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African Investment and Dispute Resolution Seminar

Tuesday 1 March 2016 | 1:30 p.m. – 7:00 p.m.

The Ritz Carlton Beijing, Financial Street

Welcome Address

- Wang Weiguo, Managing Partner of **Jingtian & Gongcheng**
- Elaine Lo, Senior Partner, Asia Chair of **Mayer Brown JSM**

Honoured Speaker

- Wang Wei, Deputy Director of **China Legal Exchange Center**
(under China Law Society)

Panel Discussion: Investment in African Countries

Latest Developments Impacting China Outbound Investment

- Dai Guanchun, Partner of **Jingtian & Gongcheng**

China's Outbound Investments are on the Increase

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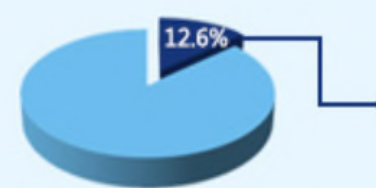
In 2015, 54 countries recorded an outbound FDI of US\$100 million or above from China, among which 13 countries recorded US\$1 bn or above, namely:



United States, Netherlands, Laos, Singapore, Luxembourg, Hong Kong, the Cayman Islands, Australia, Kazakhstan, Indonesia, Canada, Brazil and British Virgin Islands

Chinese Enterprises

Invested into 49 countries along "One Belt, one Road", totalling US\$14.82 bn.



Primarily Singapore, Kazakhstan, Laos, Indonesia, Russia and Thailand.



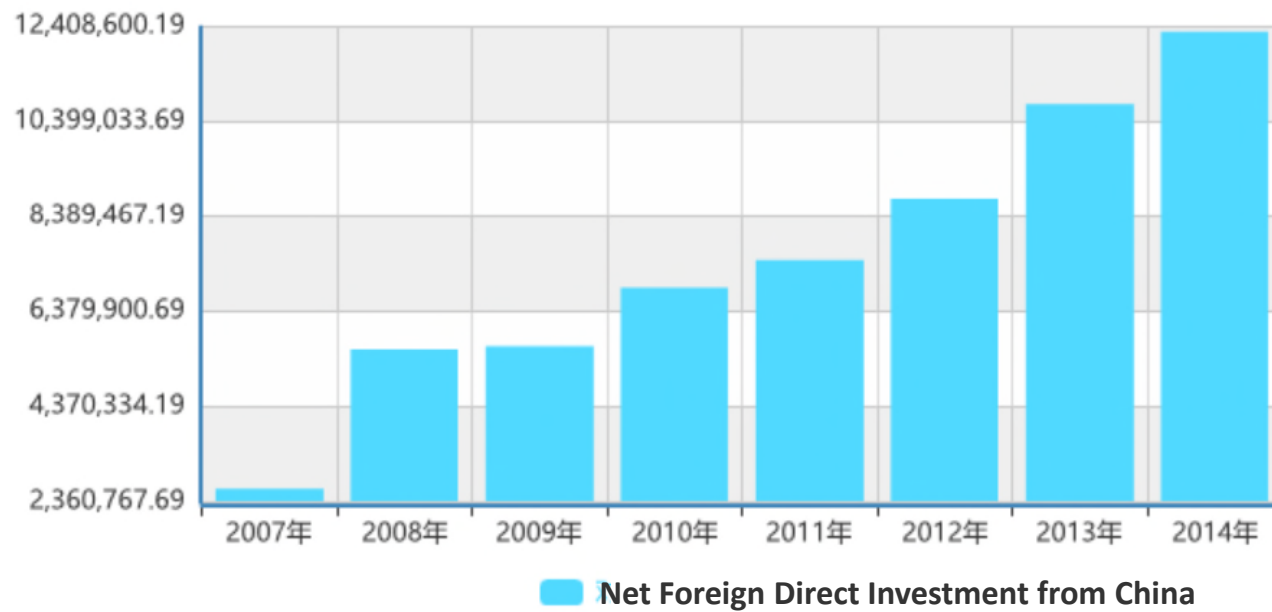
Increased by 18.2% YoY
12.6% of total

*Source: SOHU.com

China's Outbound Investments are on the Increase

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*Source: National Bureau of Statistics of China

Latest Developments on Outbound Investments by Chinese Enterprises

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Streamlined Clearance Process for Outbound Investments

Diversified Drivers for Outbound Investments

Increased Complexity in Investing and Financing Structures

One Belt, One Road Initiative may Further Increase Outbound Investments

Streamlined Clearance Process for Outbound Investments

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- State level: from approval-based to filing-only
 - Except for projects concerning sensitive countries/regions or industries, prior approval is no longer required and a filing will suffice for outbound investment projects.
- More favourable local policies

Take Shanghai Free-Trade Zone as example, the filing process has been accelerated and financing is more convenient

 - On-line filing with one application form” . In practice, filing can be completed within 3 workdays
 - Authorities in Shanghai Pilot Free-Trade Zone have eliminated prior approval for use of offshore funding and provided a separate free-trade accounting framework under which, enterprises and financial institutions can employ low-cost offshore funding on their own initiatives

Streamlined Clearance Process for Outbound Investments (Cont'd)

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- Regulation relaxation in other areas has promoted outbound investments as well
 - Changes in laws and regulations for substantial asset restructuring have facilitated overseas investments by listed companies.

Administrative Measures for Substantial Asset Restructurings by Listed Companies, has significantly eliminated approval requirements for substantial asset purchases, divestitures or swaps by listed companies. Listed companies are required to submit to CSRC for approval only when relevant thresholds are met. This actually results in improved transaction efficiency, more convenience and freedom for listed companies to invest overseas. Consequently, listed companies are more proactive in investing overseas.

Traditional drivers

- Government resources / strategies to introduce new technologies
- To expand export market
- Excess production capacity

