



# 2017 International Environmental Law Conference

*Environmental Priorities and Management  
Challenges in a Changing World*

June 22 - 23, 2017 | Chicago





# Welcome Lunch and Opening Remarks

**John Watson**, Baker McKenzie, Chicago





# Global Environmental Regulatory and Enforcement Outlook

Moderator: **John Watson**, Baker McKenzie, Chicago



# **2017 Global Environmental Enforcement and Regulatory Outlook – The Americas**

# Americas – Assessing the Environmental Enforcement Trend Lines

- United States – Uncertain
- Mexico – Unchanged
- South America – Expanding
- Canada - Expanding

# Americas – Environmental Enforcement Outlook

- **United States**
  - Trump Administration brings uncertainty to US enforcement picture
  - All enforcement constituencies – EPA, states and environmental groups – still assessing roles and strategies
  - Directional shifts at federal level likely to influence responses by states and NGOs

# Americas – Environmental Enforcement Outlook

- **United States**

- EPA Enforcement Outlook



- Movement back to “traditional” environmental programs and enforcement focus – air, water, waste
- Targeting “worst polluters”
- CERCLA – “center of Agency’s core mission”

- Continued reliance on existing enforcement tools

- Next Generation Compliance strategy
- EPA Audit Policy

# Americas – Environmental Enforcement Outlook

- United States

- State Enforcement Outlook



- Expect divergent responses to EPA enforcement policy
  - States eager to escape overbearing EPA
  - Funding issues may limit State enforcement agendas
  - Public may demand strong State responses to highly politicized issues
- Red/Blue leanings may dictate ultimate direction of State enforcement policy



# Americas – Environmental Enforcement Outlook

- United States



- Citizen Enforcement Outlook

- NGOs gearing up for a fight

- Likely targets

- Programs subject to Trump rollbacks

- Carbon emitters

- Chronic violators

# Americas – Environmental Enforcement Outlook

- Mexico



- Mexico Enforcement Outlook
- Enforcement agencies operating in “business as usual” mode
- Enforcement tools expanding
  - Recent punitive damage awards by Mexican Supreme Court to compensate victims of environmental harm

# Americas – Environmental Enforcement Outlook

- Mexico
  - The Mexican Supreme Court has issued a number of rulings in the area of punitive damage
  - Punitive damages awarded based on environmental harm from negligence/failure to due care

# Americas – Environmental Enforcement Outlook

- **Mexico**

- Companies that fail to exercise care when undertaking their activities or that fail to comply with an environmental law, may be subject to punitive damages, aside from facing administrative or criminal liability
- Punitive damages may be in amounts that may reach the willingness of dollars to properly indemnify a victim and punish an improper behavior
- Judges may taken into account the harm caused to victims, the degree of liability or negligence, the social aspect of the harm that has been caused, and the economic situation of the party causing environmental harm.

# Americas – Environmental Enforcement Outlook

- Mexico
  - Environmental liability may be (i) administrative, (ii) criminal or (iii) civil
  - If environmental harm is caused with serious repercussions for the ecosystem or public health, it may be viable for affected parties to seek payment of punitive damages (as part of what they may seek in civil or collective actions), particularly if the party at fault acted willfully, with gross negligence, violating a law or failing to comply with an obligation of care.

# Americas – Environmental Enforcement Outlook

- South America



- Brazil/Chile Enforcement Outlook
  - Brazil – Enforcement dominated by responses to major contamination cases
    - State of Sao Paulo EPA enforcing stricter remediation standards
    - District attorneys pursuing class actions to achieve “full recovery of the environment”
  - Chile – New environmental authority expanding oversight of project environmental assessments and regulatory enforcement

# Americas – Environmental Enforcement Outlook

- Canada



- Canada Enforcement Outlook
- Both Environment Canada and provincial environmental ministries are stepping up their enforcement efforts
  - Increased inspections of regulated industries
  - Use of covert surveillance methods to gather compliance data

# Americas - Environmental Regulatory Priorities

- **United States**
  - Regulatory Roll-backs
    - Trump Administration “2 for 1” Executive Order
    - Clean Power Plan
    - Waters of the U.S. Rule
    - Risk Management Plan facility safety rule
  - CERCLA Streamlining/Reform
  - TSCA Implementation



# Americas - Environmental Regulatory Priorities

- Mexico
  - National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons sector
  - General Law for Climate Change
  - General Wildlife Law
  - General Law for Ecological Balance and Environmental Protection

# Americas - Environmental Regulatory Priorities

- South America
  - Brazil
    - Contamination Management – CETESB Board Decision No. 38/2017/C
    - Take-back Requirements
    - Climate Change – Paris Agreement implementation

# Americas - Environmental Regulatory Priorities

- South America
  - Chile
    - Environmental Impact Assessment regulations
    - “Waste Management, the Extended Liability of the Producer and the Encouragement of Recycling Act” – No. 20,920 (June 2016)
    - Water Code reforms

# Americas - Environmental Regulatory Priorities

- **Canada**
  - Regulatory Harmonization
    - Coordinated through Canadian Council of Environmental Ministers
    - Air (including GHG), waste diversion, chemical management standards moving towards single standard
  - Moving towards a “Circular Economy”
    - Resource recovery regulations coming for virtually every waste stream
    - Hazardous substance tracking and reporting
    - Registration of transport and consumer packaging
    - Growth of diverted waste streams

# Americas – Notable Enforcement Cases

- Brazil – Samarco Case
- Mexico – Buenavista Mine Case
- Canada – Kawartha Lakes Decision

# Americas - Environmental Enforcement Outlook

What lies ahead?



# **2017 Global Environmental Enforcement Outlook – The European Union**

# Environmental Enforcement Priorities and Trends: European Union I

- Enforcement of EU environmental law = duty of Member States
- European Commission
  - monitors implementation of EU law:
    - 2017: "Fitness check on Reporting and Monitoring"
  - takes legal action against EU Member States for failing to comply with their obligations under EU environmental law (infringement procedure)
    - ca. 300 cases/year; top offenders: Spain, Greece, Italy.



# Environmental Enforcement Priorities and Trends: European Union II

- European Commission
  - has conducted a broad EU Environmental Implementation Review (EIR)
    - 2017 Reports on state of implementation of EU environmental law in all 28 Member States, common challenges, common opportunities and points of excellence.
    - Commission and Member States to follow up by "closing implementation gaps".
    - Second round of EIR in 2 years: 2-yearly cycle of analysis.

# New Environmental Initiatives Imposing Burdens on Global Business: European Union I

- Environmental plans and proposed initiatives are set out in
  - General Union Environment Action Programme to 2020 (Decision No. 1386/2013/EU of the European Parliament and the Council of 20 November 2013)
  - Strategic Plan 2016 – 2020 of European Commission's DG Environment.
  - Management Plan 2017 of European Commission's DG Environment.

# New Environmental Initiatives Imposing Burdens on Global Business: European Union II

- New initiative: Adoption of new rules (Dec. 2016) for Member States to reduce air pollution by primary particulate matter, sulphur dioxide, nitrogen oxides, ammonia and volatile organic components ("National Emission Ceilings Directive")
  - to be transposed into national legislation by 30 June 2018
  - National Air Pollution Control Programs to be established by 31 March 2019
- New initiative: Strategy for more sustainable production, use, reuse and recycling of plastic (2017).
- New initiative: New waste legislation (?)

# Notable Environmental Enforcement Cases: European Union

- European Commission: Infringement Cases – "Article 260" Cases.
- European Court of Justice:
  - Access to environmental documents expanded (Case C-673/13P: Commission vs. Greenpeace; Case C-442-14: Bayer; judgements of 23 November 2016).
  - Access to justice widened (Case C-137/14: Commission vs. Germany, judgement of 15 October 2015).

# EU Enforcement Outlook – Member State Developments

- UK
- Italy
- France
- Germany
- Belgium
- Spain

# EU Enforcement Outlook

What lies ahead?



# **2017 Global Environmental Enforcement Outlook – Asia/Pacific**

# Asia/Pacific – Assessing the Environmental Enforcement Tread Lines

- China – Significant Expansion
- India – Significant Expansion
- Japan – Unchanged
- Thailand –Expanding



# Asia/Pacific –Environmental Enforcement Outlook

- **China**
  - Under Premier Li's "War on Pollution" . . .
    - State Council / MEP both conducting routine inspections
    - Enforcement powers have been strengthened
      - higher penalties – over 50% above 2015 level
      - shutdown of responsible corporate actors

# Asia/Pacific –Environmental Enforcement Outlook

- **India**
  - Enforcement Focus
    - Improving air pollution through reductions in vehicle emissions
    - Crack down on unauthorized/unpermitted mining/industrial activities

# Asia/Pacific – Environmental Enforcement Outlook

- **Japan**

- Ministry of Environment enforcement priority – illegal waste disposal activities
  - Management of waste by generators
  - Operation of licensed waste disposal facilities

- **Thailand**

- Government enforcement targeting power and mining industries
- Response to growing public opposition to these resource exploitation and fossil fuel projects

# Asia/Pacific –Environmental Regulatory Priorities

- **China**
  - 2015 revision to Environmental Protection Law has increased MEP enforcement powers
  - Current or planned revisions to air, water and soil pollution laws in response to surveys indicating seriousness of issues
  - Revamped RoHS regulations
  - Environment Tax Law

# Asia/Pacific –Environmental Regulatory Priorities

- **India**
  - New regulatory classification system based on “pollution index“
  - State Pollution Control Board initiative requiring installation of emissions/effluent monitoring systems
  - Plastic Waste Rule (2016)
  - E-Waste Management Rules (2016)
  - Environmental Impact Assessment Notifications (2016)

# Asia/Pacific –Environmental Regulatory Priorities

- **Japan**
  - Amendment of Chemical Substance Control Act
  - Amendment of Waste Management Act – E-waste regulation
  - Amendment of Soil Contamination Prevention Act
- **Thailand**
  - New Minerals Act
  - Thailand Greenhouse Gas Management Organization carbon trading scheme

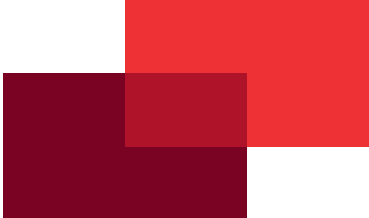
## Asia/Pacific – Notable Enforcement Cases

- 2016 Tianjin Chemicals Warehouse Explosion
- Bellandur Lake action
- Bhiwadi Groundwater case
- Cessation of Gold Mining Operations in Thailand

Asia/Pacific

What lies ahead?





# State of Corporate Environmental Sustainability/Climate Change Initiatives in a Fractured Marketplace

Moderator: **David Hackett**, Baker McKenzie, Chicago

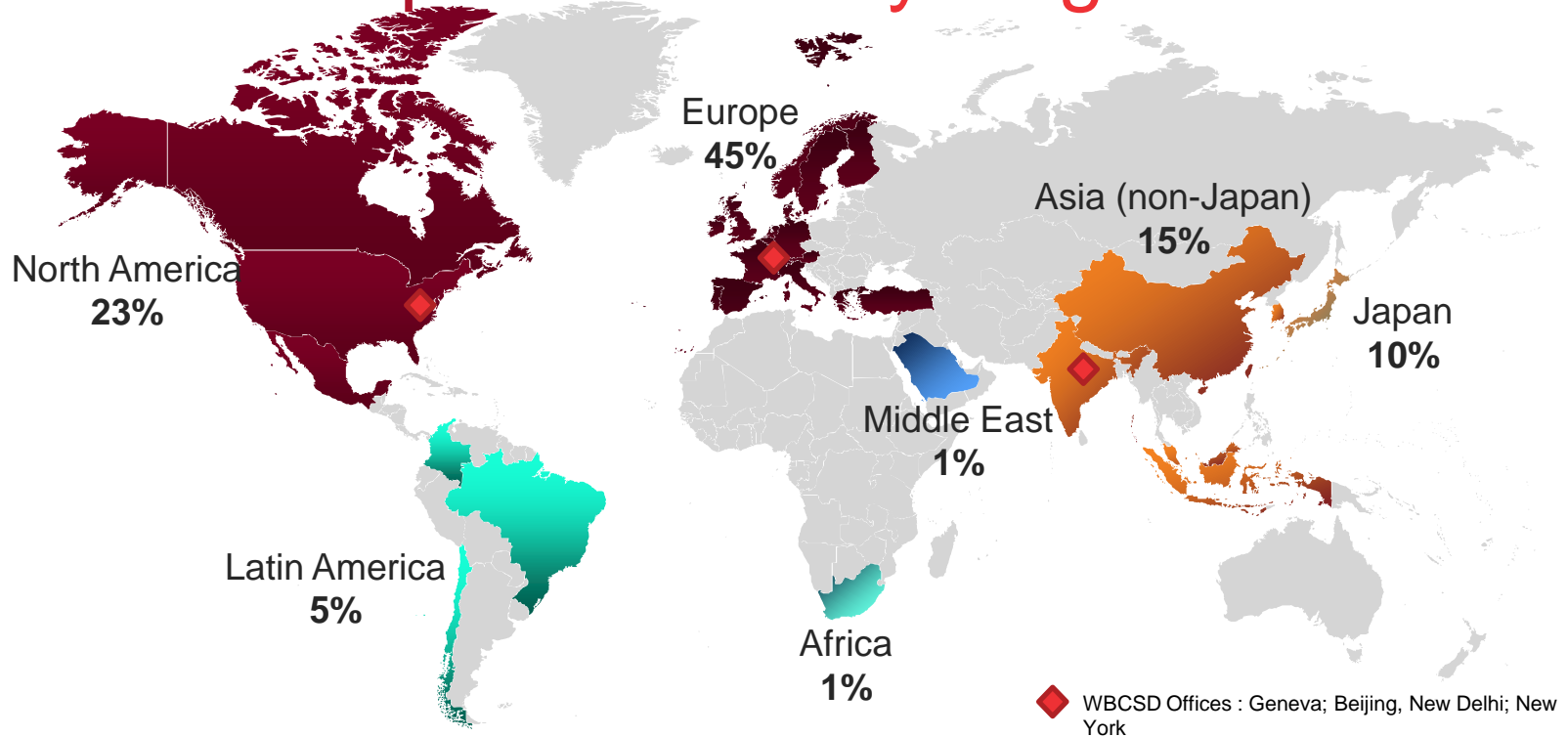
# World Business Council for Sustainable Development

Chris Walker, WBCSD



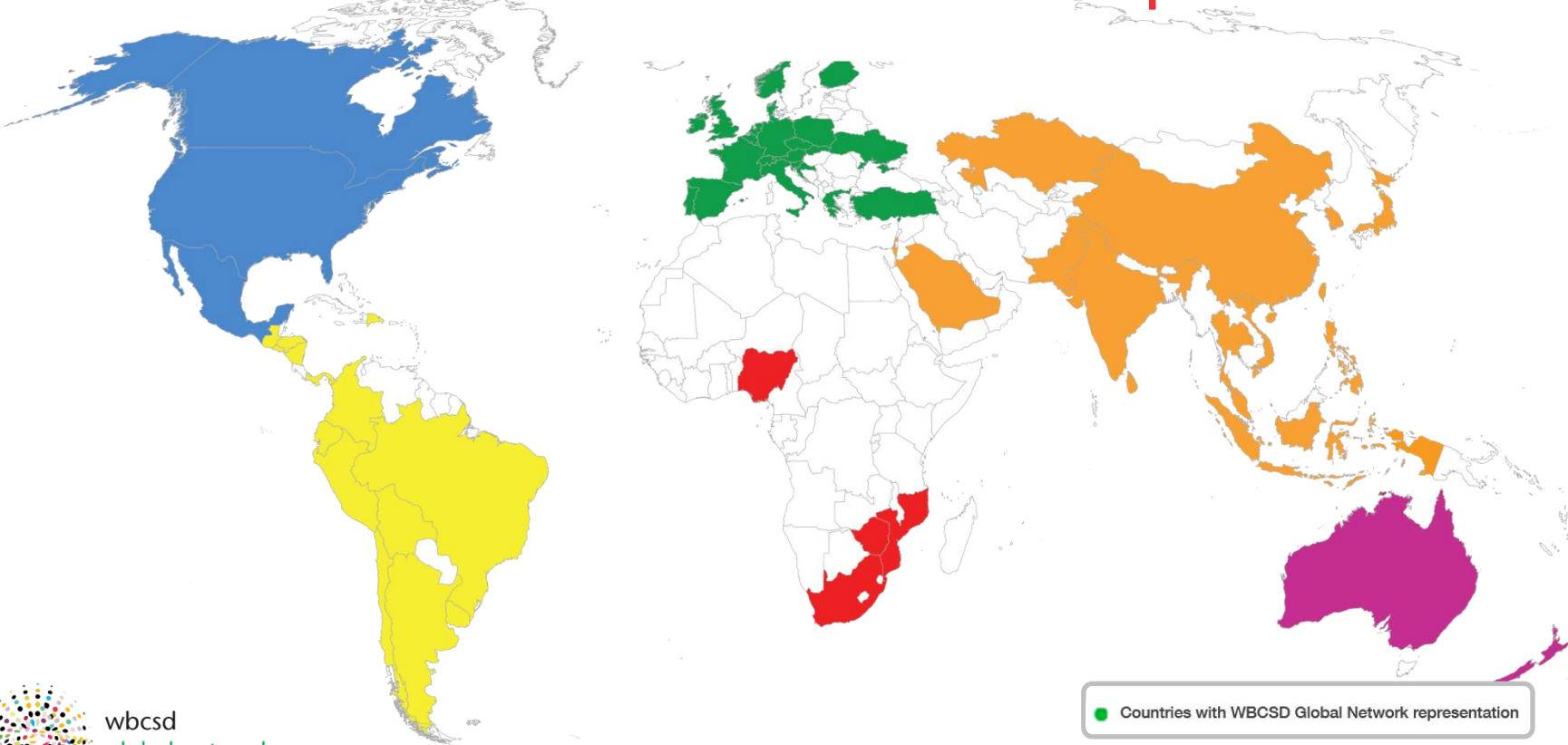


# Membership Overview by Region



N.B.: Based on the member companies' headquarters and is thus not representative of our members' activities around the globe.

