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JINGTIAN & GONGCHENG



## 非洲投资及争议解决专题讲座

2016年3月1日 ( 星期二 ) 下午 1:30 - 下午 7:00

北京金融街丽思卡尔顿酒店

## 致欢迎词

- 竞天公诚律师事务所管理合伙人王卫国
- 孖士打律师行首席合伙人、亚洲区董事会主席罗婉文

## 特邀嘉宾致辞

- 王伟，中国法学学术交流中心副主任（中国法学会直属单位）

# 专家研讨会：投资非洲国家

- 约翰·缇皮斯，肯尼亚共和国大使馆公使衔参赞
- 王克文，中国产业海外发展协会国际合作部主任
- 主持人：Kwadwo Sarkadoie，Mayer Brown合伙人



- 王克文

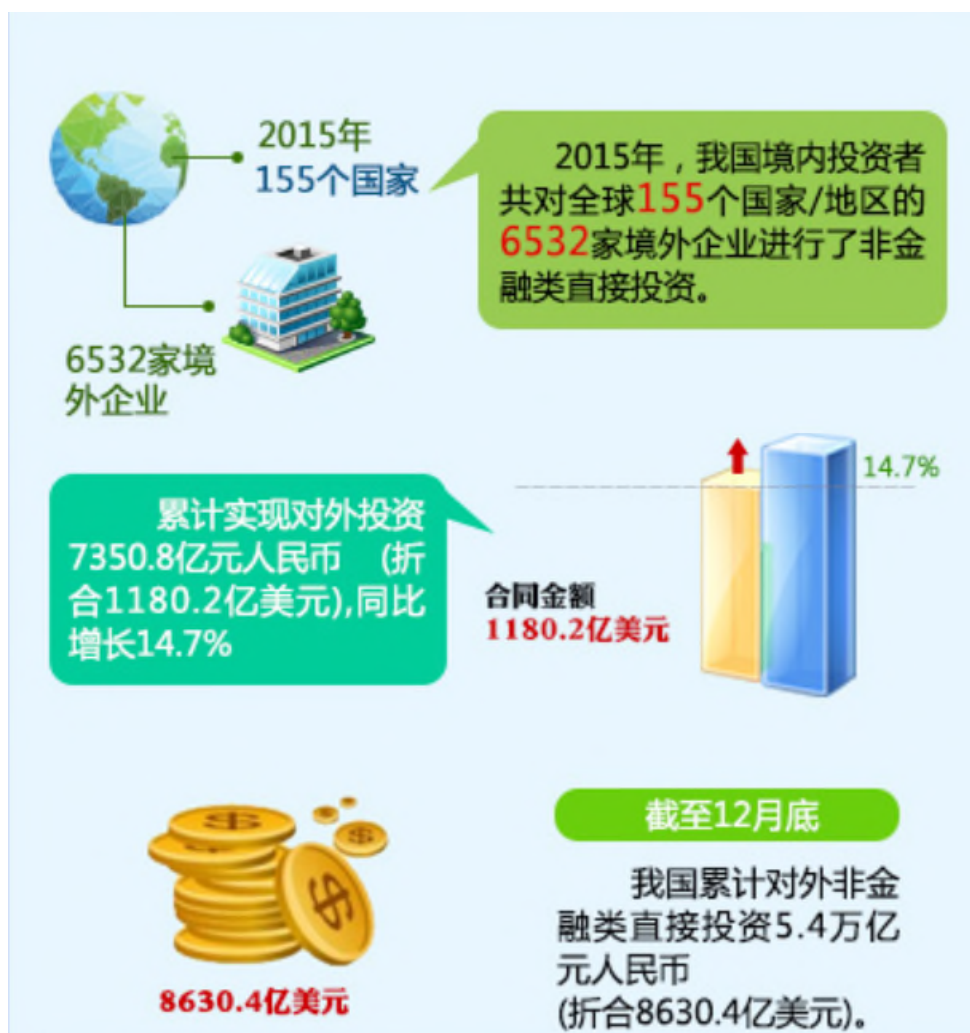
中国产业海外发展协会国际合作部主任

# 专家研讨会：投资非洲国家

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# 中国境外投资的新影响因素

- 競天公誠律師事務所合夥人戴冠春

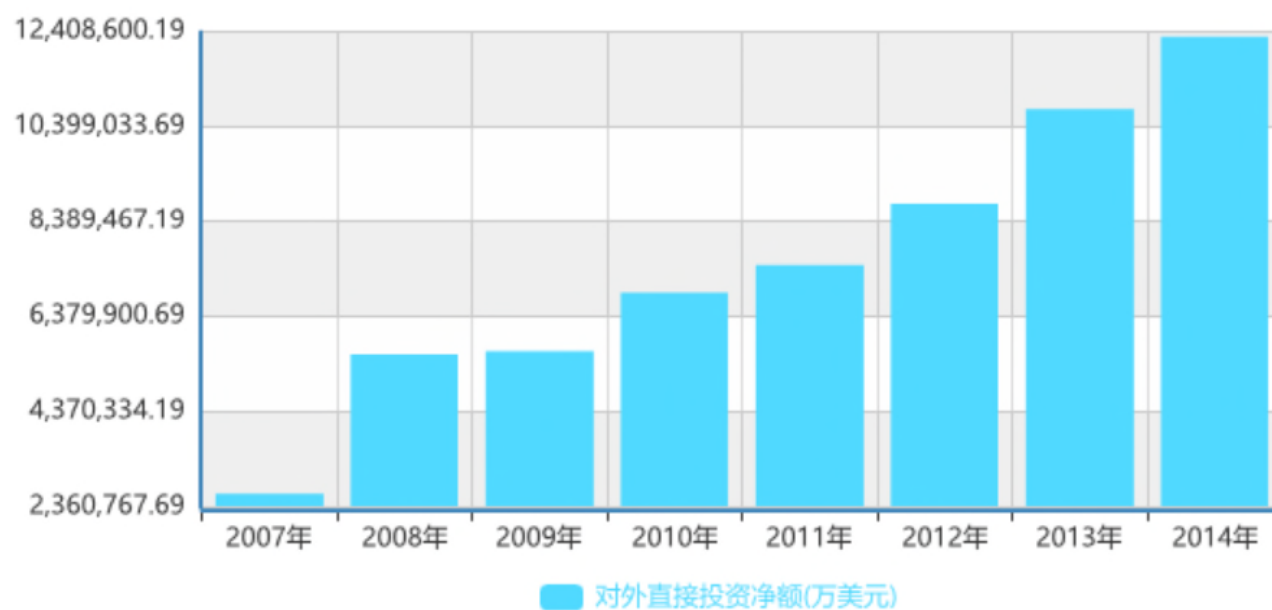




# 中国对外投资增长趋势

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\*本页幻灯片数据引用自国家统计局

政府进一步简化海外投资审批程序

海外投资的驱动多元化

投资和融资结构更复杂

一带一路推动海外投资

- 国家层面：由核准制转为备案制

- 除金额特别巨大，和涉及敏感国家和地区、敏感行业的项目外，其他项目全部取消核准改为备案管理

- 地方优惠政策增多

以上海自贸区为例，备案时间变短，融资便利

- “在线备案，一表申报”，实务中备案时间可缩短为3日

- 根据《中国（上海）自由贸易实验区分账核算业务境外融资与跨境资金流动宏观审慎管理实施细则》，上海自贸区取消境外融资的前置审批，在自由贸易账户分账核算管理框架下，企业和各类金融机构可以自主从境外融入低成本资金

- 其他政府管制放松推动海外投资

- 重大资产重组的法律法规变化使得上市公司海外投资便利。

根据《上市公司重大资产重组管理办法》，大幅取消上市公司重大购买、出售、置换资产行为审批，上市公司只有在达到重大资产重组标准时才需报送证监会审批。这实际上加快了交易的效率，给了上市公司海外投资更大的便利和自由。上市公司对海外投资也因此更加积极。