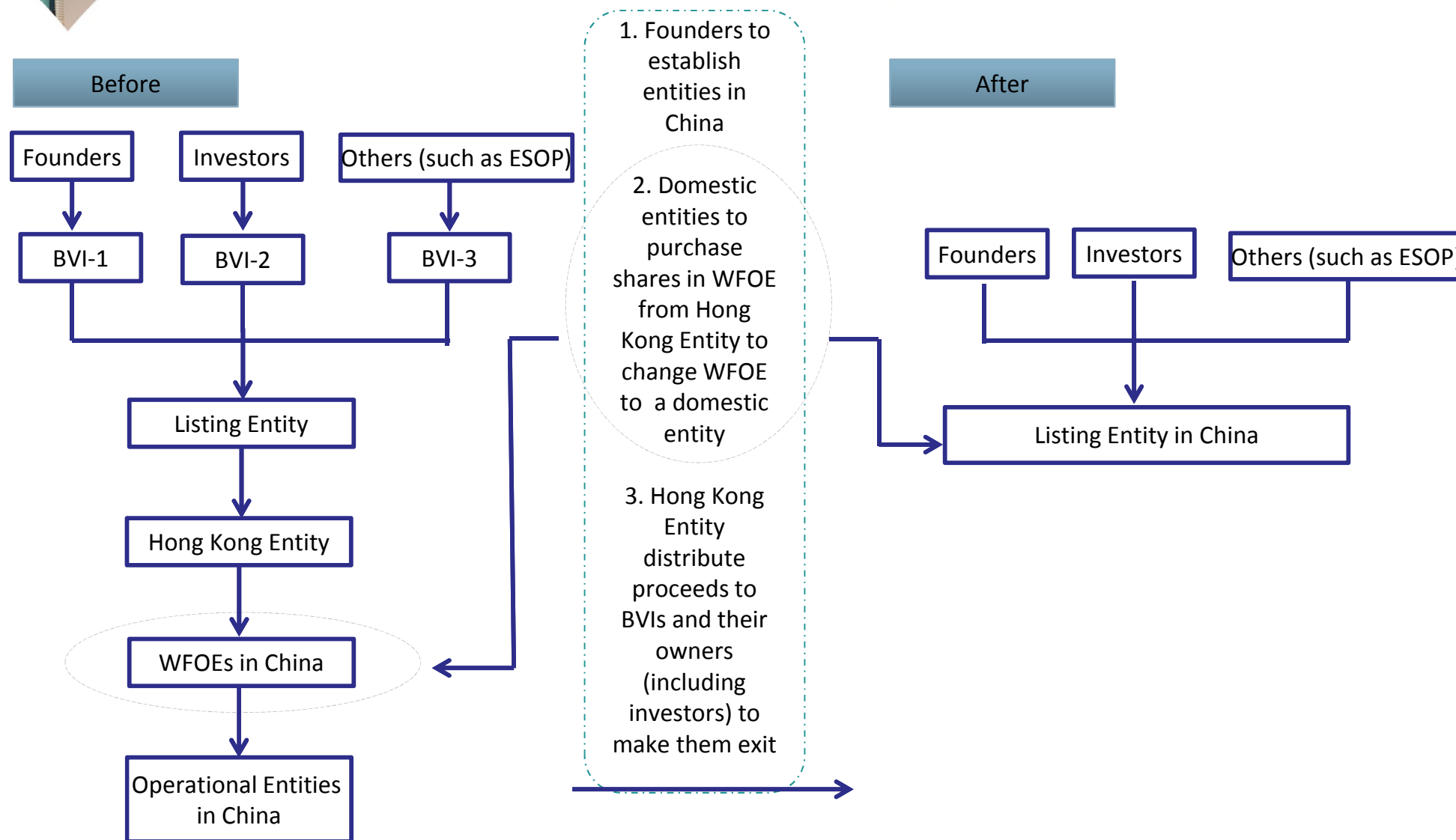
Additional drivers

- Enterprise transformation and upgrading
- Search for stable returns
 - China's growth is slowing while overseas market may present opportunities
 - Chinese investors have gained an international mindset and become more market-oriented. Cross-border flowing of funds is more convenient in China
- Pursuit of regional growth opportunities
 - OBOR (infrastructures)
 - Emerging markets
- Interest spread between domestic and internal capital markets
 - Return of red-chip companies

Diversified Drivers for Outbound Investments: Red-chip Companies are Returning to A-share Market

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Increased Complexity in Investing and Financing Structures

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- Domestic investment vehicles may participate through:

- Funds

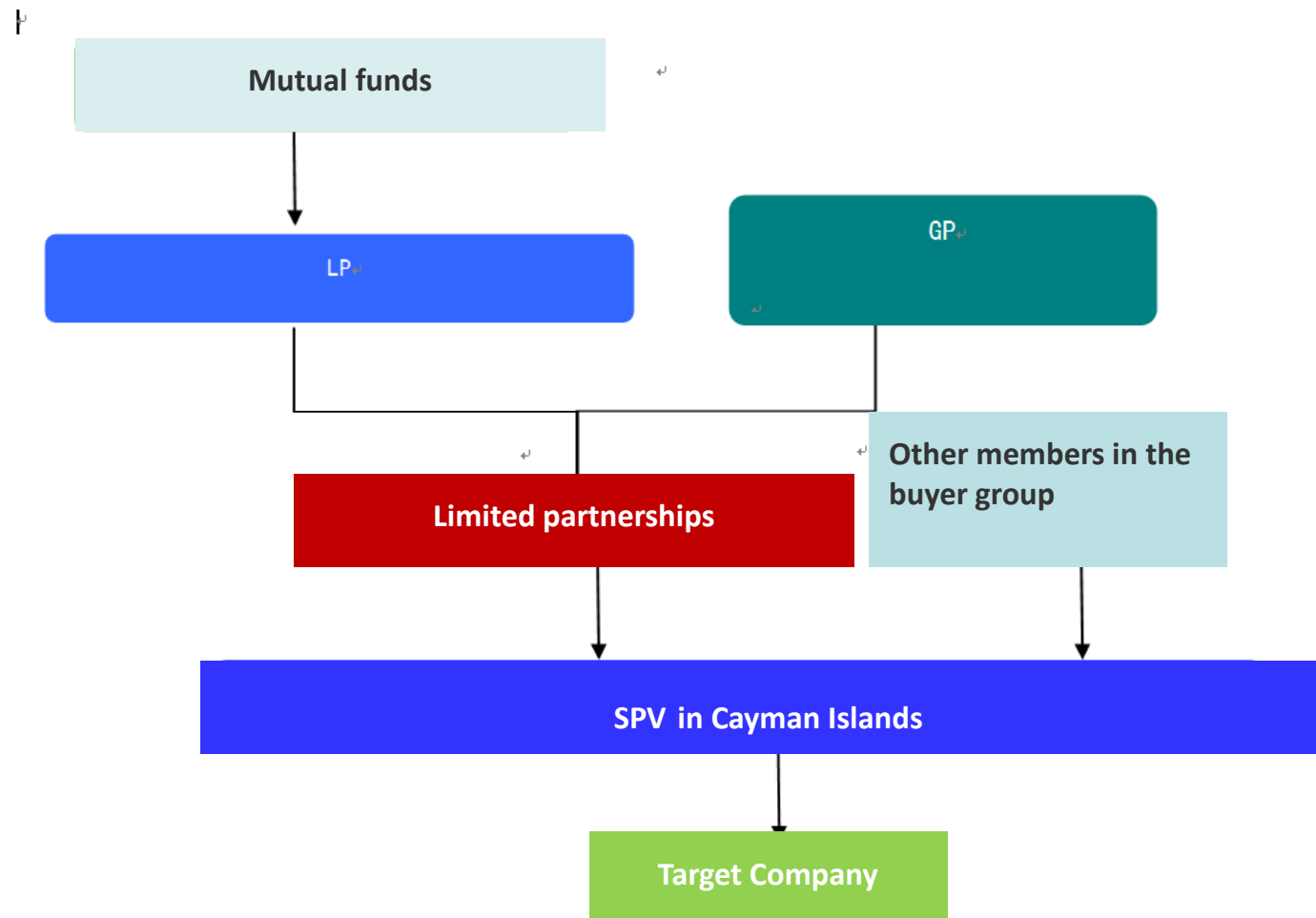
- Structured financial products

This would enhance investment returns and productize investors' future anticipation for market trends