# WBCSD's 60+ Global Network partners



2016





COP21- CMP11

PARIS 2015

UN CLIMATE CHANGE CONFERENCE



# SUSTAINABLE DEVELOPMENT GOALS



2017

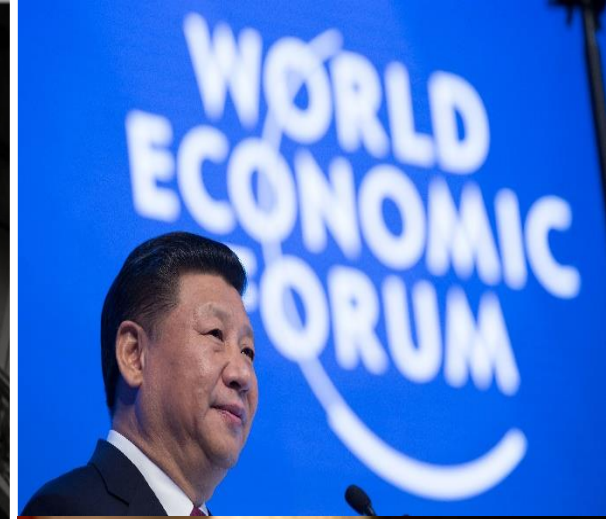
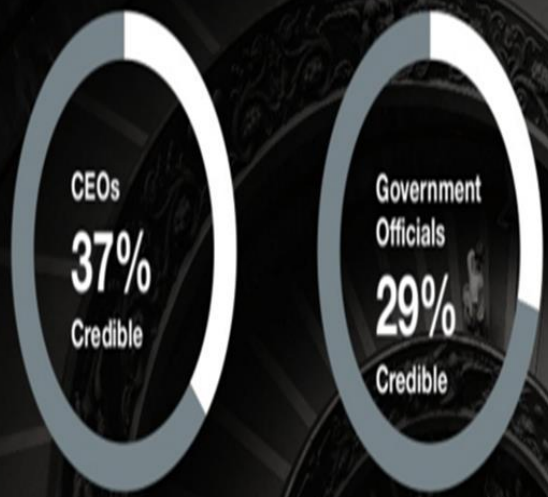






## Credibility of Leadership in Crisis

Percent who rate each spokesperson as very/extremely credible



Source: 2017 Edelman Trust Barometer Q130-747. Below is a list of people, in general, when forming an opinion of a company, if you heard information about a company from each person, how credible would the information be—extremely credible, very credible, somewhat credible, or not credible at all? (Top 2 Box, Very/Extremely Credible) General Population, 28-country global total, question asked of half the sample.





# BUSINESSES SUPPORTING PARIS ACCORD

 **Brad Smith**   
@BradSml

 **Microsoft**



We're disappointed with the decision to exit the Paris Agreement. Microsoft remains committed to doing our part to achieve its goals.

3:58 PM - 1 Jun 2017

1,971 retweets 5,469 likes

 **Sundar Pichai**   
@sundarpichai

 **Google**



Disappointed with today's decision. Google will keep working hard for a cleaner, more prosperous future for all.

5:08 PM - 1 Jun 2017

4,174 retweets 13,286 likes

 **Paul Polman**   
@PaulPolman

 **Unilever**



#ParisAgreement = huge economic opportunity. Inaction is existential threat. No turning back. Business must lead.

3:06 AM - 2 Jun 2017

90 retweets 116 likes

 **Tim Cook**   
@tim\_cook

 **Apple**



Decision to withdraw from the #ParisAgreement was wrong for our planet. Apple is committed to fight climate change and we will never waver.

8:36 PM - 1 Jun 2017

10,410 retweets 26,011 likes

 **Jeff Immelt**   
@JeffImmelt

 **GE**



Disappointed with today's decision on the Paris Agreement. Climate change is real. Industry must now lead and not depend on government.

3:56 PM - 1 Jun 2017

12,286 retweets 25,310 likes

 **Mark Zuckerberg**   
8 mins - Menlo Park, CA · 

Withdrawing from the Paris climate agreement is bad for the environment, bad for the economy, and it puts our children's future at risk.

For our part, we've committed that every new data center we build will be powered by 100% renewable energy.

Stopping climate change is something we can only do as a global community, and we have to act together before it's too late.

## BREAKING NEWS

# TRUMP: U.S. WILL WITHDRAW FROM CLIMATE DEAL



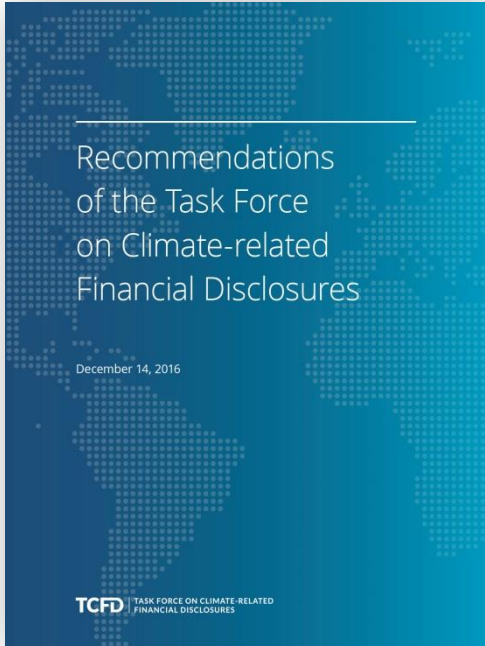
SMI ▲ 8.28

@CNBRK

WITNESS REPORTS SMOKE, GUNSHOTS AT MANILA RESORT



# Business Driving Leadership



## Governance Recommendations

- Board's oversight of climate-related risks and opportunities
- Management's role in assessing and managing climate-related risks and opportunities



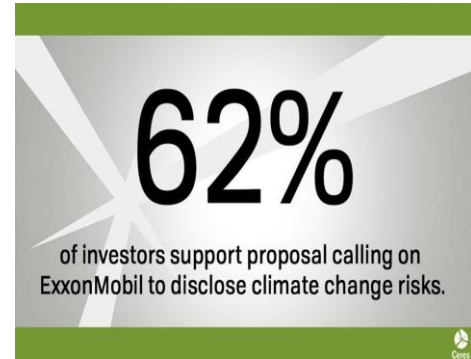
## Strategy Recommendations

- Potential impact of different scenarios, including a 2° scenario on the business, strategy and financial planning



## Disclosure Recommendations

- Disclose the metrics to assess climate related risks and opportunities
- Disclose scope 1, scope 2 and scope 3 GHG emissions
- Describe the targets and performance against them





A call to action to business leaders

US\$12 trillion in economic opportunities

380 million jobs by 2030

Leadership needed from private sector



# WBCSD Ecosystems Focus



food



materials



energy



cities

# Current cities projects : SMP, EEB and ZEC



**Scale up**



**Expand**



**Energy Efficiency in Buildings -  
Unlock investments**

**Policy & Regulation**

Codes, labeling, incentives

# WBCSD – 26 city engagements



10 UII partner cities  
6 SMP showcase cities  
7 EEB Lab locations  
3 ZEC pilot cities



# WBCSD and Food and Agriculture Initiatives

- Moore Foundation:  
**Conservation and Financial Markets Initiative**
- Climate Smart Agriculture (CSA)
- Global Agri-business Alliance (GAA)
- FRESH
- Soft Commodities Forum

CSA	GAA	FReSH	Soft Commodities
Smallholder and landscape resilience	Water stewardship	Defining healthy and sustainable diets	Harmonisation of sustainable commodity procurement
GHG mitigation	Technology and smallholders	Reshaping food consumption	Deforestation
Climate finance	Deforestation and sustainable landscapes	Improving food trade and logistics	Soy
Food loss and waste	Food loss (and waste)	Advocacy and performance measurement	
Measurement and monitoring of CSA outcomes	SDG roadmap	Redefining food production	
Deforestation/sustainable landscapes			
Adaptation to climate change			

# FReSH Initiative

Developed by the EAT Foundation & WBCSD



## EAT Foundation

EAT is a collaboration between the Stordalen Foundation, the Wellcome Trust and the Stockholm Resilience

Center. With its partners, it aims to catalyze reform of the global food system to feed a global population with healthy food from a healthy planet.

eat

## WBCSD

CEO-led group of forward-thinking companies galvanizing the global business community Aiming to create a sustainable future for business, society and the environment

Applying thought leadership and advocacy  
Generating solutions and taking shared action.



wbcscd

## Joint vision

Reaching a healthy, enjoyable diet for all, produced responsibly within planetary boundaries

## Joint skills and competencies

- Bringing **science, society and business** together
- Integrating **health, socio-economic and environmental** considerations
- Multi-stakeholder **convening platform**
- Raising public awareness, linking with policy-makers
- **Systems thinking** and **solutions development**

# From fork to farm: consumers are at the heart of FReSH

## Science

Science-based, **independent targets and assessments of healthy and sustainable diets**, considering regional and cultural differences

**Critical to establish consumer trust**

Critical review, keeping system 'on its toes', **trust & endorser of solutions**

**Key information source and influence for consumers**

## Civil society

## Producers and business

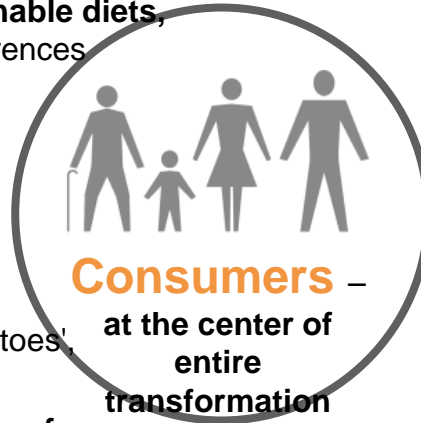
Provider of food, innovation, choice influencing, and **business solutions**

**Dependent on consumer choices**

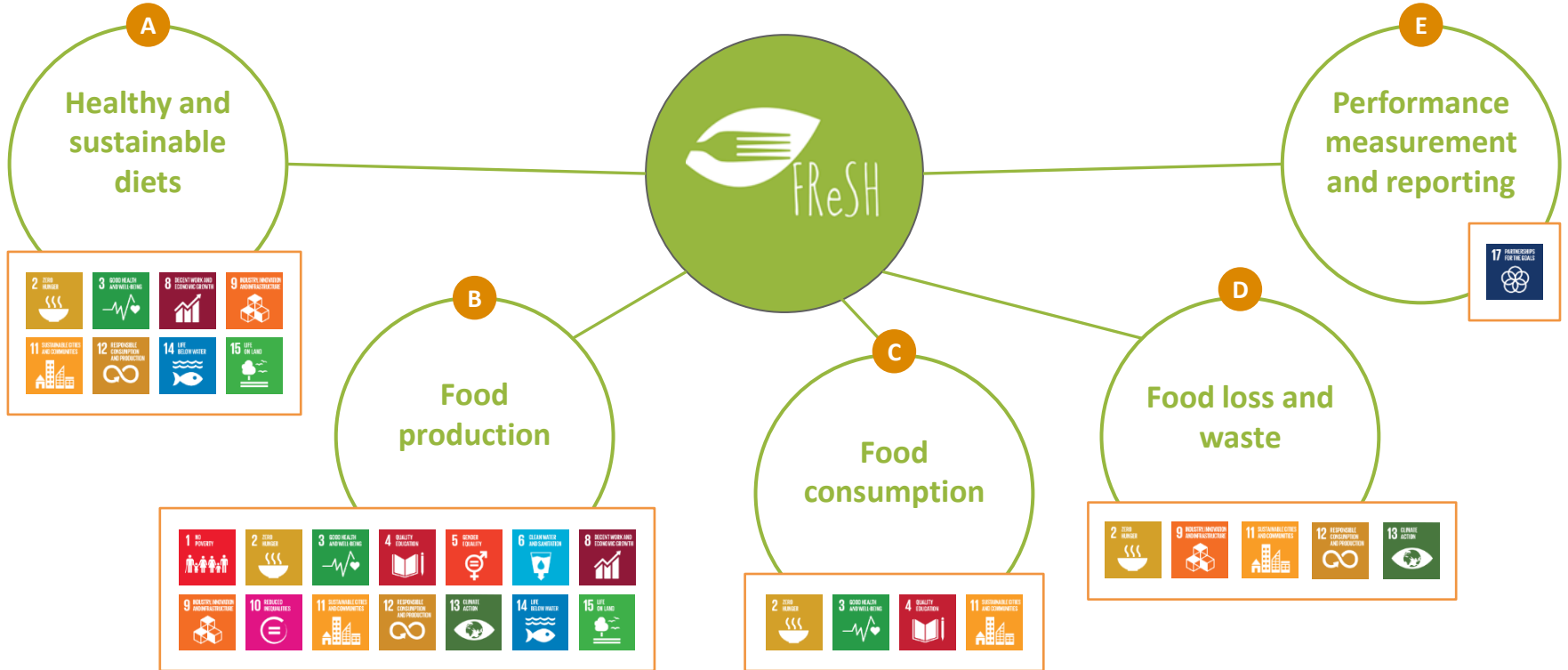
Regulation, **system incentives** and choice editing