传统  
驱动

- 资源
- 技术
- 市场
- 解决过剩产能

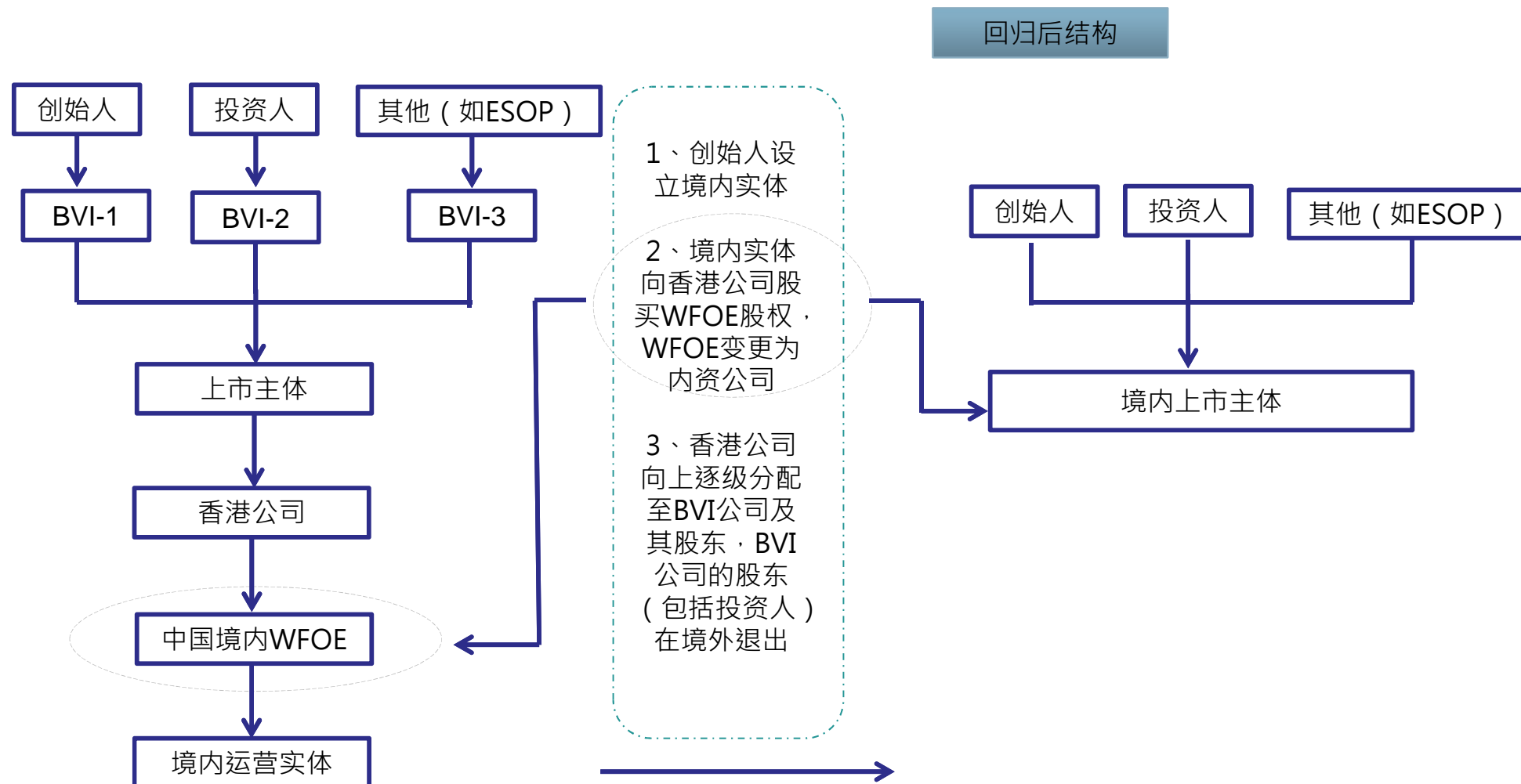
更多驱  
动

- 企业转型升级
- 寻求稳定回报
  - 中国经济放缓，同时海外市场机会出现
  - 中国投资者国际化能力和市场化程度提高，资金流动便利
- 追逐地区发展的机会
  - 一带一路（基础设施）
  - 新兴市场
- 国内国际资本市场的利差
  - 红筹回归

# 海外投资的驱动多元化之红筹回归线路

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- 境内投资工具的参与

- 通过基金投资

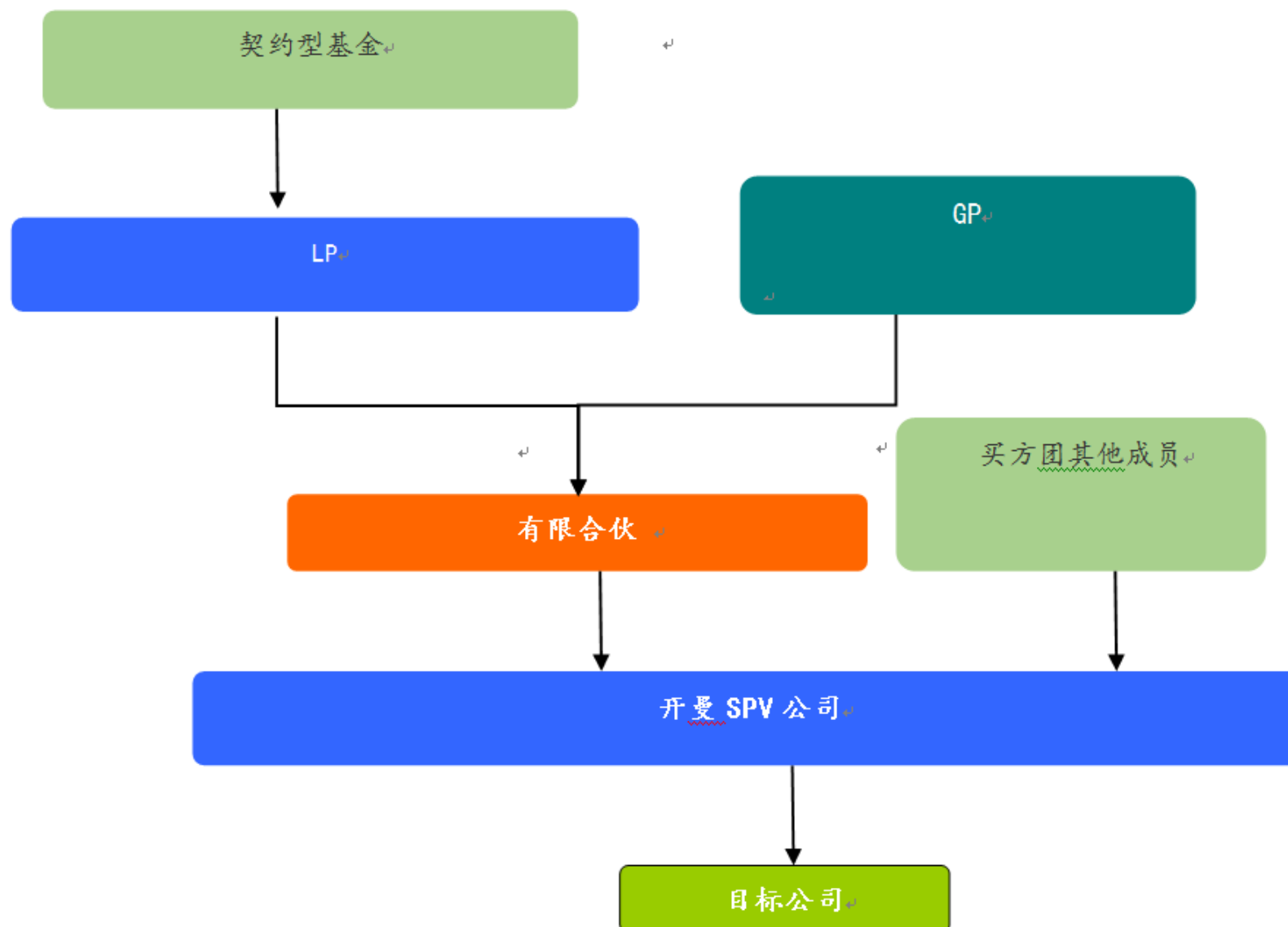
- 结构性产品

增强投资收益，将投资者对未来市场走势的预期产品化

# 海外投资投资和融资结构更加复杂（续）

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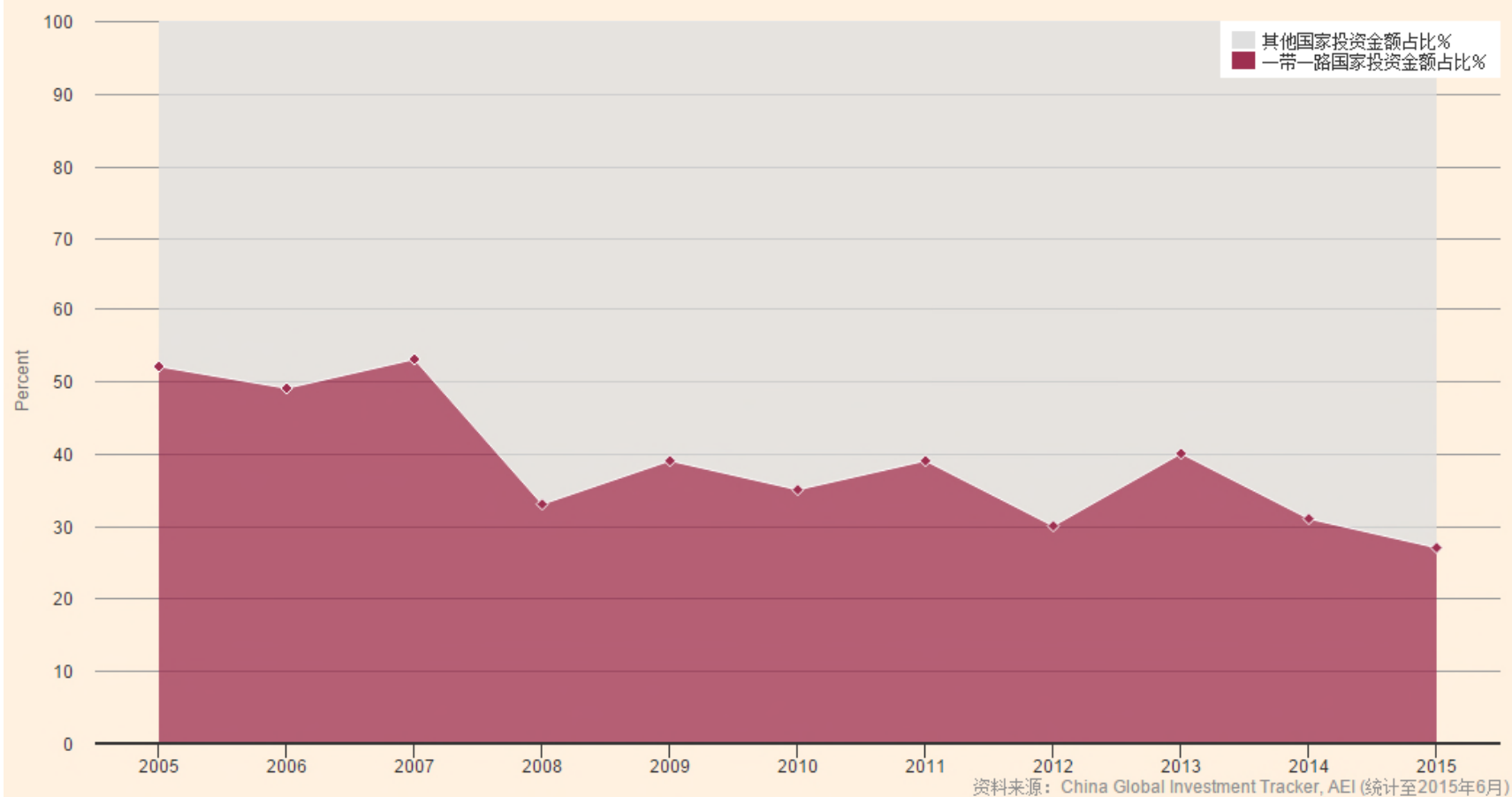
- 专门成立的海外投资的基金
  - 丝路基金
  - 中非发展基金
- 投资项目在中国境内资本市场的融资
  - 中国境内上市公司直接投资、收购