Increased Complexity in Investing and Financing Structures (Cont'd)

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Increased Complexity in Investing and Financing Structures (Cont'd)

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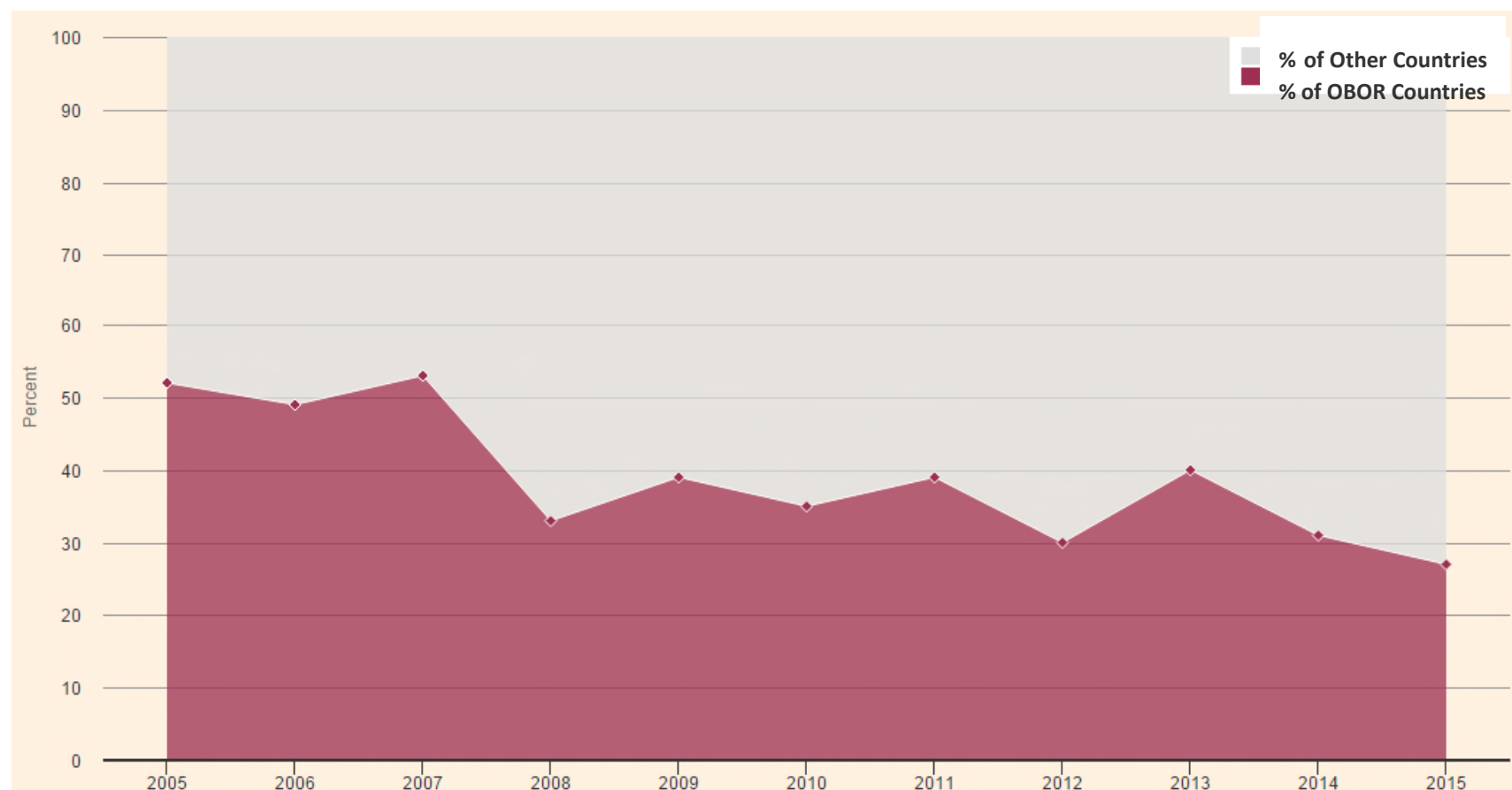
- Funds for overseas investments
 - Silk Road Fund
 - China-Africa Development Fund
- Fundraising for outbound projects in domestic capital markets
 - Listed A-share companies to directly invest and purchase overseas

One Belt, One Road Initiative may Further Increase Outbound Investments

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% of Investments into OBOR Countries as of China's total Outbound Investments



Source: China Global Investment Tracker. AEI (as of June 2015)

New Characteristics for Chinese Enterprises' Outbound Investments

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From SOE Dominance to More Balanced Efforts by SOEs and Private Enterprises

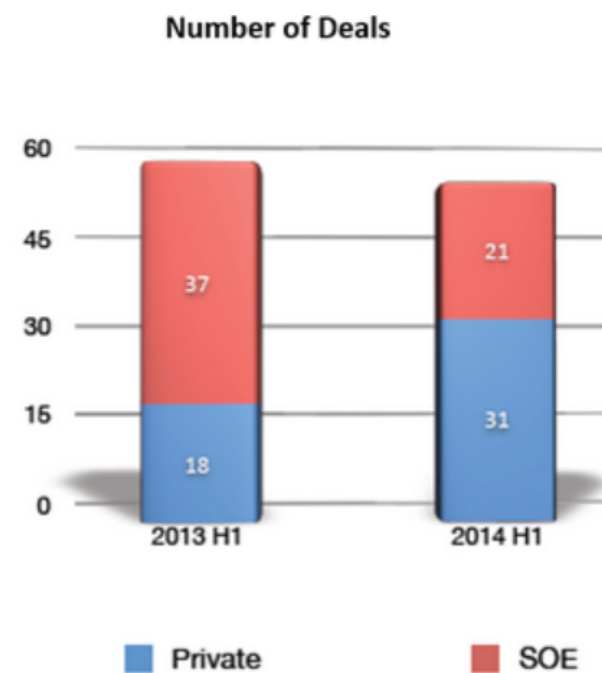
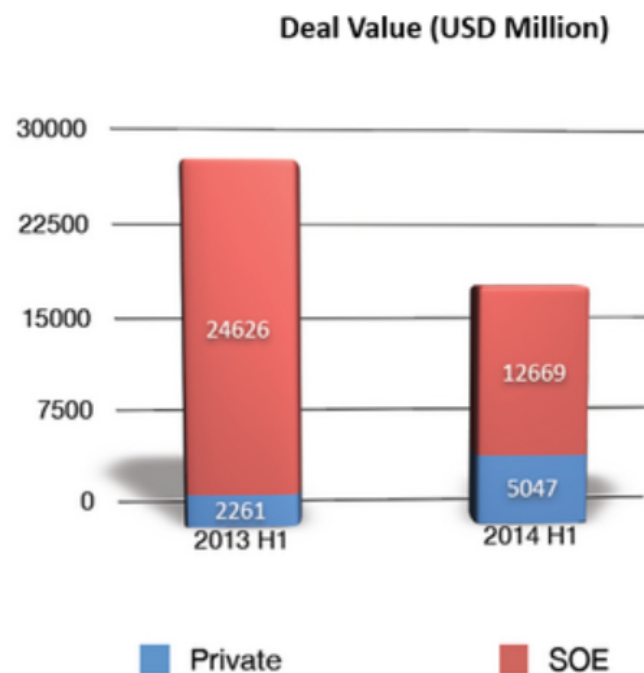
Diversified Target Industries