**Set the overall framework in which consumers and businesses operate**

## Policy makers



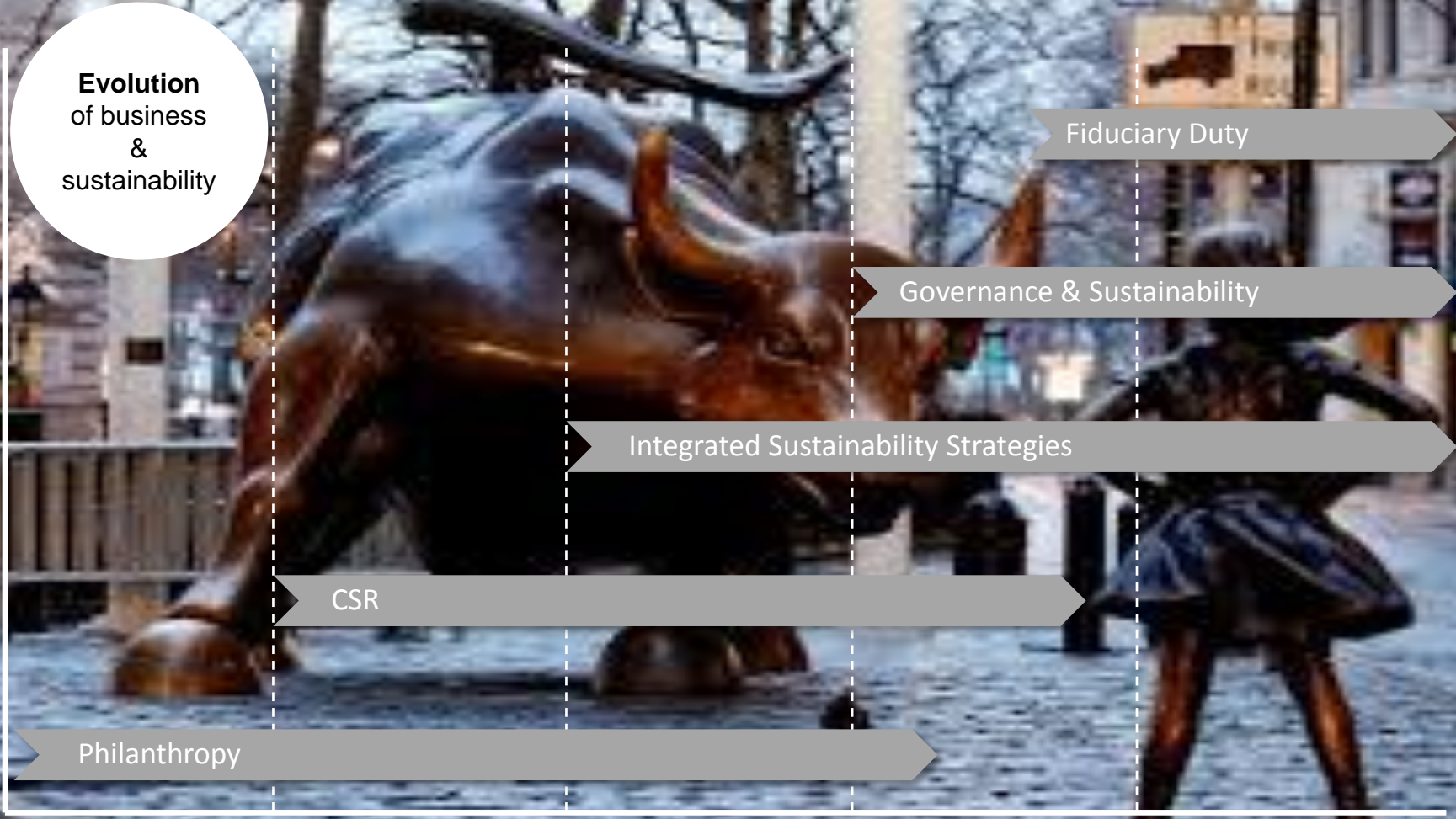
# FReSH is structured around 5 workstreams to catalyze change worldwide & support the SDGs



# 35 leading companies are already involved



**Evolution  
of business  
&  
sustainability**



2000

2010

2020

2030

Philanthropy

CSR

Integrated Sustainability Strategies

Governance & Sustainability

Fiduciary Duty



# Valuation™

True cost, true profit  
in corporate decision-making, disclosure and reporting



# WBCSD – Redefining Capital Markets

Create a two-way information flow with capital markets to improve transparency

- ① ESG ratings and rankings - company *pull* from investors
- ② ESG analyst calls - company *push* to investors

And an area to leverage capital allocation to ESG-integrated investments

- ③ Retirement benefit plans

## ESG

### Environmental

Waste & Pollution    Resource Depletion  
Greenhouse Gas Emission    Deforestation  
Climate Change

### Social

Employee Relations & Diversity  
Working Conditions    Local Communities  
Health & Safety    Conflict

### Governance

Tax Strategy    Executive Remuneration  
Donations & Political Lobbying  
Corruption & Bribery    Board Diversity & Structure



# Employees expressed several ways they would like to be engaged

**82%**

Provide matching funds to nonprofit organizations that align with company's social commitments

**74%**

Provide socially responsible funds to invest in through company's 401(k)

**74%**

Provide new feedback channels to ensure employee attitudes are being heard by senior management

**67%**

Align with company's pension plans your company's social and environmental commitments

**63%**

Provide paid time off and/or onsite opportunities to demonstrate public support

*Q. How important do you feel it is for your company to do the following things as a means of providing its employees with personal opportunities to make an impact on important societal issues?*



# CEO Guide

to the Sustainable  
Development Goals



# Agenda

- Disclosure as a driver of disputes
- Climate Change Disclosure Litigation
- Exxon: a Case Study
- ESG Investing and Disputes

## Disclosure as the Handmaiden of Disputes

- The 10(b) 5 Model equated a material omission in a statement with a misrepresentation
- “Misrepresentation by Omission” spawned a more general Duty to Disclose economy and culture
- The Contagion jumped species—securities purchases were no longer prerequisites
  - Consumer Fraud cases about slavery in the supply chain
  - Misrepresentation as an Unfair or Deceptive Business Practice
  - RICO for an ongoing fraud scheme

## Multiple settings

- California Transparency in Supply Chain Act —requires reporting on efforts to eradicate slavery in the supply chain
  - But the Interfaith Center on Corporate Responsibility and Calvert Investments advise that “it is imperative companies take active steps to combat human trafficking within their direct operations as well as supply chains to ensure they are not complicit in human rights abuses.”
- Disclosing your “steps” (auditing, training, prohibiting) sets up the action for misrepresentation when slavery is later found
- UK Anti-Slavery Act; Dodd-Frank; and others

# EXXON – A Case Study

- Two flavors:
  - Tobacco-style ongoing fraud about what Exxon knew, what Exxon paid to anti-climate change groups, what Exxon disclosed and how it calculates future climate change regulatory cost
  - Moving toward a “Stranded assets” theory—that tar sands are so bad, oil prices are so low, and inevitable regulation is so costly, that many reserves should not be counted and the balance sheet is wrong. More about the bad tar sands than the bad disclosures.....

## Oh, to litigate at home....

- A tale of two venues
- NY and Massachusetts AG state actions; broad discovery; subpoenas to Price Waterhouse about what they told Exxon as experts who also advised the Carbon Project; subpoenas re cost projections by the Canadian Exxon about tar sands projects
- Countersuit on First Amendment and Conspiracy grounds in Texas; attacking joint action by group of Democratic AG's to advance a political agenda through enforcement actions
- But guess where the Texas case went....

## Not for the faint of heart

- Virgin Islands AG dropped out; others have not joined
- Expensive litigation
- Congressional Subpoenas---AG's refusing to comply
- Senatorial threats of a Tobacco RICO case
- Bad documents on both sides
  - Wayne Tracker persona
  - Joint action plans
- SEC investigation; September 2016



## Investor “Court”—25 years, 100 Resolutions

- 1990 Friends of the Earth—6 % for carbon emissions reduction plan
- 1997 Milwaukee Priest— 4.5% for reporting impacts of climate change
- 2002 Ceres—20% support for renewables like BP and Shell
- 2006 Institutions and Connecticut Treasurer demanded meetings
- 2007 Institutions fail in opposing reelection of key Envmtl Bd Member
- 2008 Rockefeller heirs oppose Chairman and support disclosure
- 2014 Agreed to report on risk of stranded assets—”highly unlikely”
- 2015 Bigger institutions get only 10 percent supporting disclosure
- 2016 38% vote for climate change disclosures re Paris impact
- 2017 62% vote for climate disclosure resolution—Pension led with 1B\$

# Activist Investing

- Black Rock: 5.1 trillion AUM; wants more transparency on climate change; successfully opposed management at Occidental
- Other pushing for broader duty of custodial banks
- Shareholder resolutions approaching 50% at utilities Duke, DTE Energy, Dominion Resources
- Exxon appointed a climate scientist to the Board
- G20 Task Force of the Financial Stability Board, led by Bloomberg, calls for a “New Normal” of Transparency, alleging potential market shocks in the absence of more disclosure

# Aggregate Investing Tied to ESG

Global Sustainable Investment Alliance says:

- 22.9 trillion at the start of 2016
- 26% of professionally managed money world wide

## A new generation of investors and investments

- Combine Socially Responsible Investing with Robo Investing
- Add data on relative returns:
  - MSCI KLD Social Index— 8.4% since 1990
  - S&P 500 Index -- 7.6% since 1990
- Moving beyond mere “negative screens” for tobacco, coal, liquor, or guns
- OpenInvest has investors choose 10 investment themes—one is climate change, others range from women’s issues to weapons

# What is Socially Responsible? or Green?

- Multiple examples of ambiguity and confusion—ripe for litigation
- State Street Spyder **SPDR S&P 500 Fossil Fuel Free ETF**
- *included: Transocean, Southern Co, and Valero Energy*
- Had to change the name to “FF Reserves Free” ETF—but still included those who drill or refine crude....
- 26 new ESG ETFs since 2016
- Most tackle harder issues than “fossil fuels”—women’s rights, good governance, pro-labor, etc.
- MSCI proud of its downgrade of VW due to “governance issues”—but missed the cheating

## Ambiguity is the mother of litigation

- Portland could not decide what to blacklist—so no bonds, and no stocks
  - Started as “No money for Prisons, Pipelines, or Palestine occupation”
- Should anti-fossil fuel include anti-fossil-fuel users or providers?
- And if so, then also anti-climate-change-deniers?
- What is the level of inquiry required before attaching an approval?
- When is the falsehood of a given characteristic too egregious? Ever?
- Doesn't the use of ESG classification to induce investment acknowledge its materiality?
- Add Human Rights and Venezuelan Bonds....

## What to do and expect

1. “Watch, Embrace, and Participate”--- in the move toward a standardized terminology and set of metrics
2. “Accept and Align”—your CSR report and your 10K are parts of a single whole. “Statements” do not have to be in the 10k to be actionable.
3. “Take a Compliance Approach” to this Risk. Who owns it? How do you train on it? How do you audit it and improve it?
4. Accept the inevitable move toward Outside Assurance. Begin a conversation on how to do that effectively.
5. Get Ready for this as a “Popular Litigation Product”. It’s custom made for litigation by Attorneys General, Competitors, Investors, and NGOs.



# State of Corporate Environmental Sustainability – Climate Change Initiative in a Fractured Market Place

European Contribution

**Pascal Mallien**, Baker McKenzie, Antwerp



# 1. Evaluation of emerging legal mandates on environmental sustainability performance and disclosure

- from a steady definition change of ‘sustainability’ to a legal definition

Example :

“*sustainable bio-diesel*” = production in the EU, a criterium ?

- influence of politics

Example:

“*Netherlands to get first US LNG cargot*” (liquified natural gas)

Questions in the Dutch 2nd Chamber by Groen Links (Van Tongeren)

Proposal not to accept LNG coming from shale gas protection in the USA

# 1. Evaluation of emerging legal mandates on environmental sustainability performance and disclosure

- definition of sustainability = uncertainty

Example:

Blood diamonds, cobalt from Congo fighting rebels...

Clothes manufactured in collapsing factories in Bangladesh

## 2. Status of litigation for expanded disclosure of environmental / climate risks

- a company commitment or statement = soft law
- when soft law becomes legislation, legislation is sometimes applied *back in time* due to the company commitment

### 3. Impact of financial market / investment

- especially in real estate
- “work with nature to reduce costs” (Aecom) through a natural capital protocol = framework ≠ tools
- limited liability for the past pollution

Example:

national grid in the UK, ruling before the House of Lords that they are not liable for pollution caused before the privatisation

## 4. Directional changes in corporate environmental sustainability / climate change policies

- more and more a requirement to have a non-governmental non profit adviser

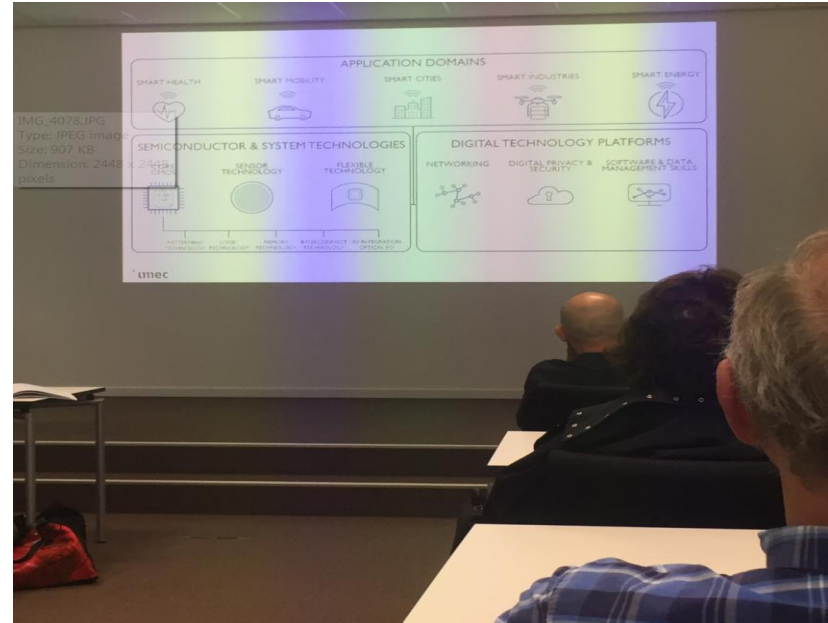
Example:

Imec

smart mobility / cities / industries / energy

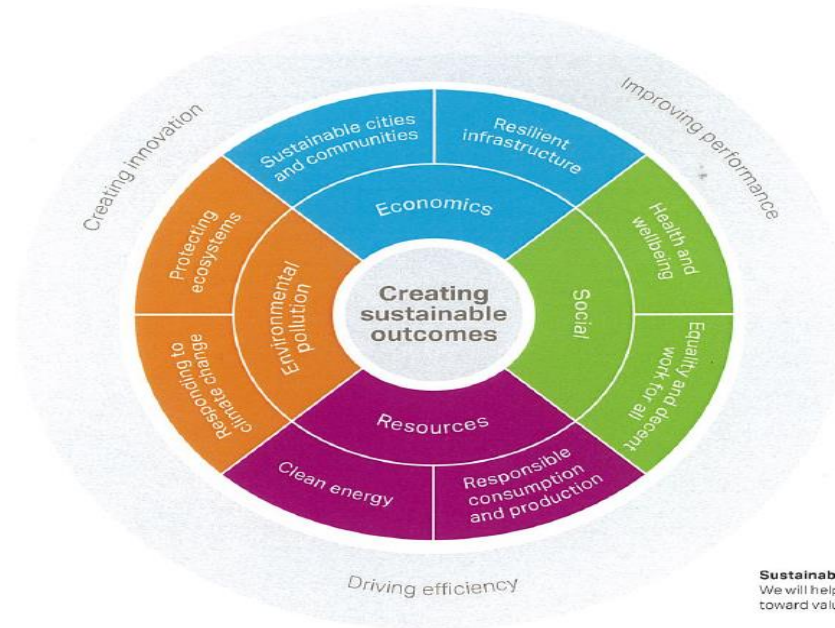
semi conductor and system technologies

digital technology platforms



## 5. Summary

- turning in circles but more and more impact for round-globe approach



**Sustainable development challenges**  
We will help you navigate these complex issues toward value creation, growth and resilience