# 一带一路战略可能会推动中国海外投资

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一带一路国家占整体中国海外投资金额占比 仍有增长空间



从国企为主到国企、民企并举

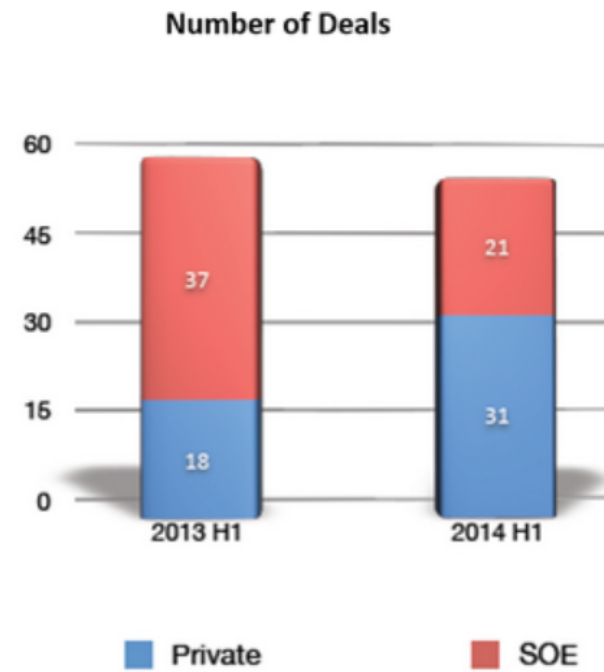
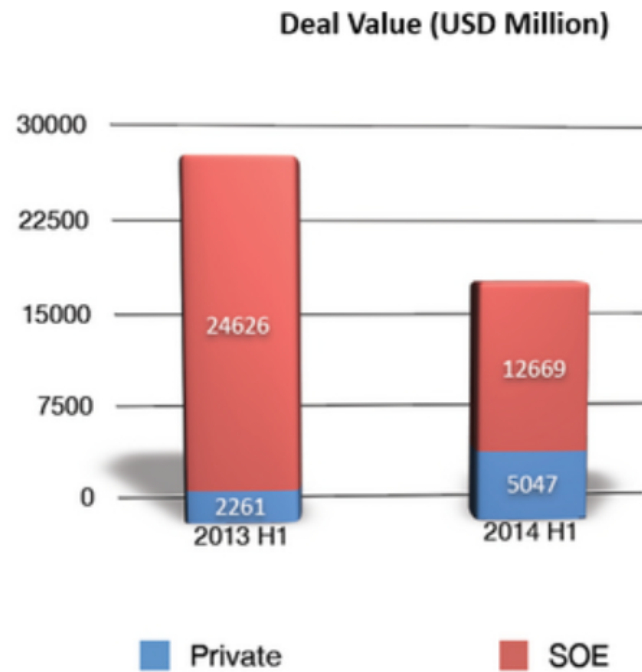
投资产业多元化

发达国家投资比例更高

# 从国企为主到国企、民企并举

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\* 本页幻灯片数据引用自A Capital Dragon Index分析报告



## 排名前十的海外投资项目的投资者（亿美元）



中国海洋石油总公司  
151



双汇集团  
71



中国铝业公司  
128



国家核电技术公司  
65



中国铁路工程总公司  
75



中信证券  
中国铁路建设  
62



中国石化  
72



中国电力投资  
59.5



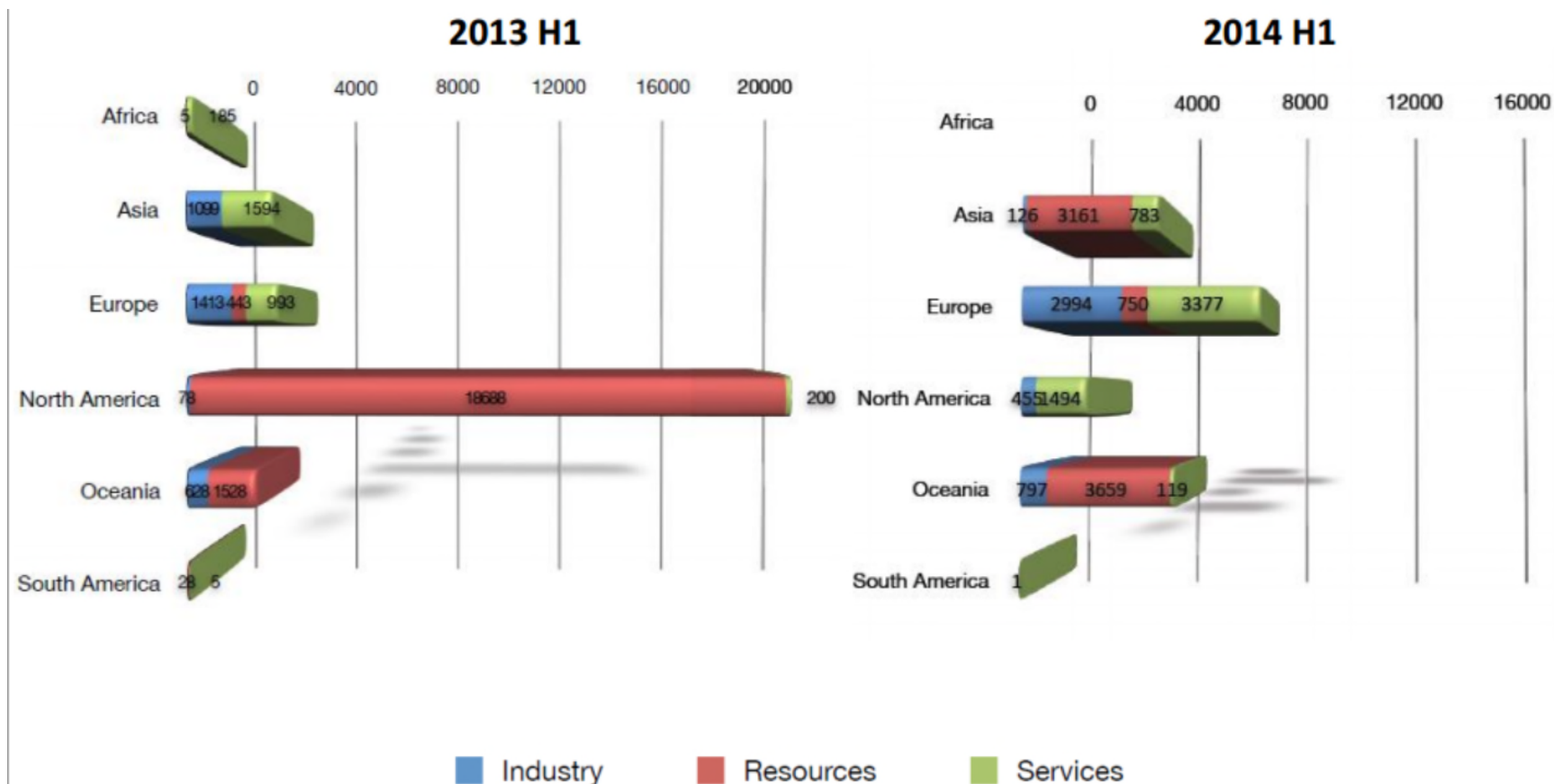
中国石化  
71



中国五矿集团  
58.5

•值得注意的是，国企仍然是海外投资的主要力量，排名前十的海外投资者均为国企

\* 本页幻灯片数据引用自观察者网



- 能源类投资较2013年有所减少，90%的能源投资集中在大洋洲和亚洲；
- 服务业有显著增长，2014年第一季度较2013年增长近1倍；
- 产业投资也呈现增长趋势。

# 发达国家投资金额比例更高

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## 中国海外投资国排名（亿美元 2002-2014.6）