Higher Percentage of Investments into Developed Countries

From SOE Dominance to More Balanced Efforts by SOEs and Private Enterprises

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•Source: analysis reports by A Capital Dragon Index

From SOE Dominance to More Balanced Efforts by SOEs and Private Enterprises

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Top 10 Investors in Overseas Investments (in US\$ 100 mm)



China National Offshore
Oil Corporation
151



Shineway Group
71



Chalco
128



State Nuclear Power Technology Corporation
65



China Railway Group
75



CITIC Securities
China Railway Construction Corporation
62



Sinopec
72



State Power Investment Corporation
59.5



Sinopec
71



China Minmetals Corporation
58.5

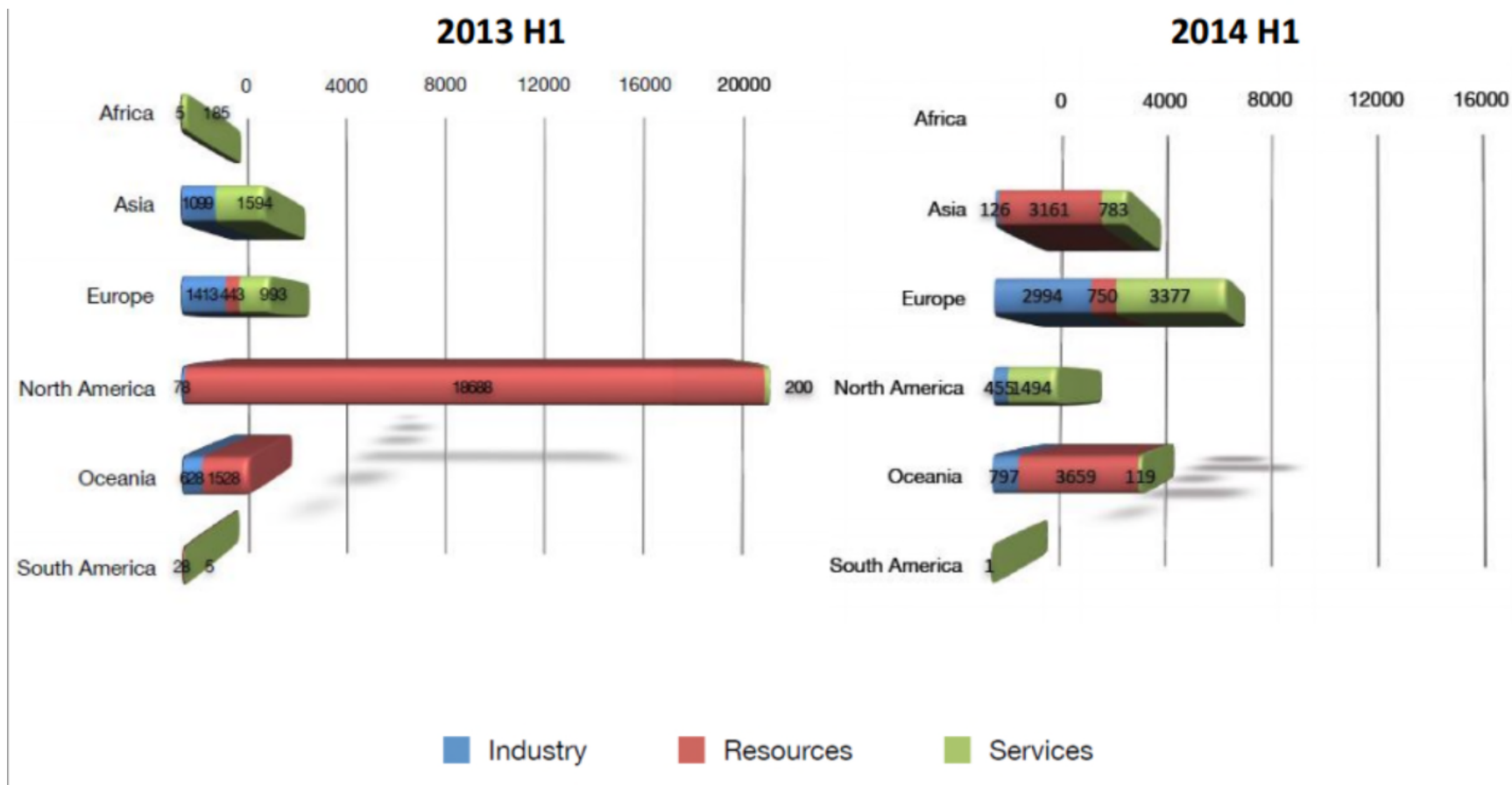
- It is worth noting that, China's overseas investment efforts are still led by SOEs, with Top 10 investors all being SOEs

•Source: www.guancha.cn/

Diversified Target Industries

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- In 2014 H1, resources investments decreased somewhat YoY, with 90% concentrated in Oceania and Asia;
- In 2014 Q1, investment into service sector increased significantly, up nearly 100% YoY;
- Investments into industries also experienced significant increase.

•Source: analysis reports by A Capital Dragon Index

Higher Percentage of Investments into Developed Countries

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Top Target Countries Ranked by China's Overseas Investments

(in US\$ 100 mm, 2002-2016.6)



United States
719



Australia
613



Canada
394



Brazil
314



Indonesia
307



Britain
236



Kazakhstan
235



Russia
209



Nigeria
207



Saudi Arabia
195



Saudi Arabia
178



Venezuela
175



Iran
172

Note: China's total investment amounts into developed countries, including the United States, Australia, Canada and Britain, far exceed that into developing countries.