# Managing Global Environmental Risks in Cross-Border Transactions

Moderator: **Jessica Wicha**, Baker McKenzie, Chicago

# Managing Global Environmental Risks in Cross-Border Transactions

- Identifying global environmental risk - environmental diligence
- Managing global environmental risk - international environmental insurance products
- Managing global environmental risk - contractual protections
- Day 1 Readiness – executing global EHS permit transfers



# Identifying Global Environmental Risk – Environmental Diligence

- What are the country-specific environmental issues that need to be considered?
- What tools are available for global environmental diligence?
  - release reporting requirements
  - jurisdictional trends

# Evolving International Environmental Insurance Products

- **Most competitive market in 25 years**
  - Significant leverage in pricing and coverage terms
- **Major insurers**
  - AIG, Allianz, Aspen, Beazley, Channel (SCOR), Chubb (Ace), Liberty, Navigators Syndicate, STARR, Tokio Marine, XL Catlin & Zurich
- **Limits** - \$200mm+ in aggregate capacity on global side
- **Policy Forms** - London Quota-share or follow form layered programs
  - Customized “bespoke” program tailored for international M&A transactions
- **Advisory** - Broker Role very critical to drive process to secure best terms, conditions and price

## Pays for:

- **Clean-up costs** for any onsite or offsite contamination
- **Third-party liability** claims including:
  - Regulator required cleanup
  - Property damage
  - Bodily injury
  - Natural resource damages
  - Business interruption and loss of rental income due to pollution conditions
- **Defense costs** are included within the limit of liability
- **Non-owned disposal** sites where hazardous materials and wastes from the site are taken
- **Transportation** (first and third-party) of materials to and from the insured property



## M&A transactions and property transfers

- Pollution conditions are known at the site
- Coverage for excess of indemnity provisions provides no exclusions for the known conditions
- Coverage responds to excess indemnity
- Coverage can respond if indemnitor fails to honor its obligations under the agreement
- Coverage is highly dependent on the creditworthiness of the indemnitor



- **Coverage Terms & Conditions** – Obtain broadest coverage
  
- **Compliant coverage:**
  - Insurance Regulations
  - Environmental Laws
  
- **Multinational Corporation can buy either:**
  - Individual local admitted policies in each country; or
  - Institute a Global Master Policy Program with local admitted policies
  - Non-compliant policy- Utilizing a world-wide territory endorsement

## A Global program utilizes a “master policy” in one country with one or more “local policies” issued locally in other countries

- “Master policy” can offer “DIC/DIL” cover on either a “PUC” or “FIC” basis to provide seamless and comprehensive global cover.
- “Basis of Coverage Clause” links the “local policies” with the “master policy”.

## Local Policy

- Policy written in a foreign country that provides coverage to the local foreign subsidiary.
- Includes local claims handling in country of loss
- Loss payments made in country to local corporate entity avoiding any taxation or fines and penalties

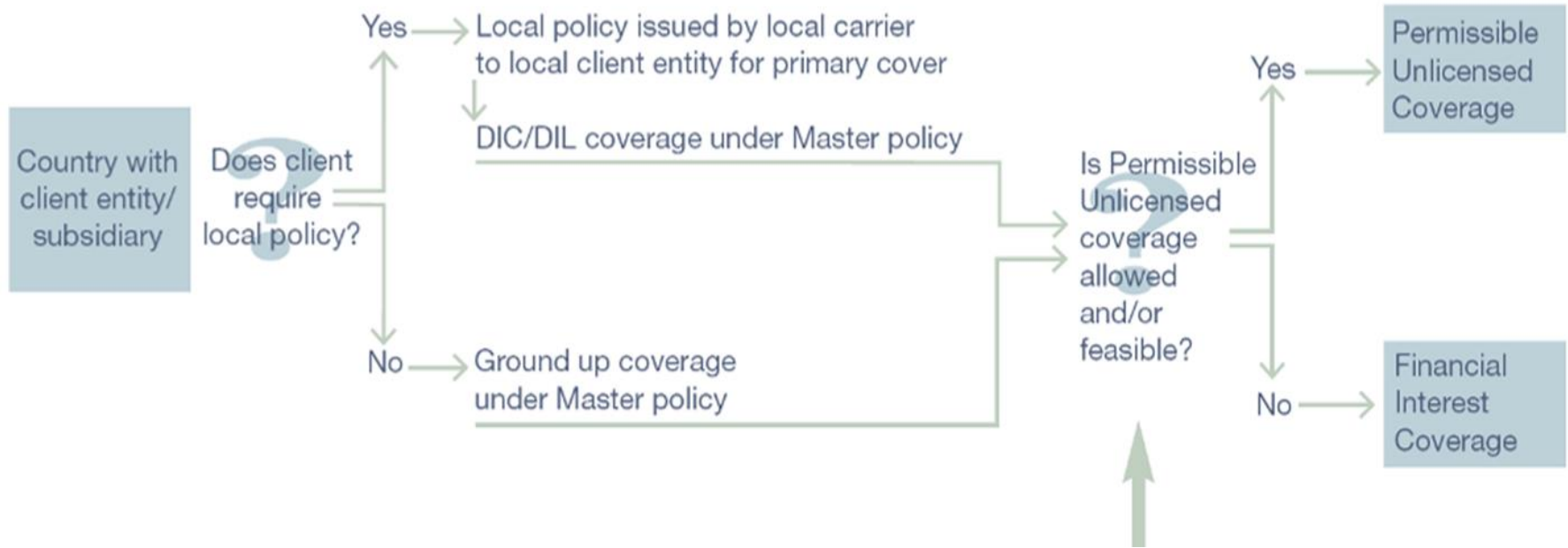
## Difference in Conditions (DIC)

- Provided by the “**master policy**” to fill in the gaps created by coverage on the “**local policy**”. To the extent that a loss is not covered under the “**local policy**”, but would otherwise be covered by the “**master policy**”, coverage will apply on an excess basis.

## Difference in Limits (DIL)

- Provided by the “**master policy**”. The “**master policy**” provides excess limits over the limits of the local underlying policies.

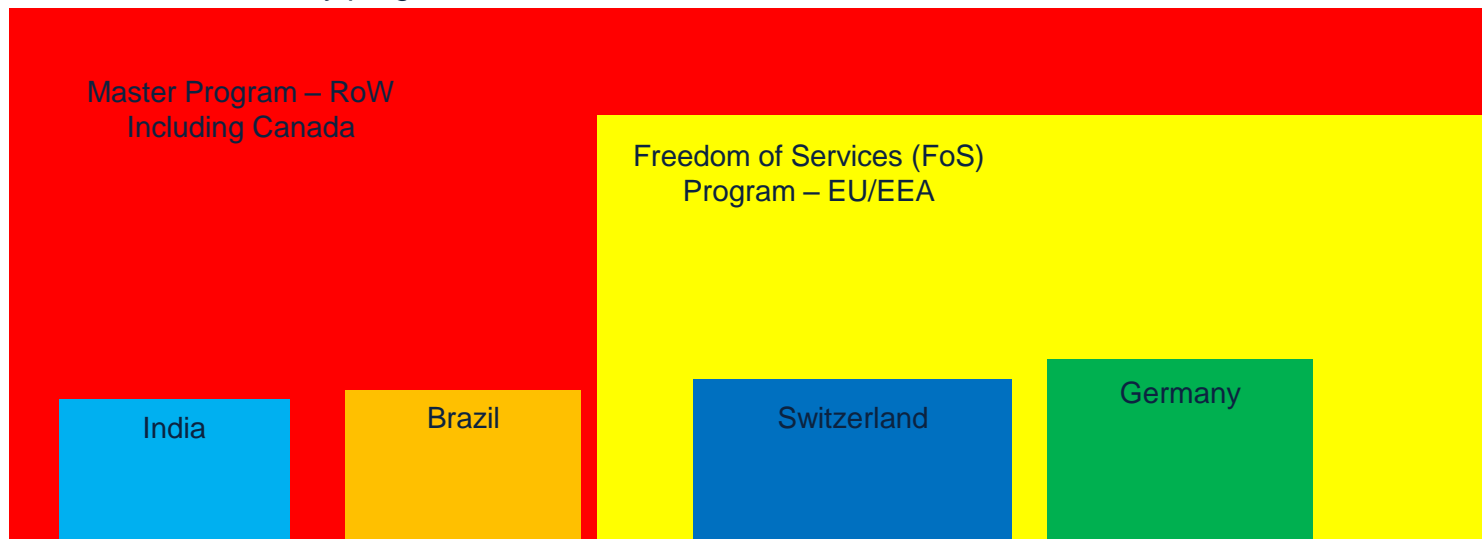
# Design BEST COMPLIANT OPTION





Key features are:

- A US Master Program – can also be written out of Europe for EU and rest of world (“RoW”)
- Local policies to create admitted cover and local compliance e.g. EU Environmental Liability Directive (“ELD”)
- DIC/DIL local policies including Germany where the client has local UHV/USV forms
- DIC/DIL General Liability program



With a Global Program, a client has many benefits over individual, standalone local policies

- Site-Specific Pollution Liability Policy(ies) (PLL) can be developed for each cross border transaction
- Consistency of worldwide coverage through DIC/DIL Master cover
- Cost savings (purchasing power, no overlaps)
- Insured dealing with one global carrier, not 20+ local carriers
- Client's Risk Management Department time is freed up to concentrate on business and loss prevention
- Centralized risk control to effectively mitigate exposures and operational risks of multinational corporations



## About JLT

JLT Specialty USA is the U.S. platform of the leading specialty business advisory firm, Jardine Lloyd Thompson Group. Our experts have deep industry and product experience serving leading U.S. and global firms. Our key to client success is our freedom to be creative, collaborative, and analytical while challenging conventions, redefining problems, creating new insights, and exploring new options to deliver solutions for each client's unique business and risks.

JLT is one of the world's leading providers of insurance, reinsurance and employee benefits related advice, brokerage and associated services. We are specialists. Our deep expertise and entrepreneurial culture give us the insights, creative freedom and tenacity to go beyond the routine and deliver better results for our clients. At JLT, clients come first. JLT owns offices in 40 territories and has more than 10,000 colleagues. Supported by the JLT International Network, we service clients in over 135 countries.

## “Day 1” Readiness – Global EHS Permit Transfers

- Important to identify all relevant EHS permits as early in the process as possible
- Consider prioritization of permits/jurisdictions/facilities to focus the review and minimize risk of business disruption
- Permit filing requirements are not limited to asset transfers
- Develop strategy for executing the required filings based on country-specific practical considerations



# Day Two



# Conference Keynote Address - Environmental Law and Policy - Charting a Course Amidst Shifting Political Winds

Keynote Speaker: **Scott Fulton**, President, Environmental Law Institute, Washington, D.C.



# NGO/Citizen Engagement - Changing Tactics and Strategies in a World with Complex Environmental Challenges and Uncertain Political Dynamics

Moderator: **Marie-Laetitia De La Ville Bauge**, Baker McKenzie, Paris

## Introduction: Environmental NGOs actions

### 1. Lobbying:

- Work with law-making institutions to ensure that the environment is placed at the heart of policy-making
- Lobby for new environmental proposals and for the full implementation of environmental laws



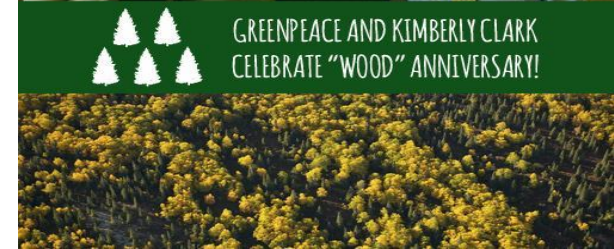
# Introduction: Environmental NGOs actions

## 2. Putting companies under pressure: communication

- Hard-hitting activist campaign

Greenpeace campaigns

- Lego / Shell
- Kimberley Clark



# Introduction: Environmental NGOs actions

## 3. Putting companies under pressure: legal action

- **Enforcement of environmental laws and prosecution of environmental damage**
  - Actions in France
  - example In Chile – focus on mining and cooper production
  - US

A political action that uses all the legal ways to reach their goals **together with the citizens**

Legal tools that are wider and wider and can jeopardize developement / industrial projects

# Introduction: Environmental NGOs actions

## Industry focus: US

- Oil & Gas/Coal Leases
- Stay of Clean Water Act Effluent Limitations Guidelines for power plants (“ELG Rule”)
- XL Pipeline project- “stale” EIS
- CWA/CAA compliance at coal mining fossil fuel power plant projects

## Industry Focus: France

- Shale gas / oil and gas research permits
- Infrastructures vs. biodiversity

## Industry Focus: Chile

- Copper mining

# Our legal focus today

1. Public participation in environmental decision-making process
2. NGOs' litigation strategies and new tools

**1**

**Public participation in  
environmental decision-making  
process**

1.1

EUROPE / France

# Legal sources of public participation

- **Art. 6 of the Aarhus Convention** on public participation in decisions on specific activities
  - public access to relevant information guaranteeing an effective participation
  - right to ask for the setting up of a participatory procedure
  - reasonable timeframes for submitting comments and proposals in the participation procedures
  - information about the way comments and proposals have been taken into account
- And from **EU law**: art. 6 of the Environmental Impact Assessment Directive (2011/92/EU)
- Article L. 120-1 of the French Environmental Code sets up the **public participation principle** and lists a range of **rights**

# Public participation in French environmental decision-making

## Public participation: Phase 1

Before an application for a permit has been filed: the **public debate** and the **prior consultation**

- Their organisation is **optional** (except for projects above certain thresholds, where a public debate is mandatory)
- The public may **request** their organisation (for projects above certain thresholds)
- The public is informed of the conditions under which they are organised (length, type of participation procedures)
- Public debates last **4 to 6 months**, prior consultations last **15 days to 3 months**
- Following the debate or the consultation, the public is informed of whether or not the project is still valid / has been modified



# Public participation in French environmental decision-making

## Public participation: Phase 2

After an application for a permit has been filed: **the public study**

- Mandatory for projects subject to an environmental permit
- It is highly formalised:
  - The public is informed 15 days before the beginning of the study and is provided with information ensuring its participation (scope of the inquiry, dates, conditions under which it is organised...)
  - the study cannot last less than 30 days for projects subject to an environmental permit
  - The study file shall be accessible to the public throughout the whole procedure
  - the public must be given exhaustive information about the project and participates throughout the whole procedure.
- At the end of the inquiry, a public study report is drafted and the administrative authority will (or will not) deliver the permit based on this report

# Public participation in French environmental decision-making

## The debate on public participation mechanisms

- The scope of public participation has been **extended** to the pre decision-making phase
- It becomes increasingly **wider**
  - public participation is ensured from the early preliminary studies to the end of the public inquiry
  - It deals with the characteristics of the project, the conditions for its implementation, its environmental impacts, and even its opportunity, objectives and the analysis of alternative solutions (if the project has a noticeable impact on the environment)
- Public participation mechanisms are also increasingly **formalistic**, thus creating **litigation risks** (which is paradoxal)
- Their ability to ensure environmental protection is disputed

**1.2**

**SOUTH AMERICA / CHILE**

# Chile: A mining country

The mining activity has been a key element for the country's development. In particular, **copper mining has played a key role in Chile's economic growth**, becoming part of our national identity.

During the 1980's, copper production in Chile was stagnant at 1.4 million tonnes per year. During the 1990's the copper industry had a sustained growth, reaching more than 4 million tons.

In recent years, production is approaching 6 million tonnes per year, which currently accounts for **30% of world copper production**.

As well, Chile has 54% of the world's **lithium carbonate reserves**, which is about one third of the total supply of lithium. The climatic conditions of the Atacama desert allow the exploitation of lithium in *salares*, being one of the lowest costs worldwide.

# Chile: leader in copper production



# Why Chile?

As mentioned, in recent decades, Chile has consolidated as a copper producing country.