美国  
719



澳大利亚  
613



加拿大  
394



巴西  
314



印度尼西亚  
307



英国  
236



哈萨克斯坦  
235



俄罗斯  
209



尼日利亚  
207



沙特阿拉伯  
195



巴基斯坦  
178



委内瑞拉  
175



伊朗  
172

注：投资于美国、澳大利亚、加拿大、英国等发达国家的总量远远超过投资于发展中国家的总量。

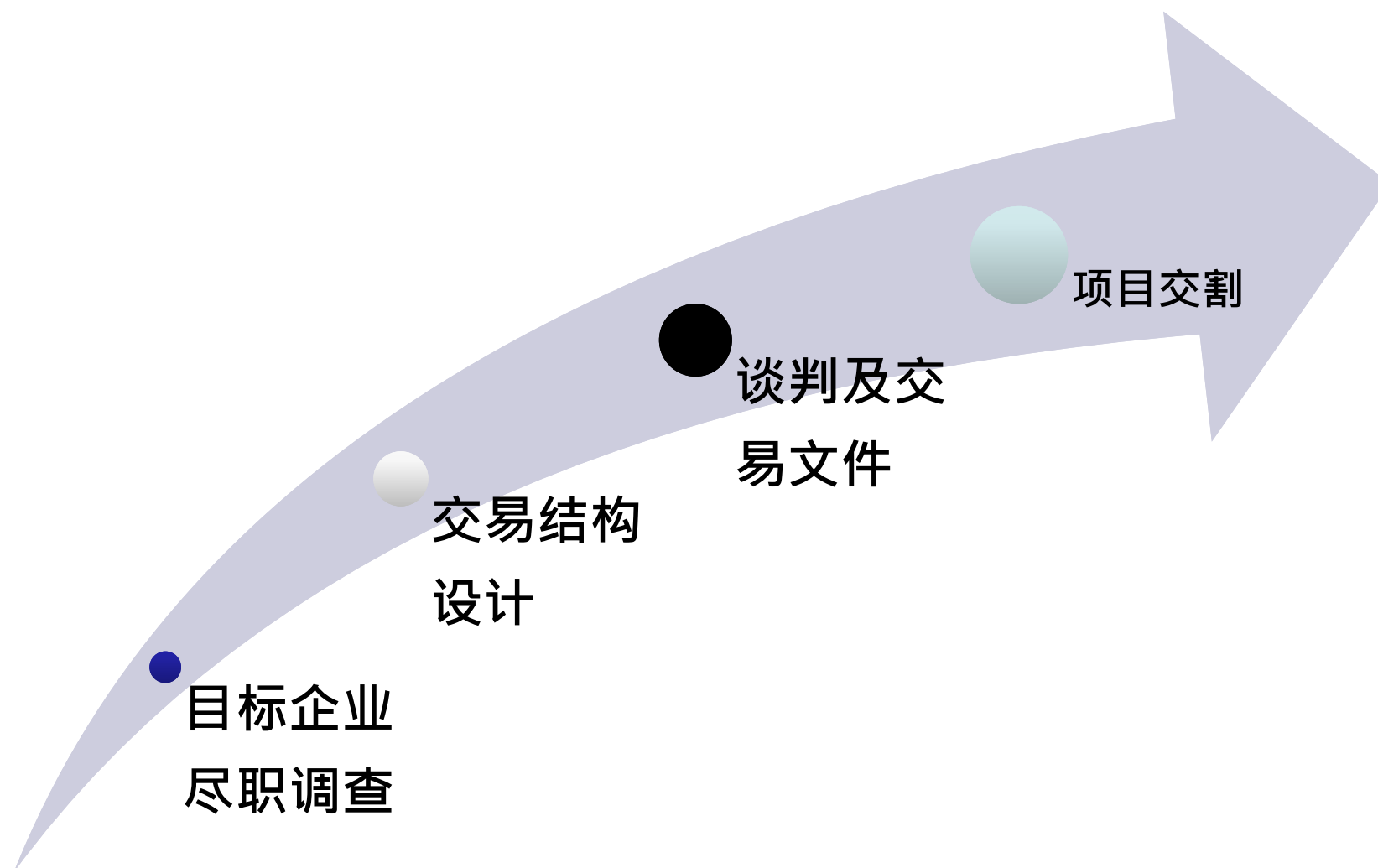
# 2015年海外投资十大交易

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目标企业	国家	中国企业	交易额
倍耐力Pirelli	意大利	中国化工	77亿美元
朱比亚水电站和伊利亚水电站	巴西	长江三峡集团	36.6亿美元
飞利浦Lumileds	荷兰	中国财团	33亿美元
Avolon	爱尔兰	渤海租赁	25.55亿美元
Tnuva食品公司	以色列	光明食品集团	21.67亿美元
Ironshore	美国	复星国际	18.4亿美元
盈方体育传媒集团 ( Infront Sports& Media )	瑞士	万达集团	11.91亿美元
Club Med	法国	复星集团	11.91亿美元
Kumport码头 ( 第三 大 )	土耳其	中国远洋	9亿美元
标准银行公众公司	南非	中国工商银行	7.65亿美元





1

- 股权结构（全稀释条件下）

2

- 核心资产（包括动产、不动产）

3

- 知识产权

4

- 应付税款、账款

6

- 或有负债（诉讼、担保）

7

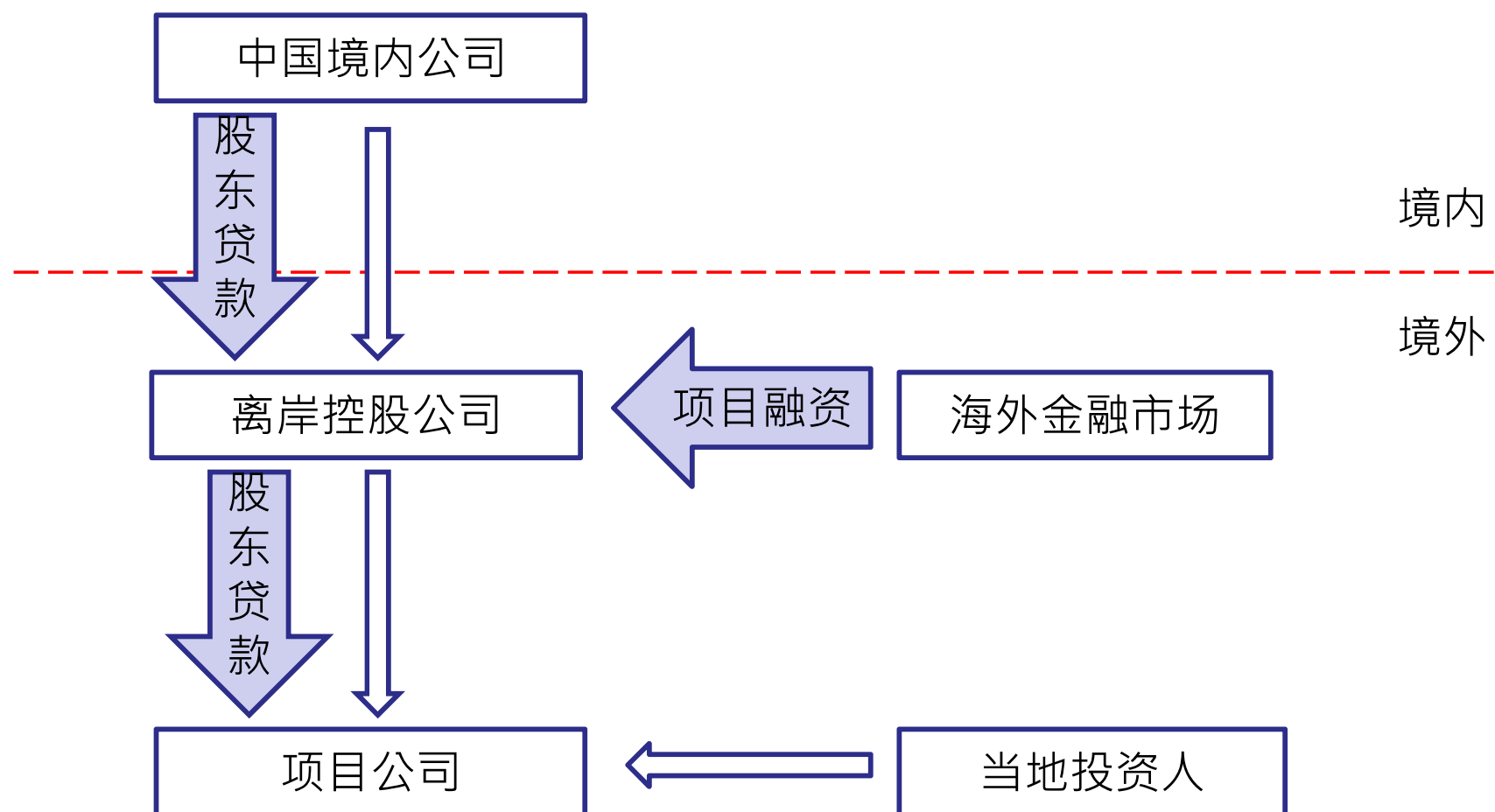
- 劳动、环保等

- 符合国内及目标企业所在国的法律法规
- 符合战略目的
- 税务结构的考量
- 有利后续运营管理（ 融资、处置、内部管理/激励的考量 ）

# 境外投资交易流程——交易结构设计

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保密协议

排他性协议

意向书/条款备忘录

股份购买协议

披露函

修订的章程/股东协议

新服务/供应/许可协议

交割事项清单

其他

ASIAN  
LEGAL ALB  
BUSINESS

CHAMBERS  
ASIAN PACIFIC

CHINA BUSINESS 商  
LAW JOURNAL 法

China Law  
& Practice  
IFLR

The  
LEGAL  
500

- 2016年1月，在**汤森路透**发布的2015年度中国海外并购法律顾问排名——总排名第**14**位，内资所排名第**2**，前进**58**名。
- 2016年1月，被**Corporate INTL**杂志评价为“年度中国跨境投资律师事务所”。
- 2015年6月，万达院线收购澳大利亚电影院线第二大运营商Hoyts集团，竞天公诚担任收购方律师。
- 2015年6月，万达集团收购全球第二大体育营销公司——瑞士盈方体育传媒集团（Infront Sports & Media），竞天公诚担任收购方反垄断律师，收购额高达**11.91**亿美元。
- 2015年12月底，华人文化控股集团作为领投方，以**4**亿美元的价格收购城市足球集团**13%**股份项目完成交割。竞天公诚担任交易主导方华人文化的中国法律顾问。城市足球集团是世界领先的足球运营管理公司，持有著名的曼城足球俱乐部**100%**的股权。华人文化控股集团是中国最有影响力的专注于传媒、娱乐、体育及互联网产业的综合性投资及运营平台，发起方包括阿里巴巴、腾讯、元禾控股、华人文化等。