Top 10 Overseas Investments in 2015

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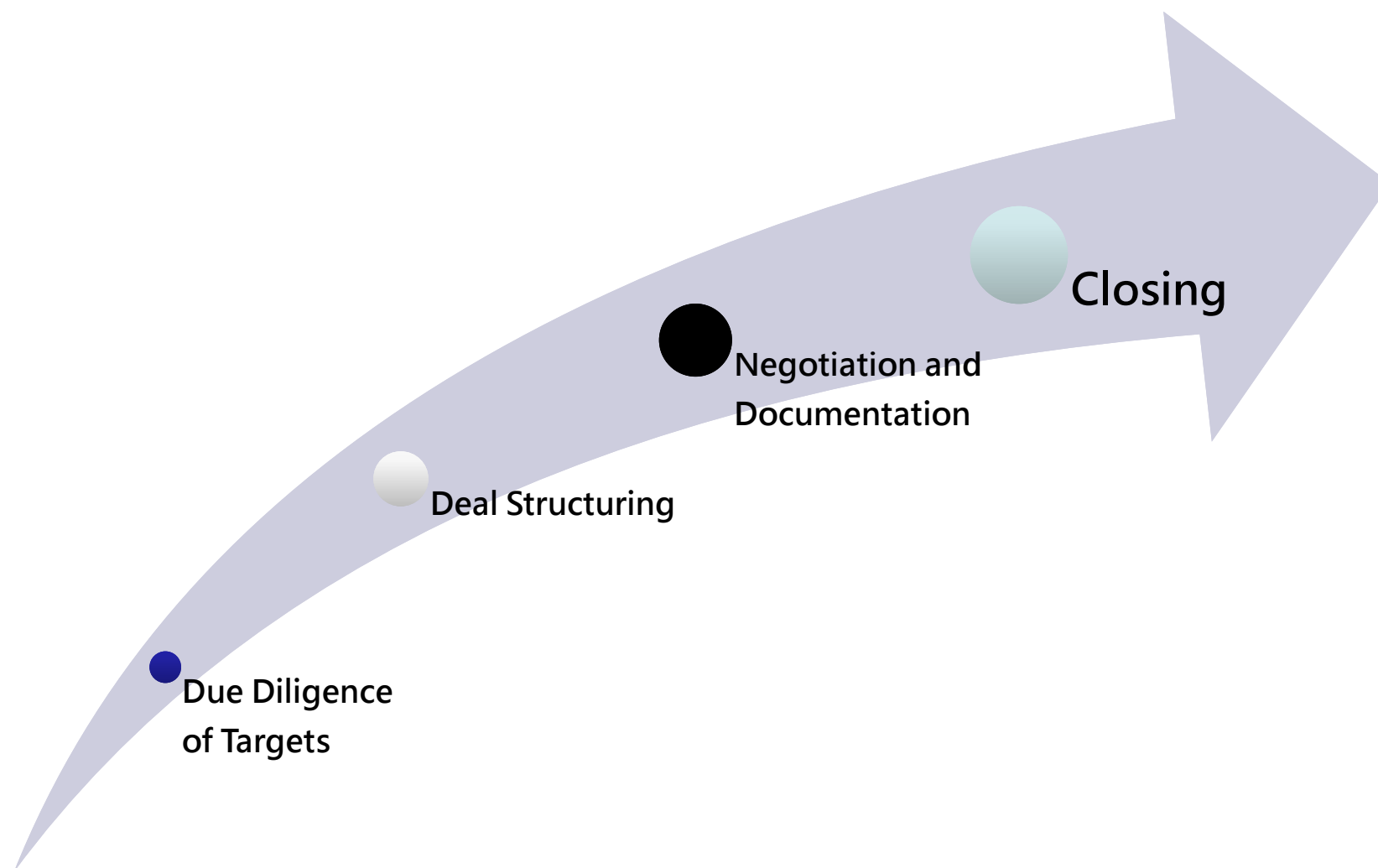
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Targets	Target Country	Chinese Acquirers	Deal Amounts
Pirelli	Italy	ChemChina	US\$7.7 bn
(Jupiá and Ilha Solteira Hydroelectric Power Plants	Brazil	China Three Gorges Corporation	US\$3.66 bn
Lumileds	Netherlands	A Chinese Consortium	US\$3.3 bn
Avolon	Ireland	Bohai Leasing	US\$2.555 bn
Tnuva	Israel	Bright Food	US\$2.167 bn
Ironshore	United States	Fosun International	US\$1.84 bn
Infront Sports & Media	Switzerland	Dalian Wanda Group	US\$1.191 bn
Club Med	France	Fosun Group	US\$1.191 bn
Kumport (3 rd largest)	Turkey	China Ocean Shipping	US\$900 mn
Standard Bank Plc	South Africa	ICBC	US\$765 mn

Procedure for Overseas Investments

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Procedure for Overseas Investments: Due Diligence of Targets

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1

- Ownership structure (fully diluted)

2

- Core assets (including personal and real property)

3

- Intellectual property

4

- Taxes and accounts payable

6

- Contingent liabilities (litigations and guarantees)

7

- Employment, environment and etc.