- **Stability:** Chile is a safe and reliable country to do business. Performance indicators grants our country a good rating.
- **Connectivity:** Chile is prepared for the adoption of new technologies. It is ranked 38th out of 148 countries in the 2015 Technology Readiness Index published by the World Economic Forum and furthermore, is a strong mining leader in Latin America.
- **Integration:** Chile has shown a growing interest in adopting international trade agreements. Accordingly, it has signed trade agreements with more than 60 countries in the world.

# Environmental institutions in Chile

## Environmental Impact Assessment System (SEIA *for its Spanish acronym*):

The “SEIA” carries out the evaluation of projects and certifies that the initiatives, both in the public and private sectors, fulfill with the environmental requirements that apply to them.

- Law No. 20.417 which came into effect in 2010, amended the Environmental General Basis Law, introducing important reforms to the SEIA.
- Among multiple amendments, the most prominent was to **extend the concept of citizen participation**, including accordingly, the right to access environmental information (access to the file of projects under evaluation) and the right to make observations to environmental impact studies and statements.

# Citizen participation mechanisms

## **Right to make observations.**

It is a right granted to every person, whether private citizen or legal entity to make comments, objections or challenges to an specific project under evaluation. Any and all of this comments must be considered and duly evaluated by the authority upon its merits.

## **Right to claim.**

In the event that the observations are not properly considered in the Environmental Qualification Resolution, a complaint may be filed before the executive director of the Environmental Assessment Service.



# Citizen participation mechanisms

Two forms of citizen participation:

➤ **In the evaluation of the Environmental Impact Studies:**

As mentioned, any natural or legal person may provide comments to the Environmental Impact Study, within 60 days from the last publication of the project abstract in the official gazette.

➤ **In the evaluation of the Environmental Impact Statement:**

Two citizen organizations or at least 10 people directly affected, are entitled to request the environmental authority, to open a term of citizen participation of 20 days.

In both cases, if the project is substantially modified a new phase of citizen participation must be opened.

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The Indigenous Consultation:  
another expression of the citizen  
participation



# The Indigenous Consultation.

Another expression of community participation in the evaluation procedure is the "Indigenous Consultation".

It was incorporated in our country, by means of ratifying the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)

This Convention, establishes the obligation to consult indigenous peoples when administrative or legislative measures that may directly affect them, are envisaged.

# 2

## Citizens and NGOs' litigation strategies

**2.1**

**EUROPE / France**

# Legal sources of judicial review involving NGOs and citizens

- **Art. 9 of the Aarhus Convention on access to justice**
  - Any person shall have access to a review procedure (and a procedure for reconsideration) in case its right to access to environmental information has been impaired
  - Members of the public shall have access to a review procedure in case public participation procedures have been infringed
- **Commission notice on access to justice in environmental matters (04/17) set up the following objectives:**
  - Facilitate access to national courts by explaining and interpreting existing legal requirements as regards access to justice
  - Help citizens and NGOs to decide whether to bring a case before national courts
  - Make national administrations aware of possible shortcomings in their justice systems
  - Provide businesses with greater clarity on what EU rights and obligations are at stake in the decisions, omissions and acts that concern them

# Environmental litigation in France

## French NGOs' litigation strategy

French environmental NGOs' litigation strategy is **twofold**:

- **Exercise the civil action before criminal courts**, in order to:
  - get damages (articles 2 and 3 of the French Code of Criminal Procedure)
  - trigger public prosecution (article 1 of the French Code of Criminal Procedure)
  - raise awareness on disputable business practices: ex. France Nature Environnement (FNE) in the *société OC'VIA* case
  - obtain that sanctions on offenders are increased: ex. FNE in the *société Chimirec* case
- **Bring an administrative appeal and/or proceedings before the administrative judge** in order to:
  - Obtain the revocation or cancellation of administrative acts ...
  - ... And as a consequence, stop a project having adverse effects on the environment: ex. FNE v. the Order authorising the construction of the nuclear EPR of Flamanville

# An example of ZAD: *Notre-Dame-des-Landes*





# Environmental litigation in France

## French NGOs' litigation strategy

- As regards proceedings brought before the administrative judge, the strategy is often **global** and aims at targetting a wide range of administrative acts
- Ex. : the *Notre-Dame-des-Landes* Airport case. The plaintiffs (NGOs, but also associations of elected representatives and residents/neighbours/activists) challenged:
- the decision whereby the concessionnaire was granted public subsidies
  - the Order approving the conclusion of the concession contract
  - four environmental orders enabling the concessionnaire and the State to perform works and depart from protected species regulations
  - the Order on the local referendum concerning this project.

# Environmental litigation in France

## New French environmental policy initiatives

### → the environmental class action

- Created by Law no. 2016-1547 of 18 November 2016 and Order no. 2017-888 of 6 May 2017
- Specific, sector-based class action aiming at:
  - cessation of the breach
  - compensation for bodily injuries and material losses, resulting from a damage caused to the environment. The environmental loss itself is not compensable
  - Make it easier to gather evidence on the breach, the damage caused to the environment, the losses resulting from the damage and the causal link
- Broad scope: damages in the areas of nature, improvement in living environment, water protection, urban planning, contamination, nuclear safety, radiation protection, etc.

# Environmental litigation in France

## New French environmental policy initiatives

- Conditions:
  - Victims and responsible entities: individuals or legal entities (governed by public or private law)
  - The victims are placed "*in a similar situation*"
  - the damage has been caused by a single responsible entity
  - the damage has a common cause: the responsible entity acted in breach of its legal or contractual obligations
- Main procedural features:
  - Standing: only registered associations can exercise the action
  - Competent jurisdiction: civil or administrative courts, depending on the quality of the defendant
  - opt-in model

**2.2**

**SOUTH AMERICA / CHILE**

# Chilean NGOs' litigation strategy

The Political Constitution of Chile enshrines in its article 20°, a Fundamental Rights Protection Claim for those who suffer deprivation or threat to their constitutional rights and guarantees through arbitrary or illegal acts or omissions.

Case law precedents of this decade, indicate the considerable filing of this Protection Claim, being widely used by NGOs, in order to appeal judicially against any given investment/energy project.

However, in the last two years the filing of Protection Claims in environmental matters has decreased significantly.

According to the Environmental Assessment Service (SEA), in 2014 more than 80 protection claims were filed. In 2016, this figure dropped by half.

The abovementioned, due to a greater use of the resources consecrated especially by the environmental regulation, before the Environmental Courts.

# Ralco Hydroelectric Power Plant

Ralco Hydroelectric Power Plant One of the most important hydroelectric plants in Chile, owned by Endesa.

Hundreds of Pehuenche ethnic families residents of the area, strongly opposed to the construction of plant.

After years of negotiations with the political authorities and the company's representatives, they reached an agreement.



# Pascua Lama mining project

Binational mining project of gold and copper, located between Chile and Argentina that has been paralyzed since 2013 due to breach to the rules contained in their Environmental Qualification Resolution (RCA).

Several NGOs in the sector organized to denounce the destruction of glaciers.

In March 2017, the Antofagasta Court of Appeal rejected a protection claim where the indigenous communities requested the closure of the Project. The Court found that water pollution, alleged by the community, was not attributable to the project.



# El Morro mining project

In 2014, the Supreme Court upheld the application of protection submitted by Diaguita indigenous community. The Court's ruling provided that the consultations required by the ILO Convention No. 169, were not properly carried out to the indigenous community.

The company decided to withdraw its environmental impact study, despite the investment of USD \$ 242 million in the project.





## What is the situation in the rest of the region?

The Latin American region has consolidated its leading role in world mining, capturing nearly one third of global activity investment.

- The exploration for non-ferrous ores in Latin America, in only one decade rose from US \$ 2 billion to US \$ 18 billion.

The contribution of mining in the Gross Domestic Product (GDP) of countries like Mexico, Bolivia or Colombia exceeds the 10%.

However, the development of the mining industry in the region has not been free from socio-environmental conflicts.

# Quick assessment of the rest of the region

**Peru:** There are 91 socio-environmental conflicts in the mining industry. The best-known case is the mining project *Las Bambas*, in the Apurímac region, owned by the mining company MMG Limited. The conflict occurred due to modifications of the original Environmental Impact Assessment (EIA) without having consulted local people.

**Colombia:** According to the *Environmental Justice Atlas*, there are 52 socio-environmental conflicts related to the mining industry. One of the most prominent cases is a project located in *Páramo de Santurbán*, in the city of Bucaramanga, owned by Eco Oro mining company. The community near the project denounces water pollution caused by the Angostura project. The project is currently on hold.

**Argentina:** According to data from the Observatory of Mining Conflicts in Latin America (OCMAL), Argentina has 26 of the region's socio-environmental conflict, placing in the third place.

**Ecuador:** There are 11 socio-environmental conflicts. The emblematic mining case is at the locality of Tundayme with the Mirador project, where a large-scale Chinese mining venture, entered the Shuar indigenous territory.

**2.3**

**USA**

## NGO Activism in the U.S. – State of Play

- The fight is on . . .
  - Michael Brune – Sierra Club – “We can guarantee President Trump the hardest fight of his life every step of the way.”
  - Annie Leonard – Greenpeace – “Let’s use this moment to reenergize the fight for the climate and the fight for human rights around the world.”
  - Rhea Sue – NRDC – “Yes, right now, shock will prevail. But prepare yourself, because tomorrow the battle for all the environmental values we hold dear will begin.”

# NGO Activism in the U.S. – State of Play

- The “Trump Bump”
  - Sierra Club – monthly donors have increased from 35,000 to over 60,000
  - Friends of the Earth - donations up by 300%
  - Earthjustice – 7-fold increase in on-line donors

# NGO Strategy – Early Signs Emerging

- **NGOs taking aim at wide ranging targets**
  - Trump Administration efforts to roll back Obama era regulations
  - Failure to fulfill regulatory mandates
  - Industries of concern
  - Chronic violations/Significant environmental impacts

## NGO Strategy – Regulatory Challenges

- Trump “2 for 1” Executive Order on “Reducing Regulation and Controlling Regulatory Costs”
- Repeals of moratoriums on Arctic oil and gas leasing and coal leasing on public lands
- Failure to comply with statutory mandates for listing of “impaired waters” under Clean Water Act
- Stay of Risk Management Plan Update rule

# NGO Strategy – Chronic Violators/Significant Environmental Harm

- CWA violations at poultry processor
- CAA violations at chemical plant
- CWA violations for discharges of pollutants to Waters of the U.S.





# CONCLUSIONS

## Required Industry Response

- No time for complacency
- Robust environmental compliance/audit programs remain a priority
- Chronic problems require attention/resolution in advance of NGO action
- May find regulators unsympathetic to your plight

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# Environmental Protection as a Fundamental Human Right: The Risks and Limits of Legal Actions by Human Rights Tribunals

Moderator: **Marisa Martin**, Baker McKenzie, Chicago

# Human Rights Obligations & the Environment

- Human rights and environmental rights traditionally in separate legal regimes but links increasingly recognized
- Focus on “greening” of human rights and identifying rights that are vulnerable from environmental degradation (e.g., right to life, health and an adequate standard of living)
- UN Human Rights Council Special Rapporteur to analyze human rights and environment and promote best practices

# Human Rights Obligations & the Environment

- Human rights laws/tribunals viewed as an additional avenue to challenge environmental degradation
- Primarily focused on states but attempts to bring in private sector
  - Focus on natural resource extractive sector
  - Even unsuccessful attempts can have reputational consequences
- Climate change is focus due to global impacts
  - Philippines Commission on Human Rights petition against “carbon majors”



# Human Right to a Healthy Environment in Europe

***Prof. Dr. Francesco Goisis***, Full Professor of Environmental Law,  
University of Milan - Of Counsel Baker McKenzie, Milan

# European Convention on Human Rights

- The **European Convention on Human Rights (ECHR)** (formally the **Convention for the Protection of Human Rights and Fundamental Freedoms**) is an international treaty to protect [human rights](#) and fundamental [freedoms](#) in [Europe](#). Drafted in 1950 by the then newly formed [Council of Europe](#), the convention entered into force on 3 September 1953.
- It has been signed in Rome by 47 European countries (i.e., almost all the European countries, not only the ones members to the European Union).





# European Court of Human Rights

- The Convention established the [European Court of Human Rights](#) (ECtHR), placed in Strasbourg.
- Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them.



## ECHR and right to a healthy environment

- Even though the European Convention on Human Rights does not establish any right to a healthy environment as such, the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks.
- In other terms, existing fundamental rights have been interpreted in an environmentally friendly way.

## ECHR and right to a healthy environment

In particular, the Strasbourg Court linked environmental concerns with **Art. 2** (right to life) but mostly with **Art. 8** ECHR (Right to respect for private and family life and home).

## ECHR and right to a healthy environment, under art. 2

The right to life has been interpreted as placing a positive obligation on States to protect individuals' life from dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites and so on, whether carried out by public authorities or by private companies.

## ECHR and right to a healthy environment, under art. 2

### Öneryıldız v. Turkey 30 November 2004 (Grand Chamber)

- The applicant's house was on land surrounding a rubbish tip. A methane explosion occurred at the tip in April 1993 and the refuse erupting from the pile of waste engulfed more than ten houses situated below it, including the one belonging to the applicant who lost nine close relatives. The applicant complained in particular that no measures had been taken to prevent an explosion despite an expert report having drawn the authorities' attention to the need to act preventively as such an explosion was not unlikely.
- The Court held that there had been a **violation of Article 2** of the Convention, for lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives and of providing inhabitants with information about the risks they ran by living there.

## ECHR and right to a healthy environment, under Art. 8.

- The right to respect for private and family life has been interpreted as giving rise to a positive duty for States to protect individuals from environmental factors that directly and seriously affect their private and family life, or their home.
- At least, the Strasbourg Court recognizes **procedural rights**, i.e. a right to effective and accessible procedures to enable individuals to seek all relevant and appropriate environmental information, and to participate in environmental decisionmaking, when their right to life, or/and their right to respect for private and family life, are threatened.

# ECHR and right to a healthy environment, under Art. 8.

## Tătar v. Romania

27 January 2009

- The applicants alleged that the technological process (involving the use of a toxic substance in the open air) used by a company in their gold mining activity put their lives in danger. In January 2000 an environmental accident had occurred at the site. The applicants also complained of **inaction** on the part of the authorities regarding the numerous complaints lodged by the first applicant about the threat to their lives, to the environment and to his asthmatic son's health.
- The Court held that there had been a **violation of Article 8** of the Convention, finding that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, and more generally their right to enjoy a healthy and protected environment.

# ECHR and right to a healthy environment, any horizontal effect?

- In principle, European human rights law **does not apply directly between corporations and victims of corporate human rights violations** ('direct horizontal effect'). Rather, it imposes duties on states to protect human rights and the environment against corporate abuses. States are bound to regulate and control corporate actors **to prevent human rights and environmental violations**, and to provide **effective enforcement mechanisms** that is, to investigate, punish, and redress such violations when they occur;
- In other terms, States are obliged **not only to refrain from violating human rights themselves, but also to protect these rights 'in the sphere of the relations of individuals between themselves'**. Correspondingly, "the acquiescence or connivance of the authorities of a Contracting State in acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention".

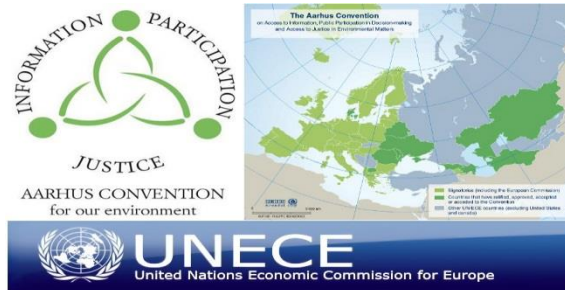


# ECHR and right to a healthy environment, any horizontal effect?

- However, where corporations act as **state agents** are, in the same way as public authorities, they are directly obliged not to violate human rights; therefore a sort of (partial) horizontal effect may operate (also at a national level).
- two main criteria to identify state actors:
  1. corporations **exercising State functions** (States cannot evade their duty to protect human rights by outsourcing public functions to the private sector);
  2. corporations **owned or controlled by the State**.
- Moreover, all the applicable domestic laws and regulations should be interpreted **consistently with the ECHR principles**. Therefore, indirectly, an horizontal effect may operate.