感谢！  
THANKS！

■戴冠春 律师

[dai.guanchun@jingtian.com](mailto:dai.guanchun@jingtian.com)

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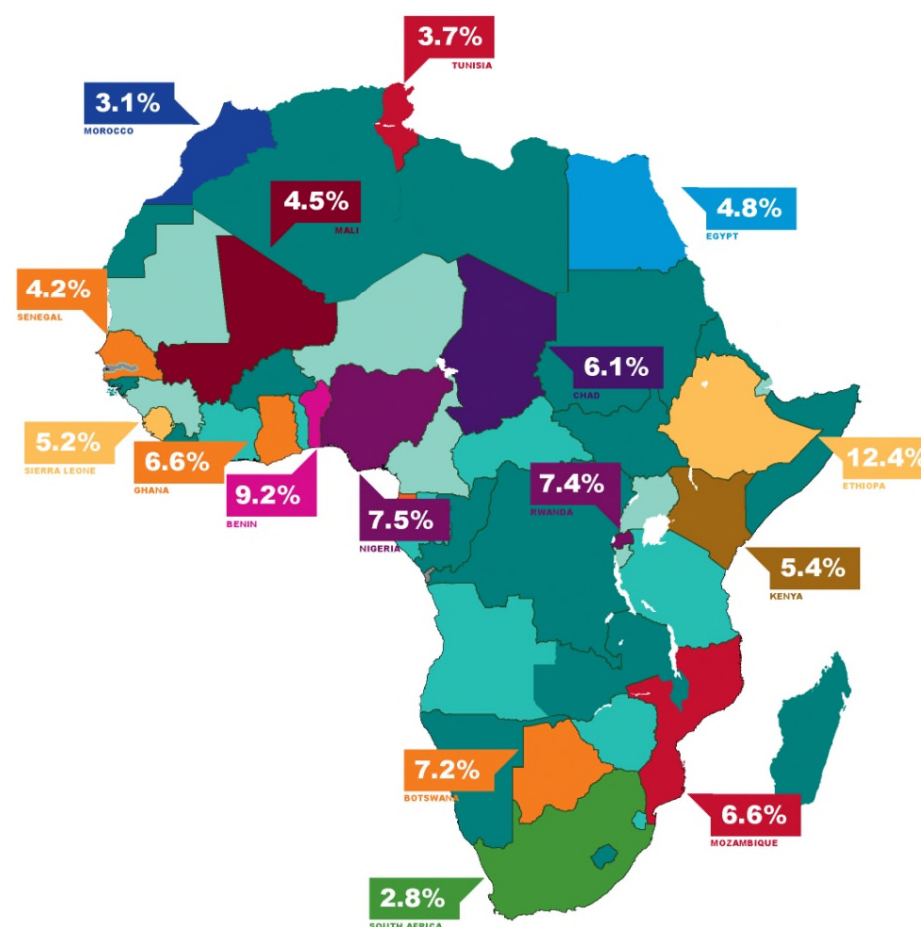
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# 非洲项目投资的监管法律框架

- **Mayer Brown** 合伙人 Kwadwo Sarkodie

- 54 countries
- 5% economic growth projected for 2016
- One of the fast growing regions the developing world
- Commodities remain the principal drivers
- Increasing focus on:
  - Infrastructure;
  - Telecommunication;
  - Consumer goods; and
  - Public health
- This shift mirrors the demand of the local population for an improved lifestyle

Sample African Country GDP Growth  
(2010 used as a base year)



# Recent Challenges

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Wed Jan 14, 2015 8:48am EST

## Copper rout echoes oil; traders brace for more selling

MELBOURNE | BY MELANIE BURTON



August 21, 2015 3:47 pm

## What has gone wrong for emerging markets?

Roger Blitz and Elaine Moore

FINANCIAL TIMES

HOME » FINANCE » ECONOMICS

## Debt, defaults, and devaluations: why this market crash is like nothing we've seen before

A pernicious cycle of collapsing commodities, corporate defaults, and currency wars loom over the global economy. Can anything stop it from unravelling?

The Telegraph

BUSINESS DAY

The New York Times

## Market Dives as Oil and Other Commodities Sink

- Continued foreign and local investment is the principal contributor to sustained economic growth across the region
- Amongst the reasons for sustained investment:
  - increasing number of stable local governments;
  - creation of a suitable and robust legal frameworks both for FDI and local investment;
  - a diversification of investment opportunities (away from the traditional commodities markets); and
  - an increasingly urban population generating an industrial workforce and increased market demands



- **Africa's single largest trade partner**
  - trading volumes estimated to have hit US\$300bn in 2015
- **Key trade partnerships 2013 – 2014:**
  - South Africa – estimated US\$268bn
  - Angola – estimated US\$238bn
  - Nigeria – estimated US\$85bn
  - Egypt – estimated US\$69bn
  - Sudan – estimated US\$59bn
- **Business Services; Wholesale/Retail; Import/Export; Construction; and Natural Resources**
- **Forum on China Africa Cooperation (FOCAC)**



# Examples of Chinese Investment Projects

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- **Nigeria**

- The Zhejiang-based Yuemei Group



- **Tanzania**

- Chinese private companies have created more than 150,000 jobs
- Low-tech, and labour intensive industries



- **Ethiopia**

- The Huajian Group

- **Kenya**

- US\$14.5 billion Konza Techno City development



- **Ghana**

- US\$9 billion deal with China Exim Bank for road, railway and dam projects



## Converting Opportunity into Investment

- Key rules and regulations
- Applicability of local investment and procurement law
- The status of Public Private Partnerships (PPP) and projects
- Government support for investors
- Committees and administrative bodies
- Government requirements for investors
  - Permits
  - Foreign exchange
  - Taxes
  - Financial support

## Local laws derive from a number of sources across the continent

### Primary Sources:

- Civil law
- Common law
- Mixed systems
- *Shari'a* law
- Customary laws



- **Procurement/Companies Legislation, examples include:**
  - South Africa: Black Economic Empowerment Legislation
  - Ghana: Free Zone Act 1995
  - Nigeria: Companies and Allied Matters Act (1990)
- **Hydrocarbons/Environmental Legislation, examples include:**
  - Nigeria: New Petroleum Industries Bill (and Oil & Gas Industry Content Development Act 2010)
  - Ghana: Petroleum (Local Content and Local Participation) Regulations, 2013
- **Employment Legislation**
- **Securities Legislation**
- **Public procurement and/or PPP Legislation**

- **Crucial to infrastructure and power development**
- **Structure is attractive to local governments, particularly where finance is limited**
- **Challenges:**
  - Diverse regulatory framework;
  - Local stakeholders; and
  - Need for long-term political stability
- **Thorough planning and feasibility studies required**

# Approaches to PPP Projects

	Procurement Legislation	Establishing PPP Projects	Support for Investors	Considerations?
<b>Ghana</b>	Public Procurement Act 2003	<ul style="list-style-type: none"> <li>• No PPP specific legislation</li> <li>• Governed by the National Policy for PPPs</li> <li>• Selected through a competitive bidding process</li> </ul>	Ghana Investment Promotion Centre (GIPC)	Minimum equity participation thresholds
<b>South Africa</b>	<ul style="list-style-type: none"> <li>• Constitution of South Africa 1996</li> <li>• Public Finance Management Act 1999 (and Regulations)</li> <li>• Preferential Procurement Policy Framework 2000</li> </ul>	<ul style="list-style-type: none"> <li>• PPP projects will always require a procurement procedure in line with the Public Finance and Management Act 1999</li> </ul>	Trade and Investment in South Africa (TISA)	Requirement to register as an “ <i>external company</i> ”
<b>Tanzania</b>	<ul style="list-style-type: none"> <li>• Public Private Partnership Act No. 18 of 2010</li> <li>• PPP Regulations 2011</li> </ul>	<ul style="list-style-type: none"> <li>• Solicited bids</li> <li>• Unsolicited bids</li> </ul>	<ul style="list-style-type: none"> <li>• PPP Co-ordination Unit (PPCU)</li> <li>• Tanzania Investment Centre</li> </ul>	Requirement to register a branch of the company in Tanzania – Tax consequences



- **Restrictions on foreign ownership of business – e.g.**
  - Ghana – enterprises wholly owned by foreigners must have a minimum level of foreign capital investment;
  - Kenya – 25% of shares in companies listed on the Nairobi Securities Exchange must be held by Kenyans
- **Restrictions on ownership of land by foreigners – e.g.**
  - Tanzania – all land is vested in the President as trustee for the nation (it is only possible to be granted a lease for a maximum of 99 years)
- **Insurance required to be provided locally – e.g.**
  - Kenya and Botswana
- **Under-developed financial systems**
- **Lack of infrastructure – power and transport**
- **Protectionist legislation**
- **Bureaucracy**
- **Corruption**
- **Political and legal changes**

- **Additional Considerations:**
  - ✓ attracting suitable partners
  - ✓ due diligence
  - ✓ role of local counsel
  - ✓ the regulatory environment
  - ✓ role of Development Financial Institutions
  - ✓ Multilateral Financial Institutions, ECAs etc.
  
