “GAP” continued

## **Domestic Law with extraterritorial application (U.S.)**

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



# Compliance (as distinguished from Ethics/CSR)

## ■ Approaches:

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

Some firms are directly subject to various requirements, others will be impacted as supply chain partners, who are expected to report to customers subject to the Acts.



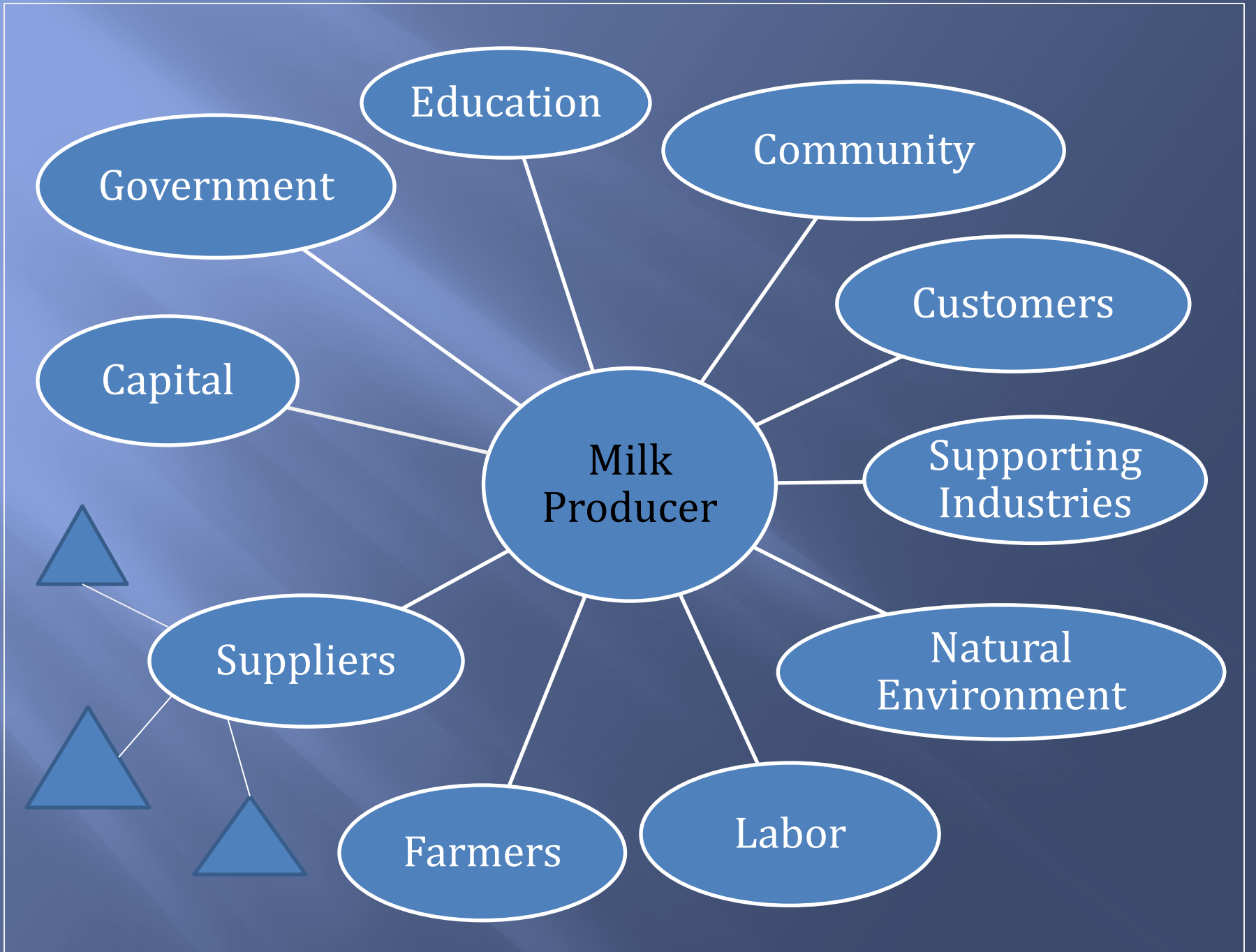
# The Client's Broader CSR Picture


## NGO/Industry Action

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

## The Client's Stakeholders' Expectations

- Internal and External
- Direct and Indirect





A firm that can identify stakeholder expectations and determine, evaluate and execute its strategic choices in light of those expectations is more likely to be sustainable.



# Conclusions on Legal Counsel's Role

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



# CSR in China



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



# Leadership's aspirations/slogans

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

# Substantive Legal Changes (illustrative)

- Company Law 2005 revisions
  - “a company must... observe social morals and business ethics... and fulfill social responsibilities” [“demonstrating an entirely new legal principle and a value objective in regulating business behaviors”<sup>[CTAI report]</sup>]
- Labor Contract Law of 2007 (age, hours, overtime)
- Employment Promotion Law of 2007
- Cooperation with OECD on “Encouraging Responsible Business Conduct “
- Guidelines for State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities (2007)
- Draft Guidelines on CSR Compliance for Foreign Invested Enterprises (2008)
- CSC9000T – Textile Industry (voluntary, CSR Management System for responsible supply chain)
- Numerous environmental regulations
- “Social Risk” assessments for major projects (in place?) (Environment Minister Zhou Shengxian, Nov. 2012)
- Proposed “Charity Law” that could allow public fundraising for NGOs and other recognition of legitimacy



## Other drivers

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



# Supply Chain Scrutiny

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



# Conclusions regarding China

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