# ECHR Environmental Procedural Rights

- Corporations should not underestimated the possible relevance of the procedural rights descending from ECHR and Aarhus Convention, which, in particular, entitle everyone to have a full access to environmental information, even if related to a specific industrial plant.
- [Directive 2003/4/EC on public access to environmental information](#) , that fully adapts EU countries' national laws to the 1998 [Aarhus Convention on access to information, public participation and access to justice in environmental matters.](#)



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# **Environmental Protection and Human Rights.**

Representative Cases Latin America

June 22, 2017





1

# Overview

# Overview

## Relevant Legislation

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1. American Convention on Human Rights (Pact of San Jose, Costa Rica):

The American Convention was adopted in 1969 and entered into force in 1978. The **Inter-American Commission** and the **Court of Human Rights.**, are the key forums to which American States can bring cases regarding human rights violations related to the American Convention on Human Rights.

# Overview

## Relevant Legislation

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### 1. American Convention on Human Rights – 25 Member States:

Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

# Overview

## Relevant Legislation

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### 1. Key Rights

- right to life (Article 4)
- humane treatment (Article 5),
- personal liberty and security (Article 7)
- a fair trial (Article 8)
- privacy (Article 11)
- freedom of expression and access
- to information (Article 13)
- use and enjoyment of property (Article 21)
- participation in government (Article 23)
- equal protection under the law (Article 24)
- judicial protection (Article 25).

# Overview

## Relevant Bodies

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### 2. Inter-American Commission on Human Rights:

- The IACHR's mission is to **promote and protect human rights in the American hemisphere.**
- The IACHR **addresses human rights conditions and violations in the 35 Member States of the Organization of American States (OAS).**
- **It began operating in 1960.**
- **In 1965 was authorized to begin processing specific complaints of human rights violations.**



# Overview

## Relevant Bodies

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### 3. Inter-American Court of Human Rights:

- The Court was **established in 1979** to enforce and interpret the provisions of the American Convention on Human Rights.
- Its two main functions are **adjudicatory and advisory**.
  - **Adjudicatory:** hears and rules on the specific cases of human rights violations referred to it.
  - **Advisory:** Issues opinions on matters of legal interpretation brought to its attention by other bodies or member states.



**2**

## **Mayagna (Sumo) Awas Tingni Community v. Nicaragua**

# Mayagna (Sumo) Awas Tingni Community v. Nicaragua

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## The Facts:

Jaime Castillo Felipe, the leader of a small indigenous community lodged a petition with the Inter-American Commission on Human Rights in 1995, on behalf of himself and of the community of Awas Tingni, which lives by hunting, fishing and farming in a forested area of about 90,000 hectares.

He sought precautionary measures from the Commission because the Nicaraguan authorities planned to grant a concession to a private company for commercial development of the forest. Lengthy domestic proceedings which had been brought by means of the *amparo* remedy, to prevent the grant of the concession/require its suspension, were unsuccessful.

# Mayagna (Sumo) Awas Tingni Community v. Nicaragua

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## Violations of the American Convention on Human Rights :

- Article 1 (obligation to respect rights)
- Article 2 (domestic legal effects)
- Article 21 (right to property)
- Article 25 (right to judicial protection)

The Commission asked the Court to declare that **the State must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community**, and it must **abstain from granting or considering the granting of concessions** to exploit natural resources on the lands used and occupied by Awas Tingni until the issue has been resolved.

# Mayagna (Sumo) Awas Tingni Community v. Nicaragua

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## Key Findings:

The Court concluded there was a **violation of the Article 25 right to judicial protection**, linked to the State's duty to provide protection in domestic law, and the Article 2 **duty to adopt protective administrative and legislative measures**.

The Court determined that Nicaragua had **“violated the right of the members of the Mayagna Awas Tingni community to the use and enjoyment of their property,”** since it had “granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled”

In relation to remedy, the Court declared that **the State must adopt “legislative, administrative, and other measures required to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities,** in accordance with their customary law, values, customs and mores.” The Court also awarded damages to the plaintiffs.

# Mayagna (Sumo) Awas Tingni Community v. Nicaragua

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## Commentary:

This was a **landmark case** in recognizing that **indigenous communities have fundamental rights to the recognition and protection of their ancestral lands**. It was the first time that a **human rights court recognized collective property rights of indigenous groups** over the land they have traditionally occupied.

The Court defined collective property rights as the tradition among indigenous people which does not place ownership of land in the hands of one individual, but in the whole community. Domestically, the decision compelled Nicaragua to introduce comprehensive law and policy for the demarcation and titling of indigenous lands.



**3**

**Kawas-Fernández v. Honduras,  
No. 196 (Apr. 3, 2009)**

# Kawas-Fernández v. Honduras, No. 196 (Apr. 3, 2009)

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## The Facts:

In February 2005, **Blanca Kawas Fernandez was murdered** by gunshot in her home. Shortly thereafter, a police unit arrived at the scene, but did not take measures to apprehend suspects.

In the same month, the Criminal Tribunal in the city of Tela initiated an investigation of Ms. Kawas' murder. However, **a police official actively frustrated the action of justice** by threatening witnesses ,and it was later found that the police unit that arrived at the scene had anticipated the murder.

By the date of the Court's decision, April 2009, the criminal proceedings were still in their preliminary stage.



# Kawas-Fernández v. Honduras, No. 196 (Apr. 3, 2009)

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## Violations of the American Convention on Human Rights :

- right to life
- the right to judicial guarantees
- the right to judicial protection, in connection with
- the obligation to respect rights and
- duty to adopt internal measures.

The representatives of the victim also alleged a violation of the **freedom of association**.

# Kawas-Fernández v. Honduras, No. 196 (Apr. 3, 2009)

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## Key Findings:

- During the decade following Ms. Blanca Kawas' murder, **numerous aggressions, threats and executions targeted environmental advocates in Honduras, and that the effect of violence against environmentalists has been aggravated by impunity.** In 2007 the government created a specialized unit to investigate murders of environmentalists, but had not implemented a policy to ensure safety.
- The Court inferred that **governmental agents had been involved in the murder and its ineffective investigation.** The Court also found that the State did not undertake a serious, complete and effective investigation of the murder, in **violation of the right to life**, as required by the American Convention.
- the Court concluded that the State had **interfered with freedom of association.**

# Kawas-Fernández v. Honduras, No. 196 (Apr. 3, 2009)

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## Commentary:

- The Court explicitly highlighted the **close link between human rights and the environment**. It did so by recalling the connection between environmental protection and the effective enjoyment of human rights.
- A second dimension of the human rights and environment linkage was also noted, namely that stemming from the work of environmentalists and NGOs, in connection with freedom of association.



# Climate Change - An Update on the Status and Future of the Paris Climate Agreement

Moderator: **Rick Saines**, Baker McKenzie, Chicago



# Litigation Update - Global Expansion of Liability for Environmental Damages and Other Crimes

Moderator: **Doug Sanders**, Baker McKenzie, Chicago

# Key Discussion Points

- Enforcement up and down the corporate ladder
  - extending liability to corporate parents/extraterritoriality
  - actions against individuals
- Increasing reliance on criminal enforcement
- Other litigation trends
- Risks and recommendations



# Parent Company Liability



EU – rise in claims against parent companies relating to their subsidiaries' operations in other jurisdictions or incidents in their supply chain (e.g., Shell cases in UK, Kik case in Germany)

- Various tests for parent company liability across EU, piercing corporate veil, single economic unit
- Trend in UK is to blur more typical corporate piercing analysis under following four-factor test: 1) the business of parent and subsidiary the same, (2) the parent knew that subsidiary's operations were unsafe or discharging to the environment, (3) parent company had superior expertise, knowledge and resources, and (4) subsidiary relied on that superior expertise;



India – domestic environmental enforcement has substantially increased, but there does not appear to be a trend to enforce against foreign parent companies

# Individual/Corporate Officer Liability



Brazil – public prosecutors consistently focus on individuals during investigation, including shareholders (e.g., Mariana case)



EU – individuals, including directors, shareholders and officers that control the activity are potentially liable (e.g., director of company held accountable for remediation and clean up of site in Ireland)



China – “responsible persons in charge of entity” can be liable

- enforcement actions are frequently brought against corporate officers, persons involved and even government officials (e.g., Tianjin warehouse explosion)
- increasing willingness by Chinese authorities to pursue actions against foreign nationals working for foreign companies



# Criminal Enforcement



China –

- At the end of last year, the Supreme People’s Court issued judicial interpretation at end of last year clarifying what constitutes a crime, identifying 18 types of environmental crimes as “serious environmental pollution” and 13 as “serious consequences”
- In January, the Ministry of Environment announced new measures clarifying the procedures to transfer cases to police that should result in more coordination and instances of criminal liability



Brazil – criminal enforcement against individuals is a definite trend; in particular, there are challenging issues in “crimes of omission,” where prosecutors bring an action to enforce the failure to act when there is a purported duty



EU – criminal laws enforced locally and across the EU states aggressively pursue criminal enforcement against individuals (e.g., ILVA SpA matter in Italy)



Mexico – criminal enforcement is increasingly used in response to environmental issues; because environmental crimes are considered serious, bail is not available pending trial



## Other trends



Brazil – specialization and sophistication of enforcement authorities; DA's pushing courts in collective lawsuits to provide for full recovery of environment



China –focus on manipulation of monitoring and data, false reporting; includes revisions to criminal law to make



Mexico – punitive damages are real after recent Supreme Court decision; availability of collective actions



EU – proliferation of administrative proceedings and civil suits to stop infrastructure, oil and industrial projects, in particular to the extent the projects would increase air emissions and breach state reduction commitments



Procedural – weakening of privilege and/or work product protections in context of investigations (e.g. raid on Jones Day/VW; *SFO v. Eurasian Natural Resources Corp.*, [2017] EWHC 1017 (QB))

## Risks and Recommendations

- Navigating tension between establishing and enforcing group corporate EH&S or CSR policies and exercising control over subsidiaries
  - Establish clear authority of subsidiary to act and address environmental issues; third party dealing between parent and subsidiaries
- Defining and monitoring compliance with laws and regulations in company's supply chain as plaintiffs seek to push liability upstream
  - Include mandatory compliance with law and indemnity provisions in contracts; effective audit/monitoring protocols
- Understanding soft-principles and standards that can become hard standards for determining applicable standard of care in negligence lawsuits
  - Involve legal team in sustainability or voluntary efforts, assess whether they are aligned with core business and establish compliance systems



# Product Content and Regulation: Harmonizing Voluntary Standards and Regulatory Requirements

Moderator: **Jonathan Cocker**, Baker McKenzie, Toronto

A low-angle photograph of three European Union flags on tall poles, flying against a blue sky with scattered white clouds. In the background, a modern glass skyscraper with a curved facade reflects the sky and clouds. The flags are blue with twelve yellow stars arranged in a circle. A red horizontal bar is overlaid at the bottom of the image, containing the text 'Impact of Brexit' in white.

# Impact of Brexit

# Background

UK served formal notice under Article 50 on 29 March '17 and began negotiations with the EU-27 on 19 June '17

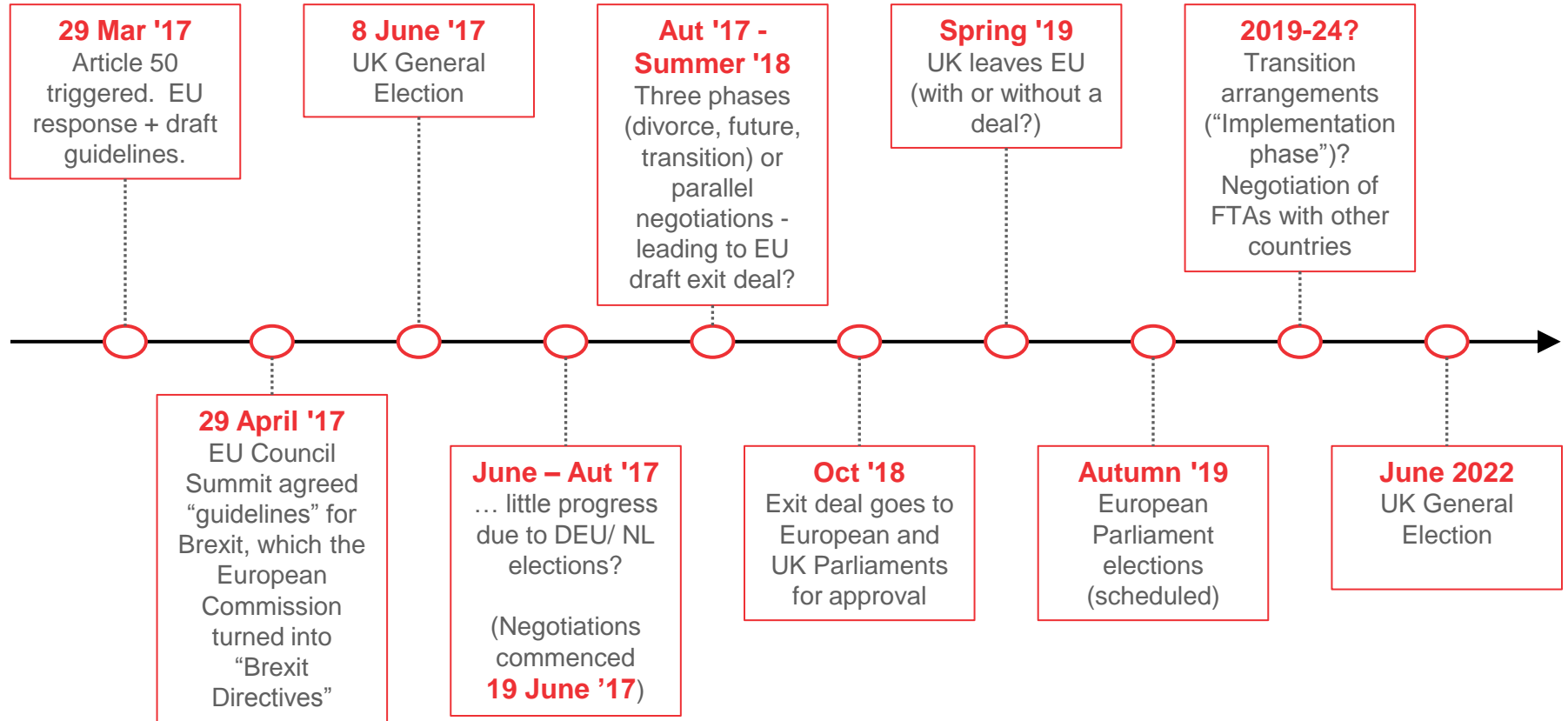
Article 50 dictates that process has to be completed within two years, unless there is mutual agreement to extend. Cannot withdraw from process once it begins?

EU's negotiating position is that "substantial progress" must be made on Article 50 "withdrawal negotiations" before "what next" negotiations can begin (although Article 50 states that withdrawal arrangements will be set out "taking into account the framework for the future relationship")

EU laws will continue to apply in the UK and the UK will remain part of Single Market until Brexit occurs

Extended period of uncertainty until negotiations finalised regarding terms of future relationship between UK and EU and implications for third countries which trade with them

# Tentative Timeline



# What Next?

## Three key questions:

**1**

**What is the UK's trade relationship with the EU-27?**

- **Complex, lengthy negotiations; cherry-picking will be difficult**

**2**

**What is the UK's trade relationship with the rest of the world?**

- **UK cannot conclude new trade deals whilst still a member of the EU. Third countries may not want to enter into talks with the UK until the EU-27 / UK relationship is agreed (and may seek to renegotiate agreements with the EU-27)**

**3**

**What is the status of EU law in the UK?**

- **European Communities Act 1972 to be repealed**



# May sets out Brexit Strategy

Leave the Single Market to become a Global Britain

## Key aims for trade:

- 1 UK to leave the Single Market
- 2 UK to negotiate a comprehensive, bold and ambitious FTA with the EU-27
- 3 UK to negotiate its own trade agreements with the rest of the world
- 4 Possible hybrid customs agreement with the EU-27 to maintain tariff-free trade

“

We do not seek membership of the Single Market. Instead we seek the greatest possible access to it through a new, comprehensive, bold and ambitious FTA

”

“

Whether that means we must reach a completely new customs agreement, become an associate member of the Customs Union in some way, or remain a signatory to some elements of it, I hold no preconceived position

”



# Status of EU Law in the UK following Brexit

The Great Repeal Bill will overturn the European Communities Act 1972 (“ECA”).