- **Additional Risk Factors:**
  - Political risk
  - Exchange controls
  - Tax regimes (e.g. withholding tax)/tax benefits
  - Legal system risks

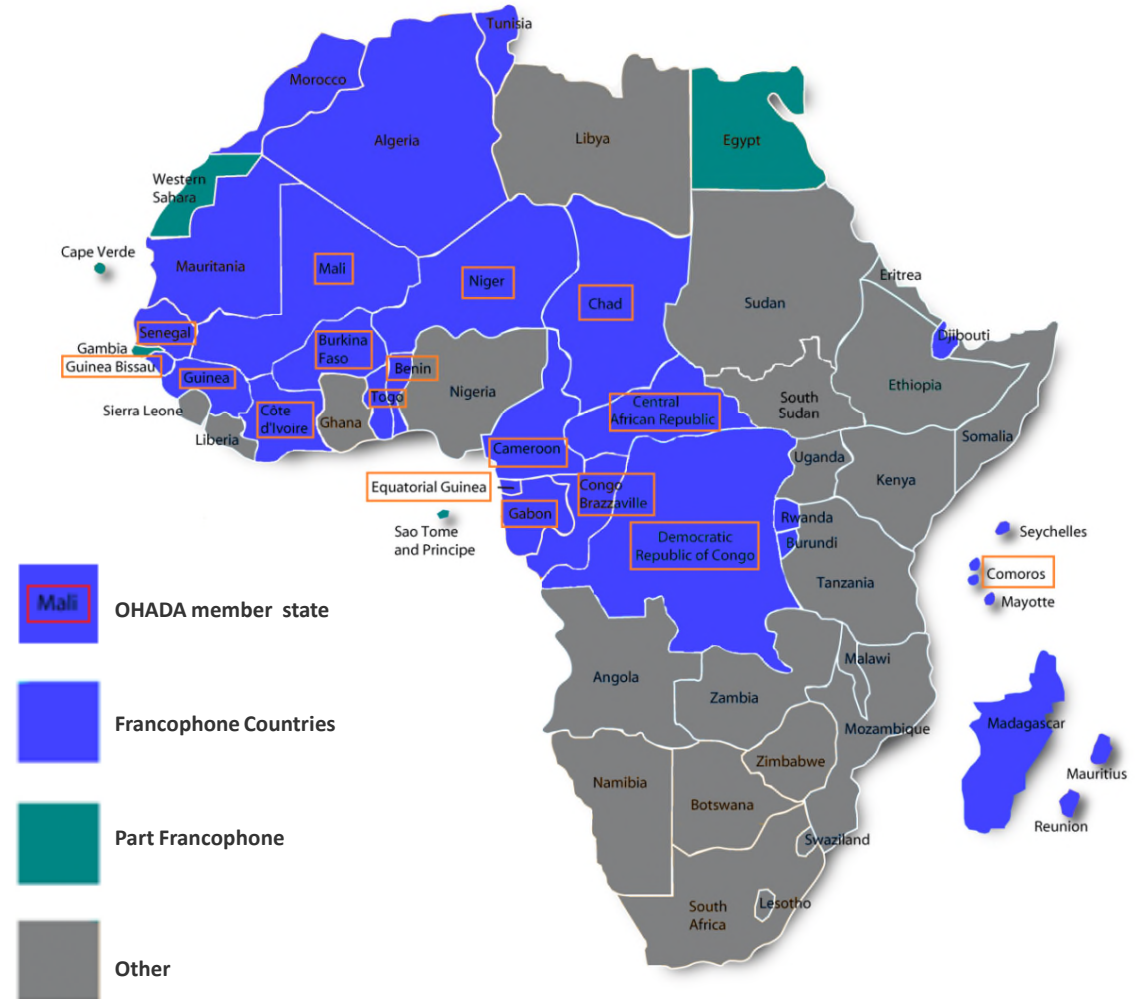
## 1. Choice of Governing Law

- A. Local law;
- B. The investor company's national law; or
- C. A neutral law of a third party state

## 2. Choice of dispute resolution mechanism: Local Courts or Arbitration

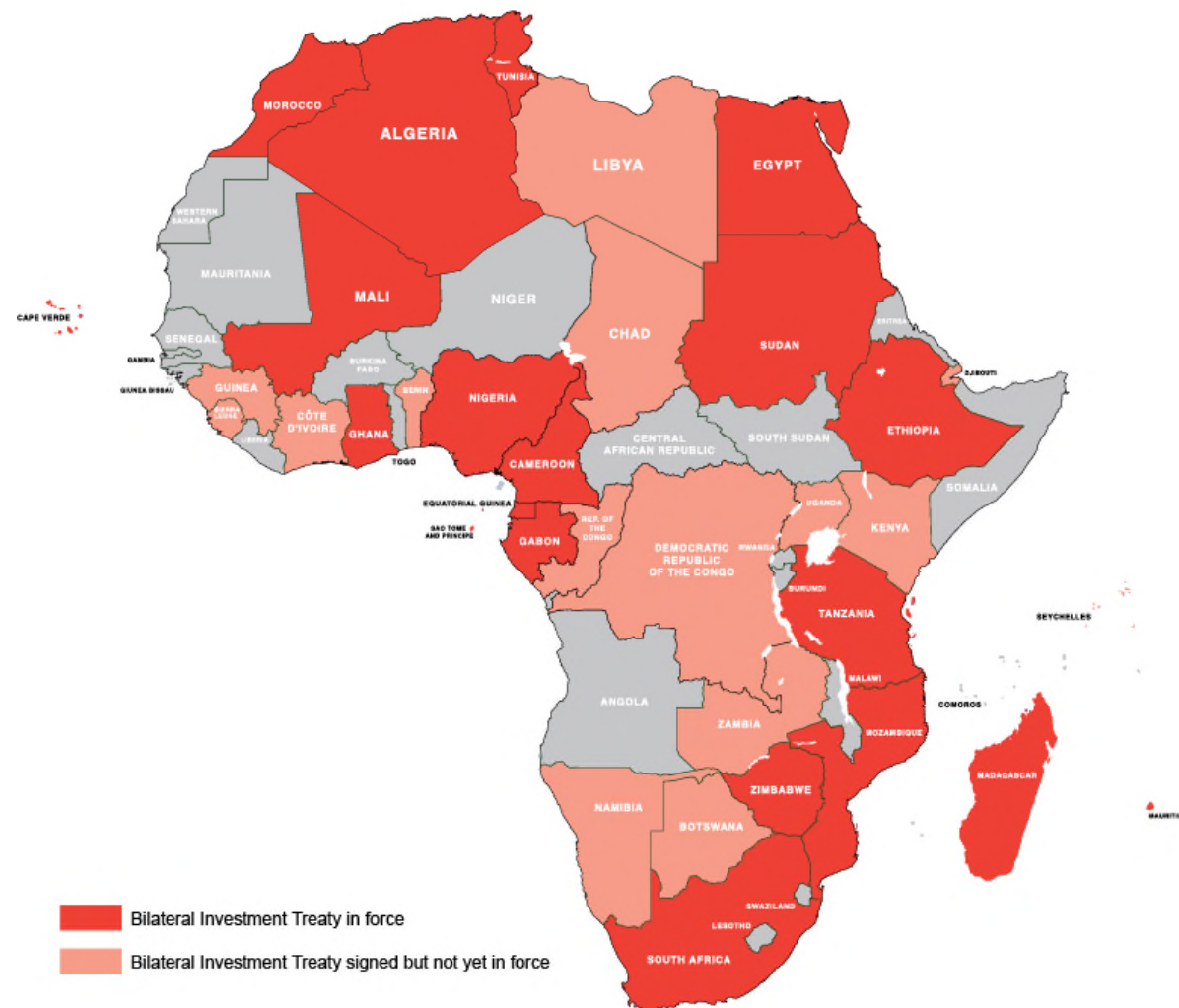
- Cost-effectiveness
- Efficiency
- Enforceability
- A good understanding of the current state of the local court system and its reliability should be gained before a decision is made

- *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*  
(Organisation for Harmonization of Business Law in Africa)
- Created on 17 October 1993
- A uniform system of business laws adopted by 17 west and central African nations
- Civil law systems largely influenced by French law
- The list of OHADA Members States covers most Francophone African countries (other than in North Africa)



- 8 Uniform Acts (UA) governing:
  - securities
  - commercial companies
  - general commercial law
  - arbitration
  - transportation
  - insolvency
  - debt collection procedures
- Direct application and enforceability in OHADA member states (without implementing measures)
- Any UA will supersede any existing national legislation
- Areas not covered by UAs: mining law, tax law, contract law, labour law, property and land law...

- BITs are currently in place between China and 32 countries across Africa





- **Africa continues to be a fertile ground for project investment**
- **A growing urban population and years of increasing FDI have led to:**
  - a greater diversity of possible investment sectors; and
  - the development of modernised legal frameworks for investors to operate in
- **Local governments have taken steps to encourage and support foreign and local investment with:**
  - provisions to promote incoming investment;
  - frameworks to support PPP investment; and
  - by developing appropriate local dispute resolution practices
- **The complexity of the local legal framework (underlying system, local laws, arbitration agreements or treaties) should encourage investors to seek advice from local and international counsel from the outset of a project**

# 如何利用双边协定设计投资架构

- **Mayer Brown** 合伙人 Alejandro López Ortiz
- **Mayer Brown** 合伙人 Dany Khayat

- International treaties protecting foreign investment under international law
  - Bilateral Investment Treaties (BITs): more than 2,200 in force
  - Multilateral Investment Treaties
  - Investment Chapters in Free Trade Agreements
  - Investment Protection Laws
- Every treaty is different; Need to check specific text

- Benefits for the foreign investor
  - Protection under international law
    - State cannot rely on domestic law to justify its breaches
    - Application of international law standards
    - In respect of all organs and subdivisions of the State
  - Allows the investor resolving disputes in an international forum
    - Avoiding local courts
    - Irrespective of the dispute resolution mechanism contractually agreed
    - Choice between different international arbitration fora
      - ICSID
      - *Ad Hoc* under the UNCITRAL Arbitration Rules
      - Others