Procedure for Overseas Investments: Deal Structuring

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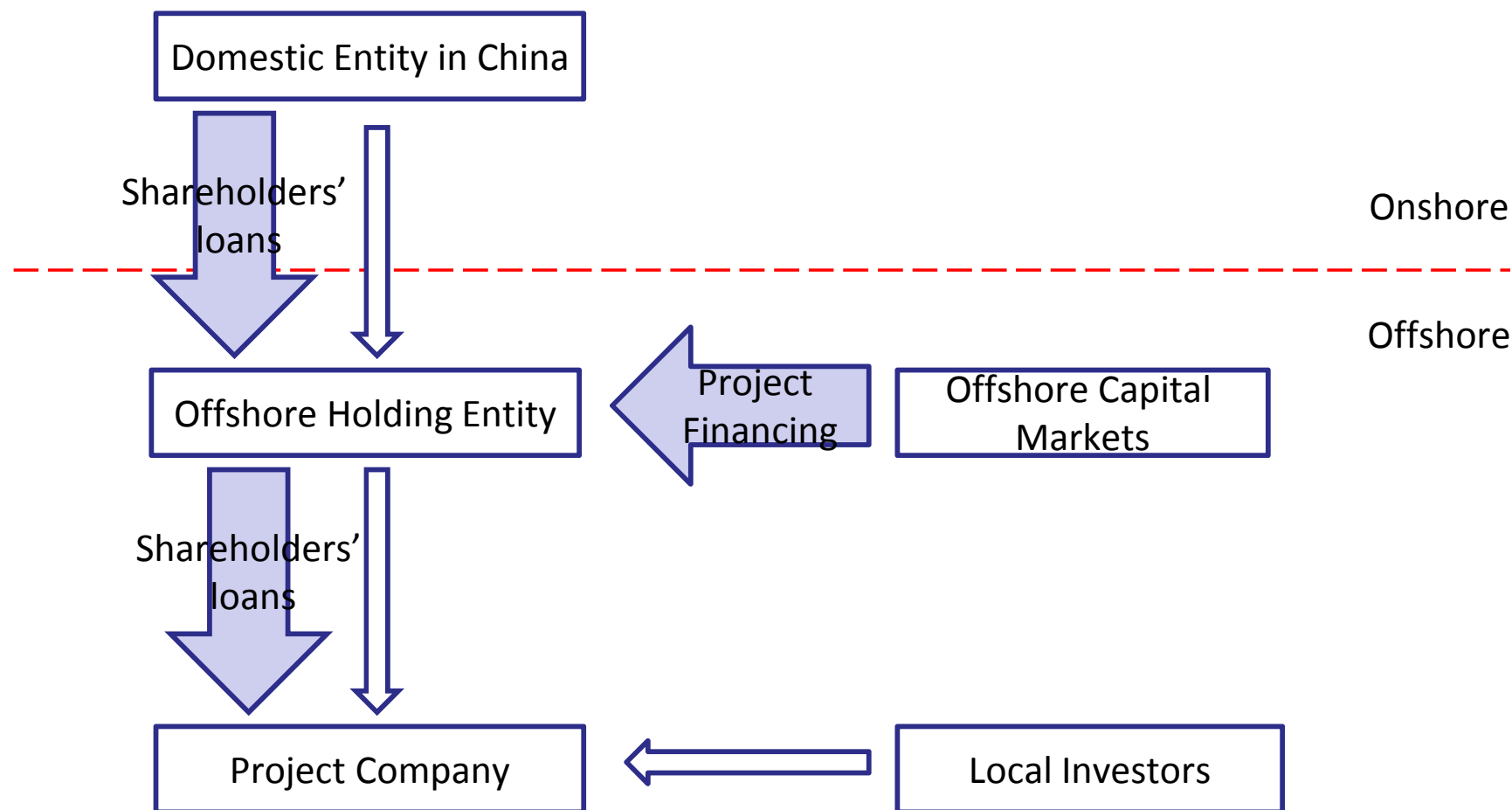
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- Compliance with laws and regulations in China and target countries
- Alignment with company strategies
- Considerations in tax structuring
- Facilitate post-merger operations (considerations including financing, disposition, corporate governance / incentives)

Procedure for Overseas Investments: Deal Structuring

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Procedure for Overseas Investments: Negotiation and Documentation

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NDA

Exclusivity Agreement

Letter of Intent / Term Sheet

Share Purchase Agreement

Disclosure Letter

Amended Articles of Association / Shareholders' Agreement

New Service / Supplier / Licensing Agreement

Closing Checklist

Others

Procedure for Overseas Investments: Approval and Filing

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1

- Development and reform commissions / foreign exchange authorities (Project information; application to remit upfront fund)

2

- Approval by and filing with State or local development and reform commissions

3

- Approval by and filing with MOFCOM or local commerce authorities

4

- Foreign exchange authorities (foreign exchange registration / foreign exchange remittance formalities)

5

- Foreign exchange authorities (foreign exchange registration / foreign exchange remittance formalities)

Jingtian & Gongcheng's Representative Overseas Investment Experience

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ASIAN
LEGAL ALB
BUSINESS

CHAMBERS
ASIAN PACIFIC

CHINA BUSINESS
LAW JOURNAL 港

China Law
& Practice
IFLR

The
LEGAL
500

- In Jan 2016, **Thomson Reuters's 2015 Top Law Firms in Outbound Chinese M&A** ranked Jingtian & Gongcheng: No. 14 in all law firms and No. 2 in domestic law firms, up by 58 in rankings.
- In Jan 2016, recognized by **Corporate INTL** as “China Cross-border Investment Law Firm of the Year”.
- In June 2015, counsel of Wanda Cinema Line Corp on its acquisition of Hoyts, the 2nd largest cinema operator in Australia
- In June 2015, antitrust counsel of Wanda Group on its acquisition of Infront Sports & Media, the 2nd largest Sports marketing company globally. The deal amount is US\$1.191 bn.
- Chinese law counsel of a consortium led by CMC Holdings to acquire 13% ownership of City Football Group at US\$400 mn. The deal was closed at end of Dec 2015. As the world's leading football league operation and management company, City Football Group holds 100% ownership of Manchester City Football Club. CMC Holdings is the most influential integrated investment and operation vehicle in China, with a focus on media, entertainment, sports and Internet. Sponsors include Alibaba, Tencent, Oriza Holdings and CMC Holdings.

THANKS !

Dai Guanchun

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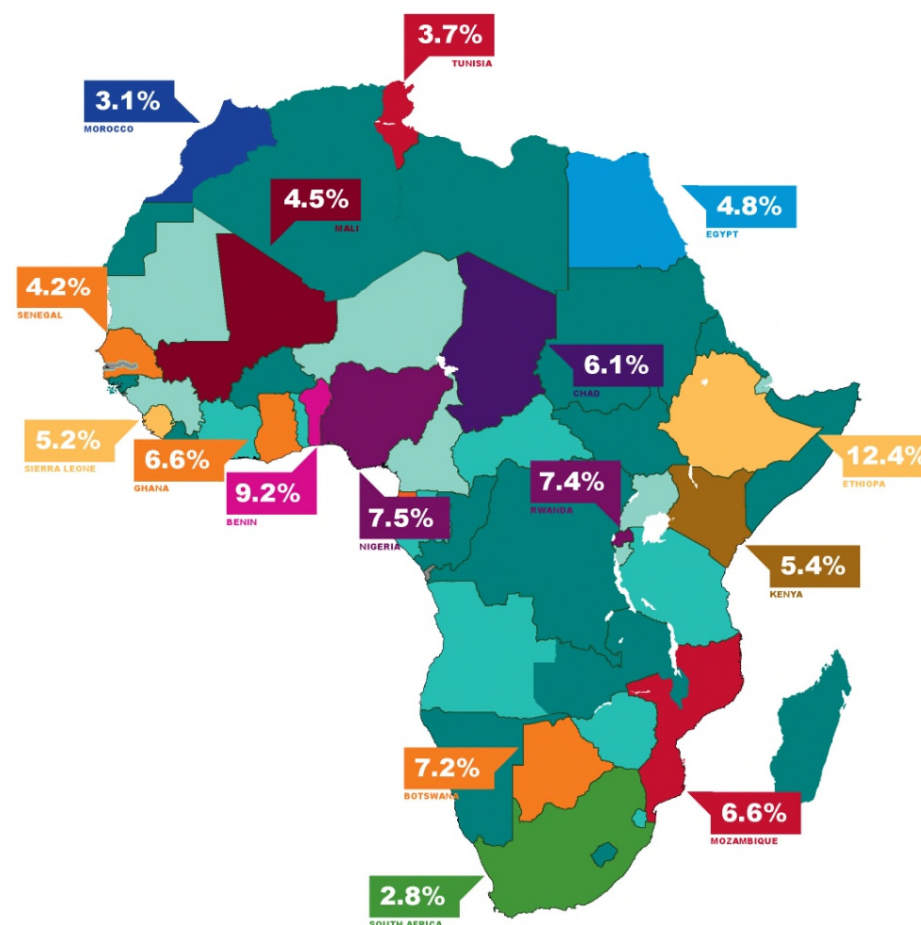
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Legal Framework Governing Project Investments in Africa