Repeal of the ECA will end the jurisdiction of the European Court of Justice in the UK, and will end the primacy of EU law in the UK.

The Great Repeal Bill will preserve EU law as it currently stands. Parliament will then be able to keep, amend, or overturn EU legislation as it sees fit.

UK no longer obliged to follow future EU law; idea of ‘drift’ away from EU law.

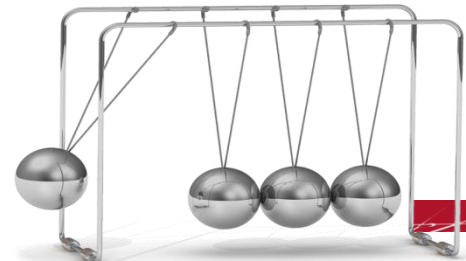
Current European court judgments will be relevant, because these form part of the corpus of UK law.

The Great Repeal Bill will not become effective until the UK leaves the EU under the Article 50 process.

# Impact on product laws?

Immediate? None from a regulatory perspective:

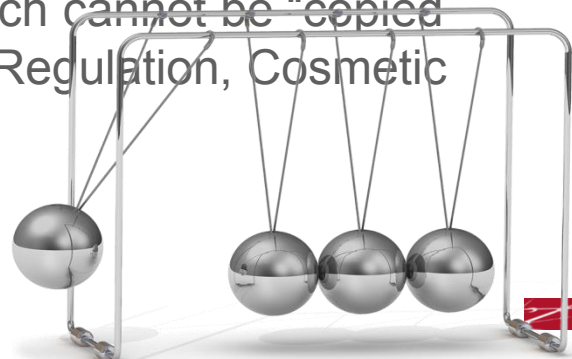
- From now until 29 March 2019, EU and UK product regulation will remain fully aligned until at least the point of exit
- EU deadlines will still need to be complied with eg the May 2018 REACH registration deadline will still apply to UK based EU importers and manufacturers of chemicals



# Impact on product laws?

Longer term? Impact on long term decisions and continuing uncertainty:

- Possible divergence of EU and UK laws but many consider this undesirable as it would make the regulatory landscape even more complicated for global manufacturers
- Need to balance desire to relax regulatory requirements while still maintaining standards relating to safety and environmental protection
- Not yet clear what will happen to regimes / systems which cannot be “copied and pasted” into UK law eg REACH, Biocidal Products Regulation, Cosmetic Products Regulation, RAPEX



The image features three European Union flags on tall poles, flying against a blue sky with scattered white clouds. In the background, a modern building with a curved facade and a grid of windows is visible. A red horizontal bar is positioned at the bottom of the image, containing the text 'EU updates and developments' in white. The overall scene is bright and clear, suggesting a positive and forward-looking atmosphere.

# EU updates and developments

# Blue Guide 2016

- Main general guidance in the EU on the application of product-related directives and regulations to goods destined for the EU market
- Covers CE marking legislation and other similar regimes (e.g. energy labelling). Does not purport to cover GPSD, REACH and chemicals but is likely to be influential in these areas
- Updated version published 5 April 2016

Significant changes have been made to 2016 version to bring it up to date with modern sales techniques, particularly sales by **online operators**.

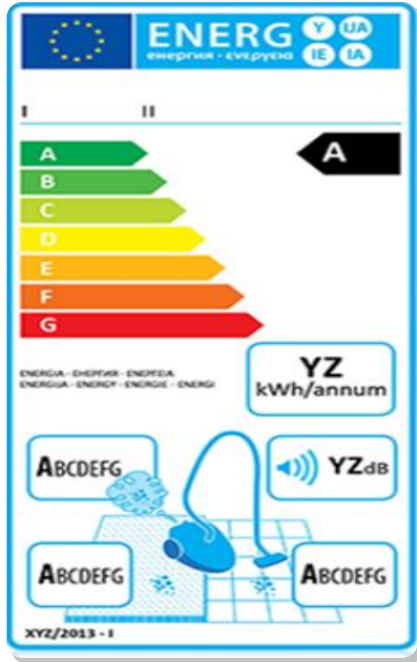
Key points to note:

- “Placing on the market” where products are offered for sale online by non-EU based retailers
- The role of fulfilment houses under EU product-related laws

Other changes of potential interest include:

- Confirmation of when instructions for use (as opposed to safety information) can be provided to customers in a non-paper format
- A slightly modified approach to manufacturer and importer address marking requirements where both entities form part of the same corporate group
- Guidance on Declarations of Conformity (translations and updates)

# Ecodesign / Energy Labelling update



In March 2017 political agreement was reached (via triologue negotiations) on a **new Energy Labelling Regulation** to replace the existing Energy Labelling Directive (2010/30/EU). Key changes include:

- Rescaling of current labels to remove A+, A++, A+++
- Creation of new product database for energy labelling information by 1 January 2019

“**Omnibus Regulations**” amending ecodesign and energy labelling daughter regulations were adopted at the end of 2016. These clarify that verification tolerances are intended for market surveillance only, and so cannot be relied upon by manufacturers

# Conflict Minerals update

**Conflict Minerals** are minerals from which mining revenues are used to fund violence in conflict areas - tin, tungsten, tantalum and gold (and their ores) (or 3TG)

They are used in many different applications, including in the automotive, electronics, jewellery, aerospace, packaging, construction, lighting, and industrial machinery and tooling sectors



- On 17 May 2017 the EU finally adopted its long awaited Conflict Minerals Regulation.
- The new regime consists of a **mandatory due diligence obligation**, conducted according to OECD Due Diligence Guidelines, for EU importers of 3TG from conflict and high-risk areas.
- Importers of products containing 3TG are **not** covered by the Regulation but will be “encouraged” (by non-binding guidelines still to be published) to report on their sourcing practices, if within scope of the Non-Financial Reporting Directive



## RoHS update

- In January 2017 the EU Commission published a proposal to amend the RoHS Directive (2011/65/EU).
- This revision is intended to deal with certain transitional issues connected to the expansion of the RoHS regime to open scope from 22 July 2019, removing what has been referred to as the "2019 hard stop" deadline which would otherwise prevent the "making available" (i.e. resales, secondary market activities) of newly in-scope products even if originally "placed on the market" before the 2019 deadline.
- It also excludes "pipe organs" from the open scope.
- Not expected to be controversial and so should be approved by the Parliament and Council quickly.

# Accessibility Directive Proposal

- The proposal was published in December 2015 and the EU Parliament's Committee on Culture and Education adopted its opinion in July 2016
- Sets out “accessibility requirements” for:
  - certain products (including computer hardware) and
  - certain services (such as E-books and E-Commerce)
- The proposal requires product manufacturers to CE mark products to demonstrate conformity and also contains importer and distributor obligations
- Query whether NLF / CE marking model is appropriate for achieving the aims of the proposal...

## Accessibility requirements for products include:



design and production of products in order to maximise their foreseeable use by persons with functional limitations making information on the use of the product available in more than one sensory channel

making the packaging of the product accessible

interfacing of the product with assistive devices

# REACH | “Article in Article”

- Court of Justice of the European Union decision published September 2015
- The Court considered the dissenting Member States’ “once an article always an article” approach vs. the majority Member States’ “whole product” approach
- “Quick update” to existing ECHA Articles guidance was published in December 2015
- Various drafts of the “full update” have been published on ECHA’s website with the most recent published on 6 April 2017. (Drafts are accessible via ECHA’s consultation pages)
- Provides substantial guidance on a number of points not explicitly dealt with in the Court's decision, such as how to measure the content of substances of very high concern (SVHCs) present in paint and coatings added to an existing article, or where two articles are joined together by a substance or mixture

# Review of the Product Liability Directive

Is the current strict liability regime fit for purpose?



## What is the review?

- European Commission launched a review of the strict liability regime for defective products in September 2016
- Consultation closed in April 2017.

## What is the goal?

- Check that the Directive is still fit for purpose given technological changes, e.g.
  - the Internet of Things
  - autonomous systems
  - malfunctioning apps

# Overhaul of the GPSD

Proposals published in February 2013 and voted on by the European Parliament in April 2014. Progress has slowed since then due to disagreement between Member States about **mandatory country of origin labelling**



## New Consumer Product Safety Regulation (“CPSR”)

- Brings the “umbrella” legislation into line with the more recent CE marking directives/regulations:
  - New requirement for manufacturers to draw up “technical documentation” for products subject to GPSD only
  - Introduces corrective action obligations for technical non-compliance, even where the product does not pose a safety risk
- Provides for enhanced traceability, including country of origin marking (controversial and may not survive)

## New Market Surveillance Regulation (“MSR”)

- Proposes increased powers and activities of market surveillance authorities:
  - Block imports or order sales to be stopped, even if no health and safety risk
  - Increase in spot checks of products – at external borders and on product shelves
  - Extension of information sharing and reporting systems across all Member States
- Obligation on Member States to provide resources and means necessary to perform these tasks



# Key Japanese product-related environmental laws

# Chemical Substances Control Law (CSCL)

- Comprehensive Control System Covering Existing Chemical Substances as well as New Chemical Substances
- Existing Chemicals - Obligation to file information on import/production quantity and end use application, when importing/producing 1-ton or more of an existing chemical substance.
- New Chemicals - The system of inspection prior to release onto the Japanese market (any person planning to import or produce more than 1 ton of the new chemical substance per year must provide prior notification of the quantity and end-use applications of the substance to METI.)

## Requirements applied to products containing Specified Chemical Substances

The import of certain stipulated products containing Class-1 SCS is prohibited. For non-prohibited products containing Class -1 SCS, no particular regulatory requirements apply at the time of import.

Importers of stipulated products containing Class -2 SCS are required to notify Japanese authorities the planned volume of import of products containing Class -2 SCS for the upcoming financial year.

Once imported, labeling requirements will apply at the time of transfer within Japan.



## Amendments to CSCL in 2017

- Draft bill approved by the cabinet in March 2017
- Low Volume Exception for new chemical substances regulation
- Upper limit of exception for import of new chemical substances (1 ton per year) will be changed from the current “scheduled quantity of manufacture or import” to “the quantity of emission to environment”. Currently “1 ton” limitation is allocated to all person who wants to manufacture/import such new chemical, which is very disruptive to business. After amendment, “1 ton” will be calculated as volume that are emitted to environment, not manufacture/import volume.

# Labeling Requirements

Entities dealing with products stipulated in the government ordinances which contain Class -1 SCS and Class -2 SCS (including those selling these products) are required to display the following information on containers and packaging:

- (i) Name of the SCS
- (ii) % content of the SCS
- (iii) risk in case of continuous exposure
- (iv) use and handling precautions
- (v) the name and address of the entity providing labeling information, etc.

# Law for Promotion of Effective Utilization of Resources

## Obligation imposed on manufacturers of Designated Electrical and Electronic Equipment

- i. Management of Designated Chemical Substances
  
- i. Marking and disclosure of information on Designated Chemical Substances

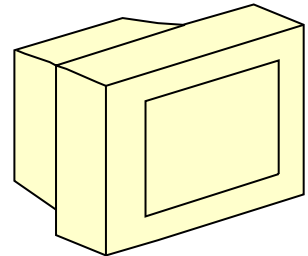
# Law for Promotion of Effective Utilization of Resources

## Designated Chemical Substance

- Lead, mercury, chromium hexavalen, cadmium, PBB, PBDE


## Designated Electrical and Electronic Equipment

- Personal compute, unit type air conditioner, TV, microwaves, dryer, refrigerator, washing machine



# Law for Promotion of Effective Utilization of Resources (J-MOSS)

## Marking of Presence of the designated Chemical Substances for Electrical and Electronic Equipment (JIS-C-0950)

- If such product contains certain amount of designated chemical substances designated by the law, manufacturing entity is required to put a designated mark ("Orange Mark" ) and disclose information on its website.

- If the amount of designated chemical substances does not exceed the amount designated by the Law, manufacturing entity can voluntarily put a **Green Mark**.

# Law for Promotion of Effective Utilization of Resources

## Take back/Recycling obligation

- Manufacturers are required to undertake obligations to take back laptops (including its batteries, components, packaging and peripheral equipment) sold after October 2003 (with PC recycle mark\*) without imposing collection fees
- The license under the Wastes Disposal and Public Cleansing Act is required to collect waste laptops as waste (or entrust to the licensed entity).
- For the laptops sold before the end of September 2003 (without PC recycle mark\*), the Manufacturers have obligations to take back laptops by imposing collection fees



# Top Runner Energy Efficiency Program

- Manufacturers and importers of the Regulated Products to comply with certain target number of energy saving rate of (average of) the overall shipped produces in Japan
- Not necessarily requires each of the products be compliant with certain energy saving capability.
- 31 Regulated products includes computers, printers, etc.



# Wastes Disposal and Public Cleansing Act

License requirement	Manifest system
<p>Business Operator who generates waste is required to contract with the licensed waste management companies by following certain requirements under the Act.</p>	<p>Waste generator must deliver the relevant <b>manifest slip</b> (specifying the type and quantity of the waste, the name of the waste disposal company and other matters required by regulations) to the waste management companies.</p>



# Waste vs. Resource?

## Vague Definition of “Waste” under the Article 2 of the Act

Practical Guidance : Guidance issued by the MOE

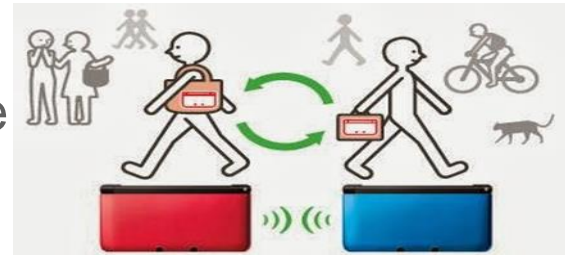
Characteristics of the object
State of emissions
Normal form of handling
Transaction Value
Intent of the Possessor



# Trade-in

## - Exception for license requirements

- Not defined in Japanese law
- The notification of September 29, 2000 issued by the MOE (“Notification”).
- A business practice where the manufacturer takes back a product from a consumer at the time of purchase of a like product (i.e., where there is a connection between the purchase of a new product and the return of a used product).
- Not required to give a discount or value



trade in.

## Green Procurement Act

- The Law Concerning the Promotion of Procurement of Eco-friendly Goods and Services by the national government, etc.
- The basic policy for green purchase (designated eco-friendly goods and the standard to be met as the eco-friendly goods)





# Harmonization of Voluntary Standards

# ChemSHERPA

<https://chemsherpa.net/chemSHERPA/english/>

**Starts operation in October 2015 led by Ministry of Economy, Technology and Industry**

**A scheme that facilitates sharing information on chemical substances in products.**

The chemSHERPA can be used as a common scheme for information handling across a supply chain.

**Designed for steady & efficient information handling**

Applicable to various products and industries. Aligned with IEC62474. and expand its scope, aiming to allow organizations to handle the CiP information under a shared policy.