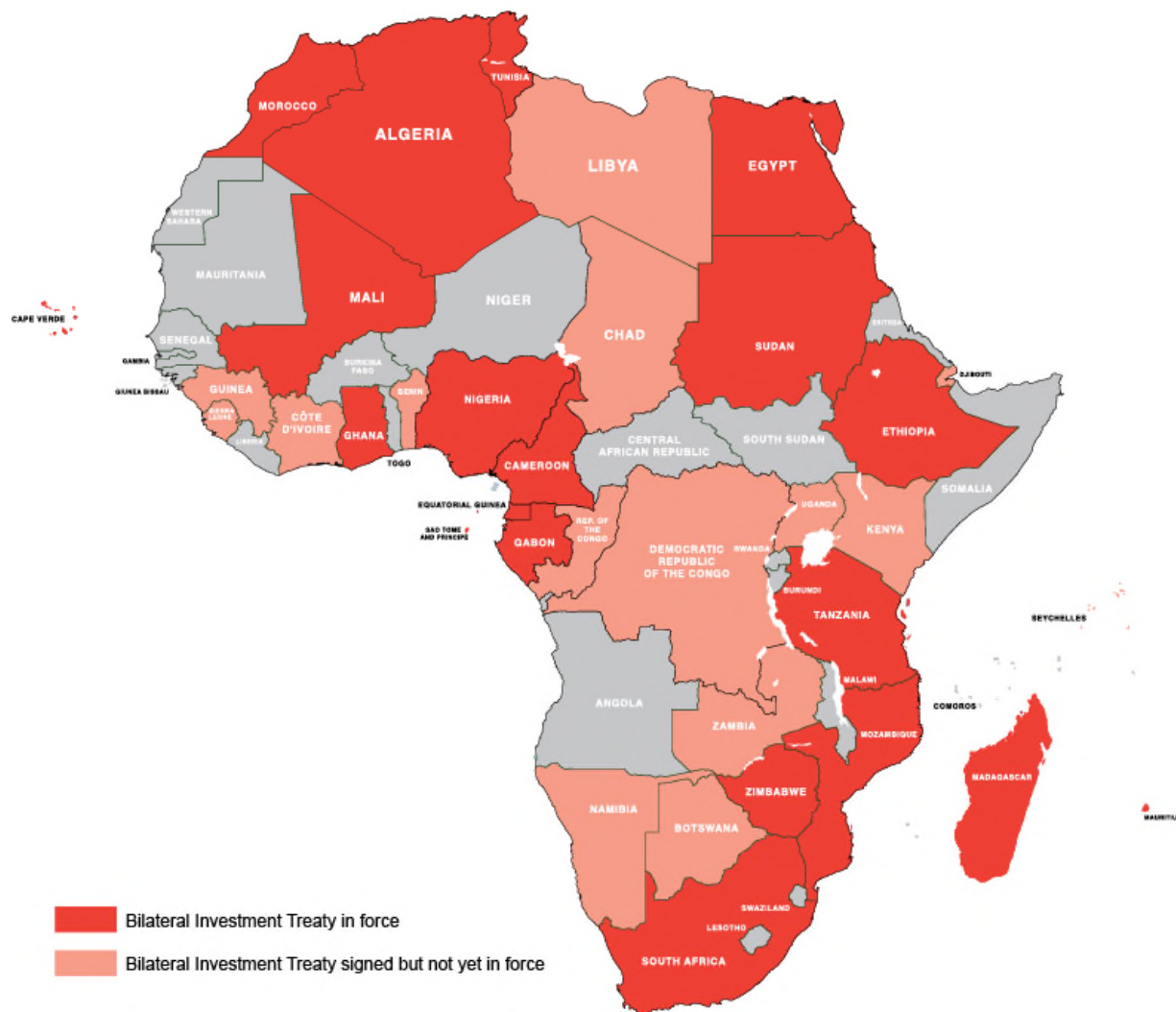
- Habitual substantive investment protections
  - Protection in respect of expropriation
    - Allowed only if it is non-discriminatory, for a public purpose, observing due process and accompanied by a prompt and adequate compensation
    - It includes indirect and de facto expropriations
  - Fair and Equitable Treatment
  - Full protection and security
  - Non discrimination
  - Free repatriation of capital

## BITs between China and African States

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- 19 BITs in force
- 13 BITs signed but not yet in force





- Definition of “investor” under applicable Treaty
- Different criteria:
  - Individuals: nationality, domicile, etc.
  - Corporations: place of incorporation, place of headquarters, place of control
- Example: China – Nigeria BIT (2010)

2. The term "investor" include nationals and companies of both Contracting Parties :

(a) “nationals” means, with regards to either Contracting Party, natural persons having the nationality of that Contracting Party;

(b) “companies” means, with regards to either Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in the territory of the Contracting Party.

# Are Hong Kong Entities covered by Chinese Treaties?

- Hong Kong has its own Treaties
  - But none with African States
- Chinese Treaties do not apply to HK territory, unless specifically extended (Art. 153 Basic Law) (<http://www.doj.gov.hk/eng/laws/table2ti.html>)
  - HK entities are excluded from protection: they are not “incorporated under the laws or China” or “having their seat in China”
  - Decision of the High Court of Singapore in *Sunam vs. Laos* (2015)
  - However, different with individuals: an individual resident in HK may still be Chinese national (*Tza Yup Shum v. Peru* (2009))
- A HK entity may benefit if the criterion of “control” is used in the Chinese BIT
  - China – Colombia BIT (1994)

# How to Structure an Investment to Qualify for Protection under Treaties

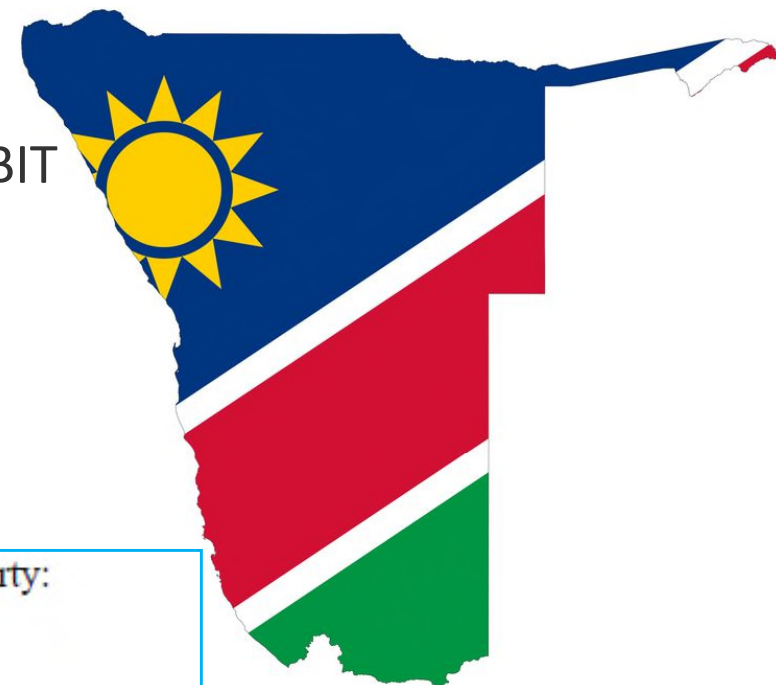
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- Protecting an investment under investment treaties is as important as optimizing its tax regime
- Necessary if:
  - There is no treaty available to investor
    - No Chinese BIT
    - Use of HK / BVI holding
  - The applicable treaty offers insufficient protection
    - Many Chinese BITs restrict dispute resolution to determination of amount in case of expropriation
- It is possible to benefit from third-State treaties by structuring investment through an entity in that third State

# How to Structure an Investment to Qualify for Protection under Treaties: Example

- Investment in Namibia
  - China – Namibia BIT not in force; no HK – Namibia BIT
  - 8 BITs available (Austria, Finland, France, Germany, Italy, the Netherlands, Spain and Switzerland)
- Consider content of BITs and check tax status
- Netherlands – Namibia BIT



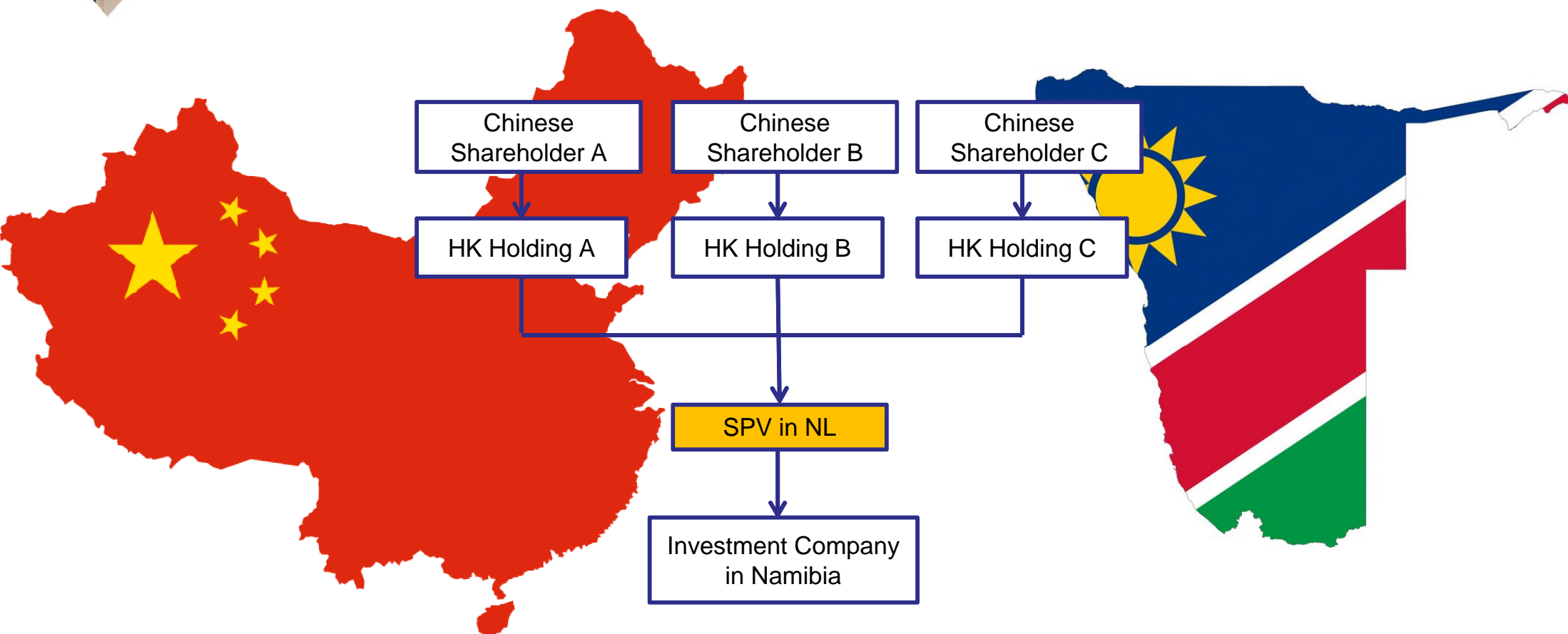
(b) the term “nationals” shall comprise with regard to either Contracting Party:

- (i) natural persons having the nationality of that Contracting Party;
- (ii) legal persons constituted under the law of that Contracting Party and being domiciled in the territory of that Contracting Party;
- (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).

# How to Structure an Investment to Qualify for Protection under Treaties: Example

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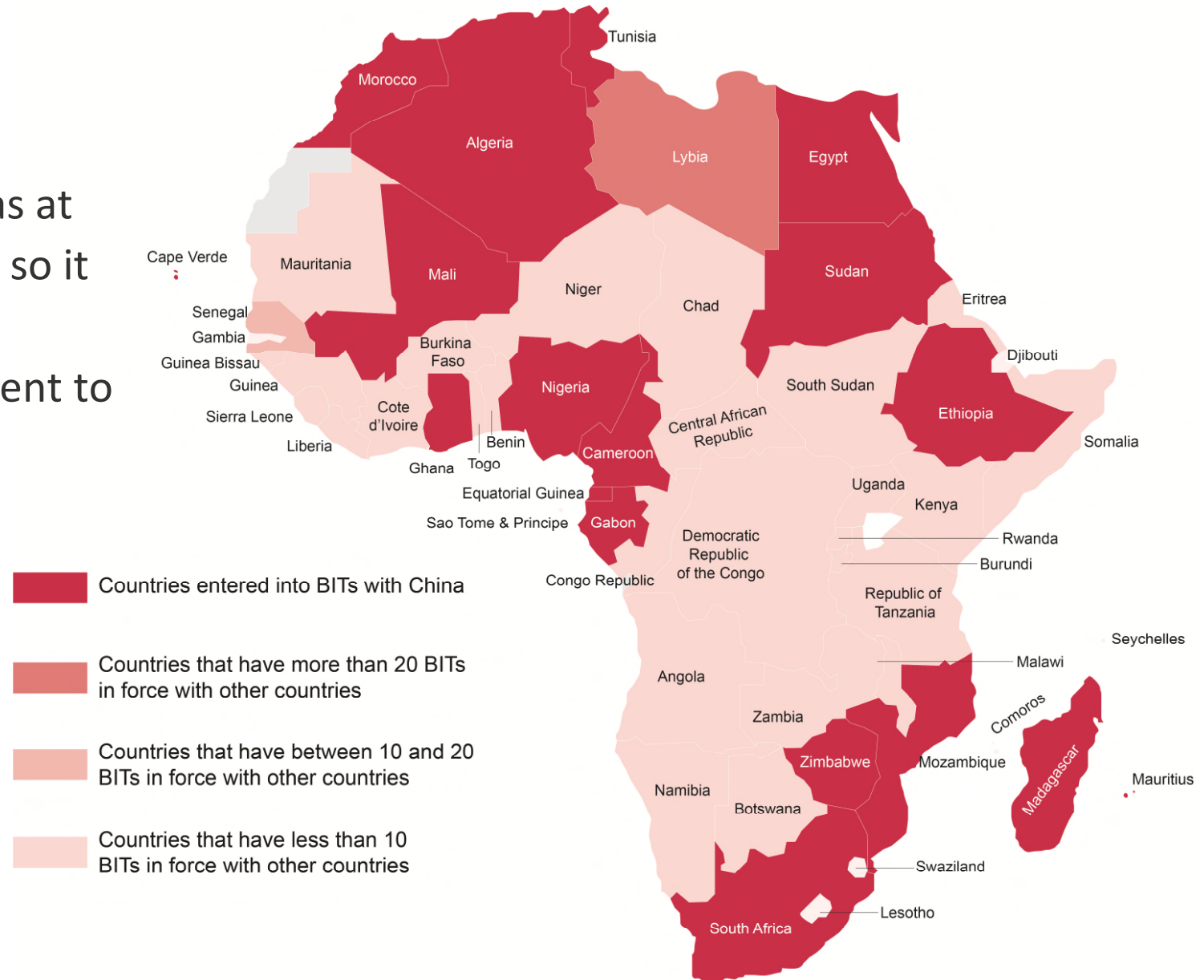
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# African BITs in Force

- Every African State has at least one BIT in force, so it is always possible to structure the investment to enjoy investment protection





- It is possible to restructure an investment after it is established, to benefit from treaty
- Comply with definition of “investor” under treaty chosen
  - Requirement of “doing substantial business”
  - Denial of benefits clauses
- Comply with all local formalities
- Importance of “timing” of the restructuring
  - Before the dispute (*Mobil v. Venezuela* (2010); *Phoenix v. Czech Republic* (2009))
  - Before the dispute “looms” (*René Rose Levy and Gremcitel v. Peru* (2015))

- Different definitions, depending on the treaty
- Generally, quite broad
- Requirement of a certain “duration”
- China – Nigeria BIT

1. The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:

- (a) movable and immovable property as well as any property rights, such as mortgages, liens and pledges;
- (b) shares, debentures, stock and any other kind of participation in companies;
- (c) claims to money or to any other performance having an economic value associated with an investment;
- (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical process, know-how and good-will; and
- (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

- Legality of the investment under the laws of the host State
  - *Inceysa Vallisoletana v. El Salvador* (2006)
  - *Fraport v. Philippines* (2007)
- Risk of losing protection if there is a restructuring during life of the investment
- Fork-in-the-road clauses in investment protection treaties
  - Consider before initiating any litigation in the host State

# 茶歇及自由交流

# 专家研讨会：非洲争议解决 商务及投资仲裁中的重要问题



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Beijing International Arbitration Center (BIAC)

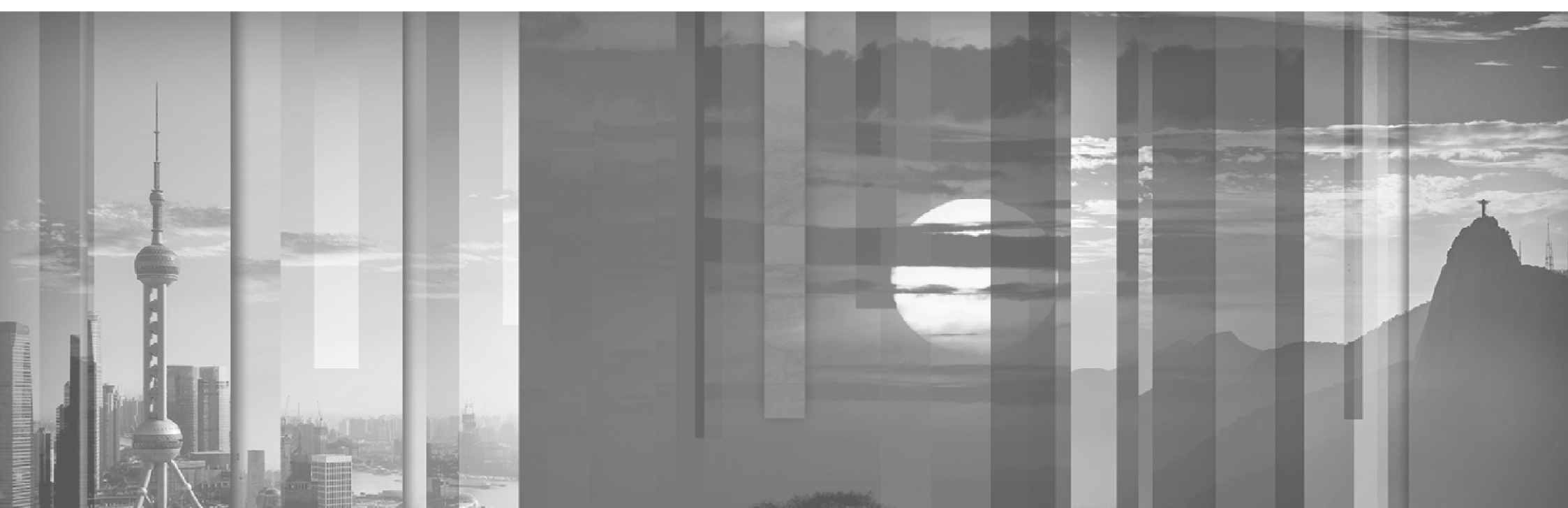


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