- Kwadwo Sarkodie, Partner of **Mayer Brown**

- 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 port



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

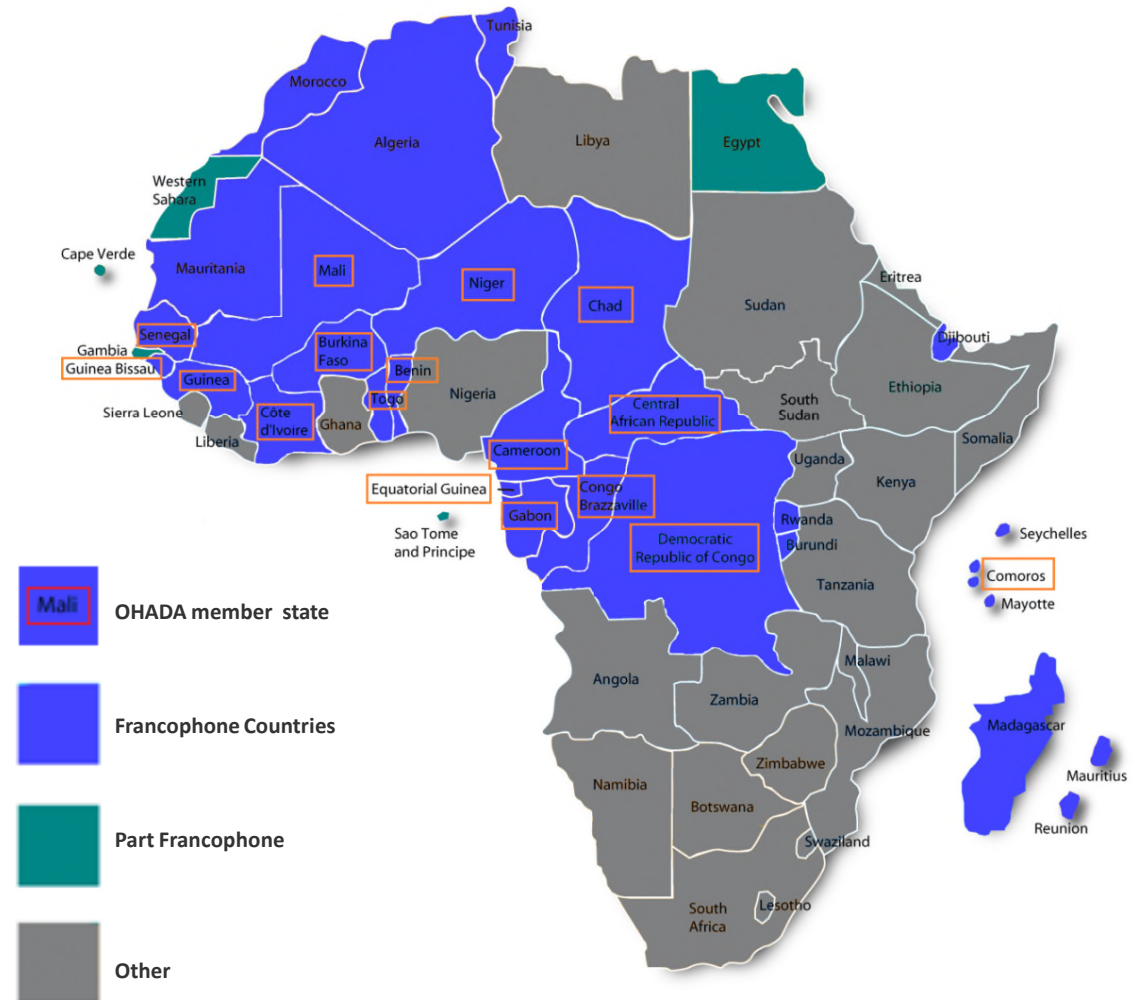
1. Choice of Governing Law

- 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...

-  Bilateral Investment Treaty in force
-  Bilateral Investment Treaty signed but not yet in force

- **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**

How to Take Advantage of Bilateral Treaties When Structuring Investments

- Alejandro López Ortiz, Partner of **Mayer Brown**
- Dany Khayat, Partner of **Mayer Brown**

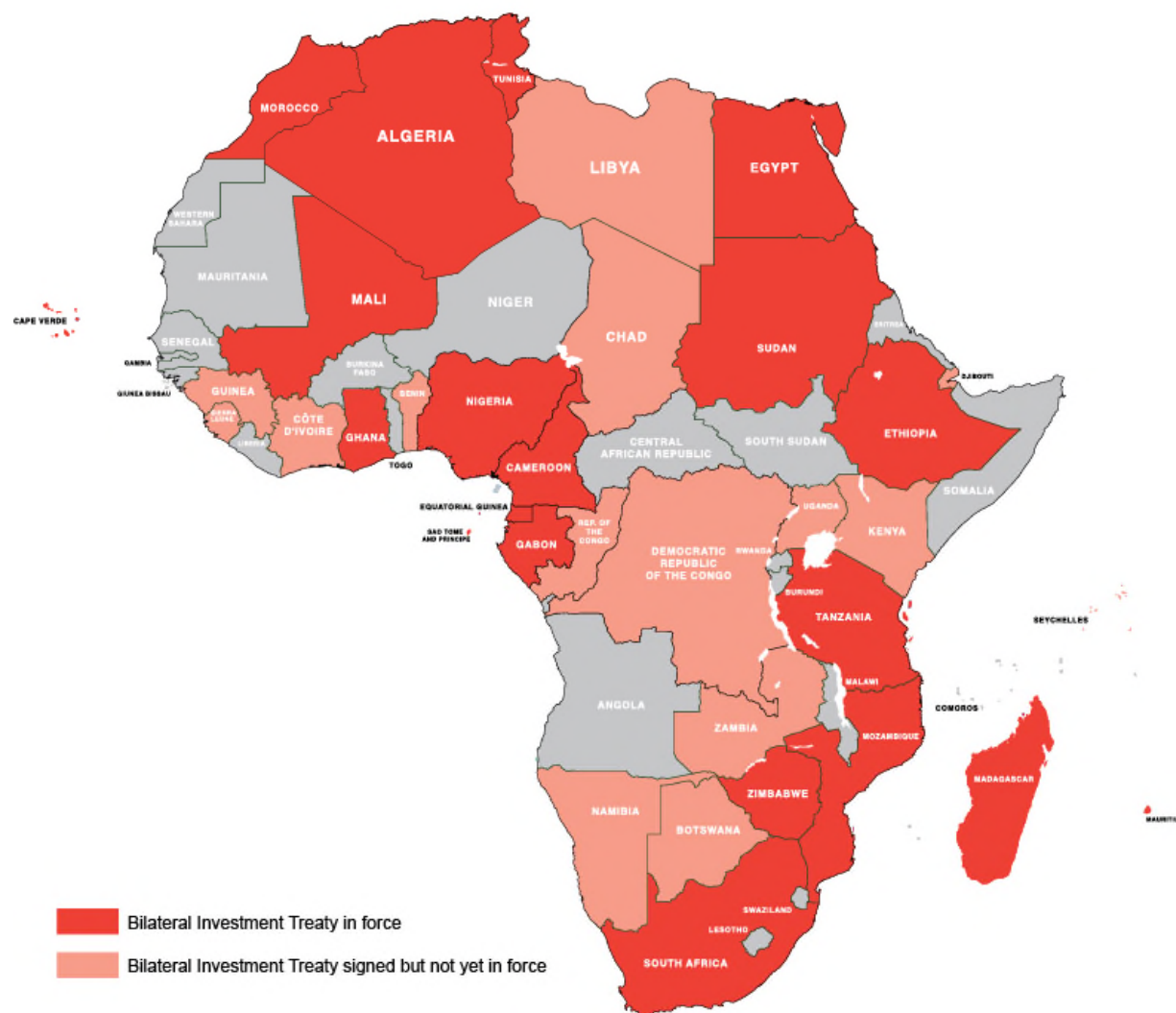
- International treaties protecting foreign investment under international law
 - Bilateral Investment Treaties (BITs): more than 2,200 in force
 - Multilateral Investment Treaties
 - Investment Chapters in Free Trade Agreements
 - Investment Protection Laws
- Every treaty is different; Need to check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