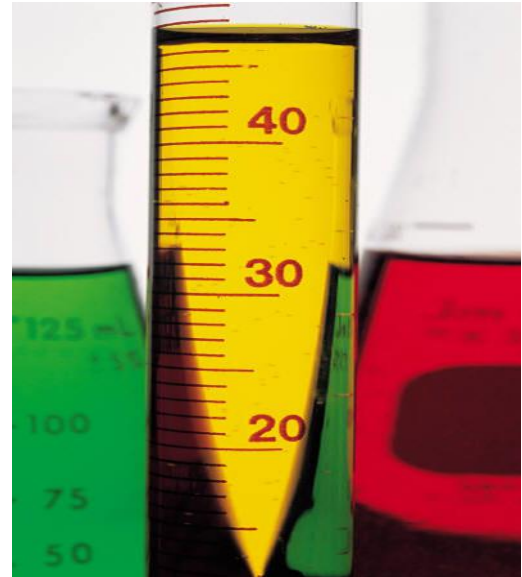
# Product Restrictions in China

## Legislation on Product Content Restriction

- Regulations on the Safety Administration of Hazardous Chemicals (“**Hazardous Chemicals Regulations**”) – 2011
- Measures for Environmental Management of New Chemical Substances (“**New Chemicals Measures**”) – 2010
- Administrative Measures for the Restricted Use of Hazardous Substances in Electrical and Electronic Products (“**RoHS Regulations**”) – 2016

# Hazardous Chemicals Regulations

- Apply to chemicals listed in the *Catalogue of Hazardous Chemicals*
- Regulate production, storage, use, and transport of hazardous chemicals
- Form the foundation for China's GHS system





# Hazardous Chemicals Regulations

Require registration of hazardous chemicals

- Producers and importers of hazardous chemicals must register with National Registration Center of Chemicals of State Administration of Work Safety prior to manufacture or importation for the first time
- Hazardous chemical manufacturers and users, and importers of chemicals covered by the *Catalogue of Hazardous Chemicals Subject to Import/Export Restrictions*, must register with the Ministry of Environmental Protection.



# Hazardous Chemicals Regulations

- Companies operating and marketing hazardous chemicals must obtain a license from the State Administration of Work Safety.
- There are three types of licenses in China.
  - Production license for manufacturers
  - Operating license for companies importing/distributing/selling hazardous chemicals
  - Safe use license for companies who use certain hazardous chemicals to manufacture products

## New Chemicals Measures

- Registration requirements for all new chemical substances produced in or imported into China
  - traders, manufacturers and users in China to register with the MEP any new chemical substances in their products that are not already listed on the *List of Existing Chemical Substances*
- Classifies chemical compounds into three categories:
  - general new chemical substances
  - hazardous new chemical substances
  - key hazardous new chemical substances
- Intended in part to align China with other leading regulatory schemes such as the system in the US and EU

# New Chemicals Measures

- New chemical registration documentation:
  - Classification and labeling samples
  - Safety data sheet
  - Physical and chemical, toxicological, and eco-toxicological testing reports
  - Risk assessment report
- Upon completion of registration procedures, the Chemical Registration Centre (CRC) will:
  - classify the new chemical substance as "general" or "hazardous".
  - issue a registration certificate within 50 to 90 days
- Ongoing reporting requirements

# New Chemicals Measures

- Similarities to REACH:
  - regulation on chemicals management
  - basically consistent with international practice in terms of management goals, purposes and approaches
  
- Differences from REACH
  - new chemicals only, not the over 45,000 on the List of Existing Chemical Substances
  - targeted only at the new chemical substances, not the goods and articles that contain such substances
  - apply only to manufacturers and certain importers/processors and not to all enterprises in the whole industrial chain

# RoHS Regulations

- Regulate the use of six hazardous substances in electronic information products: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyl (PBB), and polybrominated diphenyl ether (PBDE)
- Apply only to those electrical and electronic products (“EEP”) which are listed in a catalogue issued by the Ministry of Industry and Information Technology (the “EEP Catalogue”)



# RoHS Regulations

## Phase One – Information Disclosure

- All applicable EIPs must be marked in accordance with the RoHS Regulations to inform downstream users of relevant hazardous substances.
- Must disclose:
  - the type and level of hazardous substances,
  - the term of environmental use (the period during which the EIP will not leak hazardous substances or pollute)
  - whether the product is recyclable
- Packaging must also conform to Chinese standards and requirements.

# RoHS Regulations

## Phase Two – Content Restriction, Testing and Certification

- Applies to sub-set of EEP to be specified in a separate catalog (not yet issued)
- Must meet additional standards and complete a conformity assessment review
- The EEP Catalogue and limits on hazardous substances will be issued from time to time by relevant authorities as technology allows for use of substitutes for restricted substances.



## Voluntary RoHS Certification

- *Notice on Implementing Voluntary Certification for RoHS (2010); and Implementing Rules on Voluntary Certification for RoHS (2011)*
- Enterprises can voluntarily apply to the relevant authentication agencies to obtain certification on RoHS
- Tax incentives and priority in government procurement may be offered to companies that have conducted voluntary certification
- Authentication modes: Type test; sampling detection; self-declaration; factory inspection, supervision after authentication, etc.

# Voluntary RoHS Certification

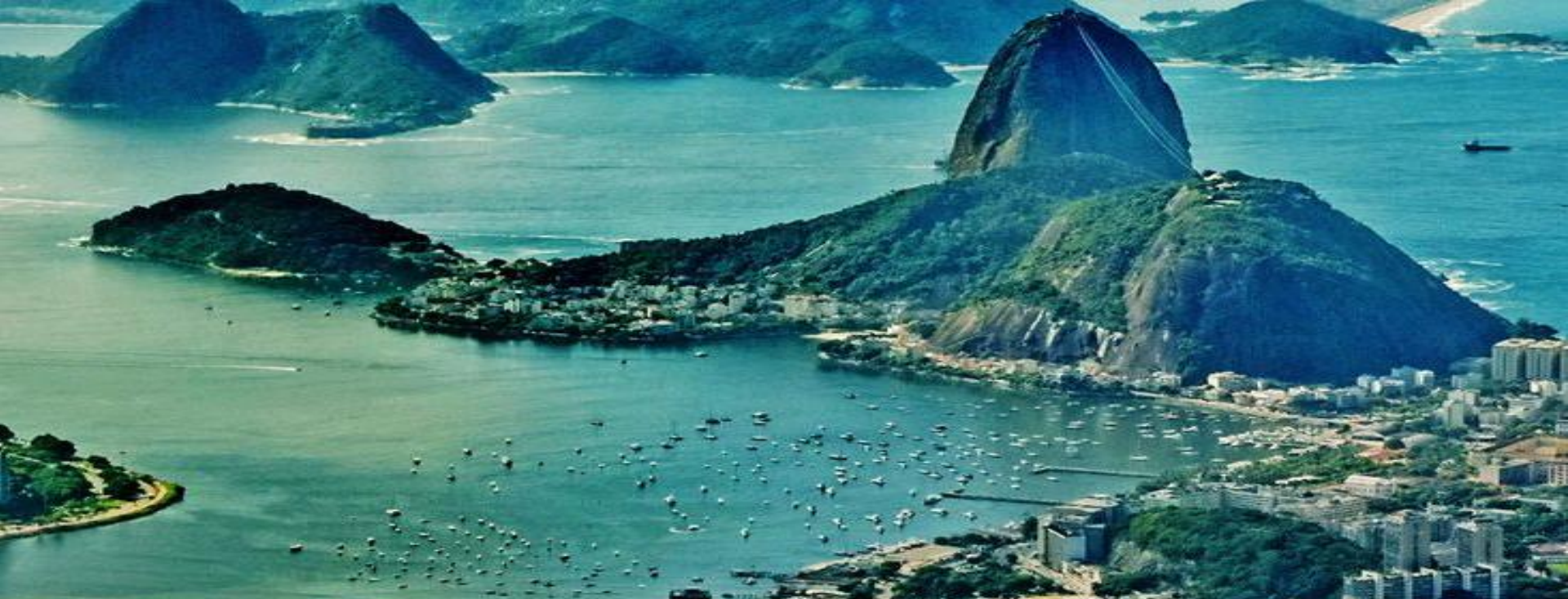
## ***Catalogue of Products Subject to Voluntary Certification for RoHS (2011)***

- The Catalogue covers:
  - A list of finished machines, such as computers, TV, telephone machines, etc.
  - A list of assemblies, such as mouse, keyboards, HDDs, etc.
  - A list of components, such as switches, sensors, headphones, buzzers, etc.
  - A list of materials, such as insulation board, printing ink, glue, etc.
  - A list of substances, such as aluminium alloy, copper alloy, colored optical glass, etc.

# Summary – Product Restrictions in China

Products may be subject to various requirements

- Certification requirements
- Labelling requirements
- Registration requirements
- Disposal requirements



# Brazil – Regulations on Chemicals



## Brazil

# Regulation on Chemicals

- Brazil lacks national regulation on chemicals, establishing classification, evaluations and risks connected to those substances.
- International standards are widely used (private and public sectors) but face lack of uniformization – problem with legal certainty.
- Ministry of Environment has proposed a Bill of Law that is under discussion:
  - i. Follows GHS.
  - ii. More aligned with Canadian model than EU (more participation of Government in the classification of the substance and risks).
  - iii. Establishes a mandatory national registration.
  - iv. Classification based on the risk of the substance.



# U.S. Product/Chemical Update

# TSCA Reform – It's Here!

## The Frank R. Lautenberg Chemical Safety for the 21st Century Act

- Statutory deadlines restrict EPA's discretion – will have to take action
  - EPA announced intention to move forward
  - budget appears to include amounts for core TSCA overhaul
- Industry wanted unified approach to chemical regulation to stave off state action; environmental NGOs wanted real risk assessments and EPA authority to take action
- EPA named first 10 chemicals to undergo risk process
- Inventory, risk assessment and chemical prioritization final rules released pursuant to deadline on June 22 (one year after passage)

## TSCA Reform – Key Changes

- Cannot consider costs in making safety determinations; concept of “use” built into risk determination
- Must make affirmative safety determinations as to new chemicals prior to import or manufacture (Section 5)
- EPA required to prioritize existing chemicals (Section 6)
- Revise inventory to eliminate outdated chemicals (Section 8)
- Make decisions based on “weight of scientific evidence” (Section 26)
- Preemption of state regulations (Section 18)



# TSCA Reform – 10 Initial Chemical Substances

- 1,4-Dioxane (manufacture of adhesives, cleaning and detergent products, cosmetics)
- 1-Bromopropane (degreasing, dry cleaning, spray adhesives and aerosol solvents)
- Asbestos
- Carbon Tetrachloride (refrigerants, propellants, solvents, fumigants)
- Cyclic Aliphatic Bromide Cluster (brominated flam retardant)
- Methylene Chloride (solvent, paint remover, degreaser, inks and adhesives)
- N-methylpyrrolidone (industrial solvent, finishing agent in textiles, nail polish remover)
- Pigment Violet 29 (additive and colorant used in food and other substances)
- Tetrachloroethylene (dry cleaning, textile processing, degreasing)
- Trichloroethylene (degreasing, solvent)

## June 22 Final Rules Released

- Inventory Rule – reset inventory by requiring identification of chemical substances that are being used or will be used
  - Reporting obligation for manufacturers and importers, 10-year look back w/in 180 days of final rule;
  - Forward obligation to provide notify EPA 90 days before use or import of inactive chemicals.
- Prioritization Rule – establishes process for determining which chemicals are High Priority and Low Priority
- Risk Assessment Rule – establishes process for EPA and manufacturer-requested risk evaluations
- Release of initial scoping documents for first 10 chemicals

# TSCA Reform – First Major Conflict: Conditions of Use

## Draft Rule Preamble:

“Overall, the statutory text and purpose are best effectuated through a more encompassing reading. . . The evaluation is on the chemical substance—not individual conditions of use—and it must be based on “the conditions of use.” In this context, EPA believes the word “the” is best interpreted as calling for evaluation that considers **all** conditions of use.”

## Definition in final Prioritization and Risk Rules:


“the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”

# TSCA Reform

- What does it mean for your business?
  - Watch how the rules are applied – will set baseline and expectations for years to come
  - Assess whether chemical substances you manufacture, import or need to manufacture your products are on EPA's initial 10 chemical list or on the broader 2014 Work Plan
  - For key chemicals in supply chain consider whether you should become involved in administrative process, *e.g.*,
    - provide chemical suppliers (or EPA) with information that informs the risk assessment process; realistic use or exposure data from manufacturing operations
    - work with manufacturer to initiate risk evaluation for chemicals targeted by states

# Prop 65 Warning Revisions

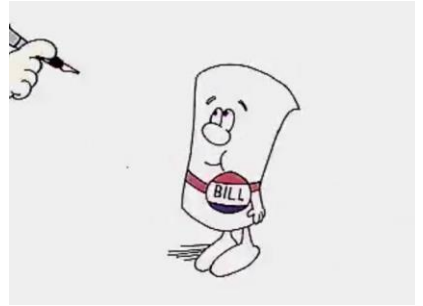
- Primary goals are to reduce overwarning and provide more information to consumers
  - Must identify a specific chemical in long-form warning
  - Warnings expressly extended to internet sales
  - Formal notice requirements between manufacturers and retailers for manufacturers to rely on retailers to provide warnings
- May require additional supply chain due diligence

 **WARNING:** This product can expose you to chemicals including **[name of one or more chemicals]**, which is [are] known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

 **WARNING:** Reproductive Harm  
- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

# Product Liability – Tort Reform

- Several bills in the House that would revamp the civil litigation process
  - **Fairness in Class Action Litigation Act, H.R. 985** – comprehensive reform bill that affects class action procedures
  - **Lawsuit Abuse Reduction Act, H.R. 720** – amendment Fed. R. Civ. P. 11 to require judges to sanction attorneys that bring meritless claims
  - **Innocent Party Protection Act, H.R. 725** – codifies fraudulent joinder analysis into remand process for diversity cases
  - **Stop Settlement Slush Funds Act, H.R. 732** – limits third-party settlement payments to payments for restitution or to directly remedy actual harm (including to the environment)
  - **Sunshine for Regulatory Decrees and Settlements Act, H.R. 469** – revise settlement process where action compels agency action or claims agency is withholding or unreasonably delaying a regulatory action





# North America's First Circular Economy Framework Challenges and Opportunities

# North America's First Circular Economy Framework

## Command Diversion Framework

Waste Diversion Ontario ("**WDO**") regulator overseeing:

- **waste electrical and electronic equipment** including computers, screens, peripherals, and audio/visual equipment;
- **municipal solid waste streams** including glass, metals, printed paper and packaging, and plastics;
- **municipal hazardous and special wastes**, including batteries, pressurized and aerosol containers, fertilizers, herbicides, insecticides and pesticides, paints and coatings, oil bottles and filters, and antifreeze and solvents; and
- **used tires**, including on-road passenger and truck tires and off-the-road tires



# North America's First Circular Economy Framework

## Command Diversion Framework

What went wrong with the Command Diversion Framework?

- reuse/reduction not prioritized over recycling;
- no inducements to reduce waste;
- no producer incentives to innovate;
- IFO monopolies precluded differential strategies;
- little real enforcement from WDO or IFO;
- excluded waste streams such as IC&I;
- fees somewhat disconnected from actual costs;
- perceptions of lack of transparency, fairness, & certainty;
- volatility precludes large capital expenditures.

# North America's First Circular Economy Framework

## RRCEA

### *Resource Recovery and Circular Economy Act, 2016*

- registry for all introduced products and their primary, convenience and transportation packaging;
- lifecycle obligations upon “brand holders” (owner, licensor or rights holder to market product under brand);
- design for reuse;
- expanded scope to include parties with “commercial connection” (importer, wholesaler, lessor or retailer of product or “otherwise involved in product’s distribution”)

# North America's First Circular Economy Framework

## RRCEA

### *Independent Producer Responsibility*

- Brand holders free to contract with any services providers;
- Certification requirements remain with Brand Holders;
- Equivalent diversion for introduced products challenging without control of waste stream;
- No geographic weighting of collected diversion materials;
- No allocation of materials;
- Collectives forming around producers, haulers and processors.



# *Closing Remarks and Adjournment*



# 2017 International Environmental Law Conference

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