- 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.

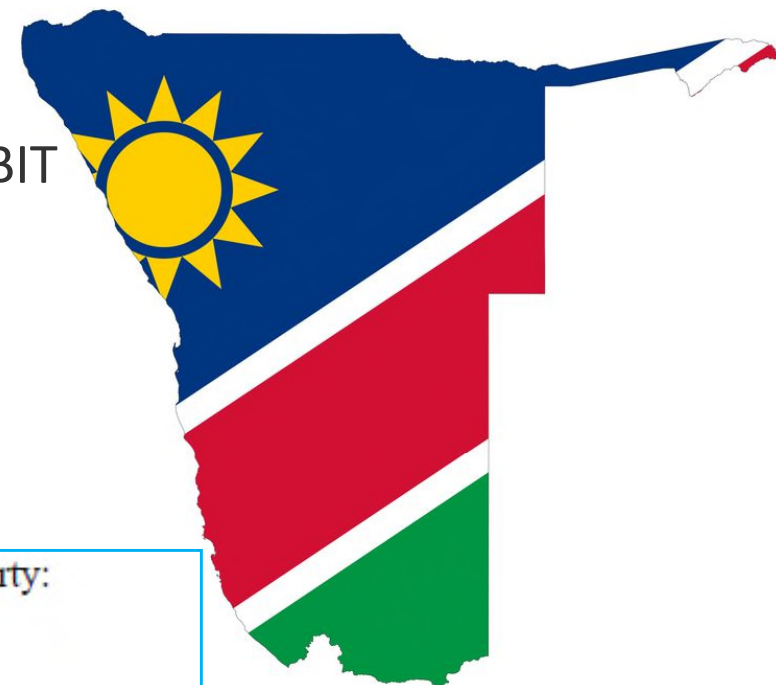
Are Hong Kong Entities covered by Chinese Treaties?

- 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)

- 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



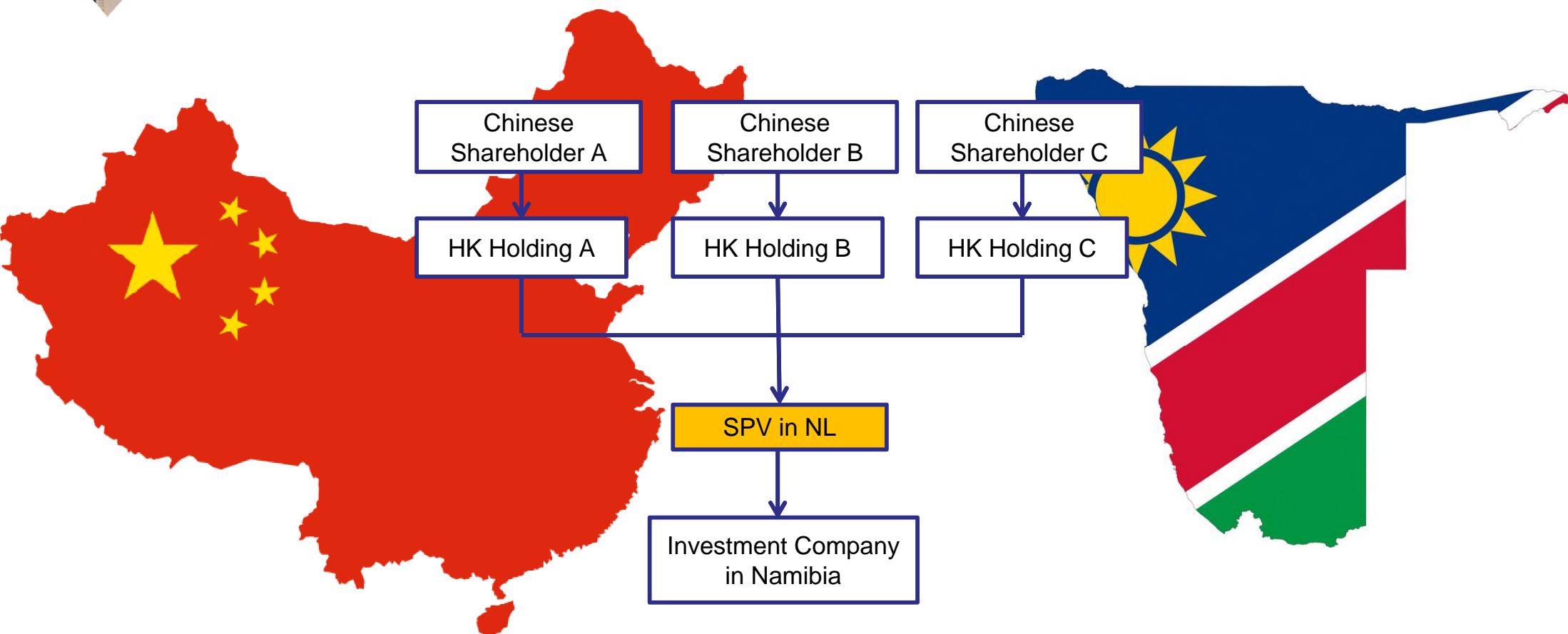
(b) the term “nationals” shall comprise with regard to either Contracting Party:

- (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

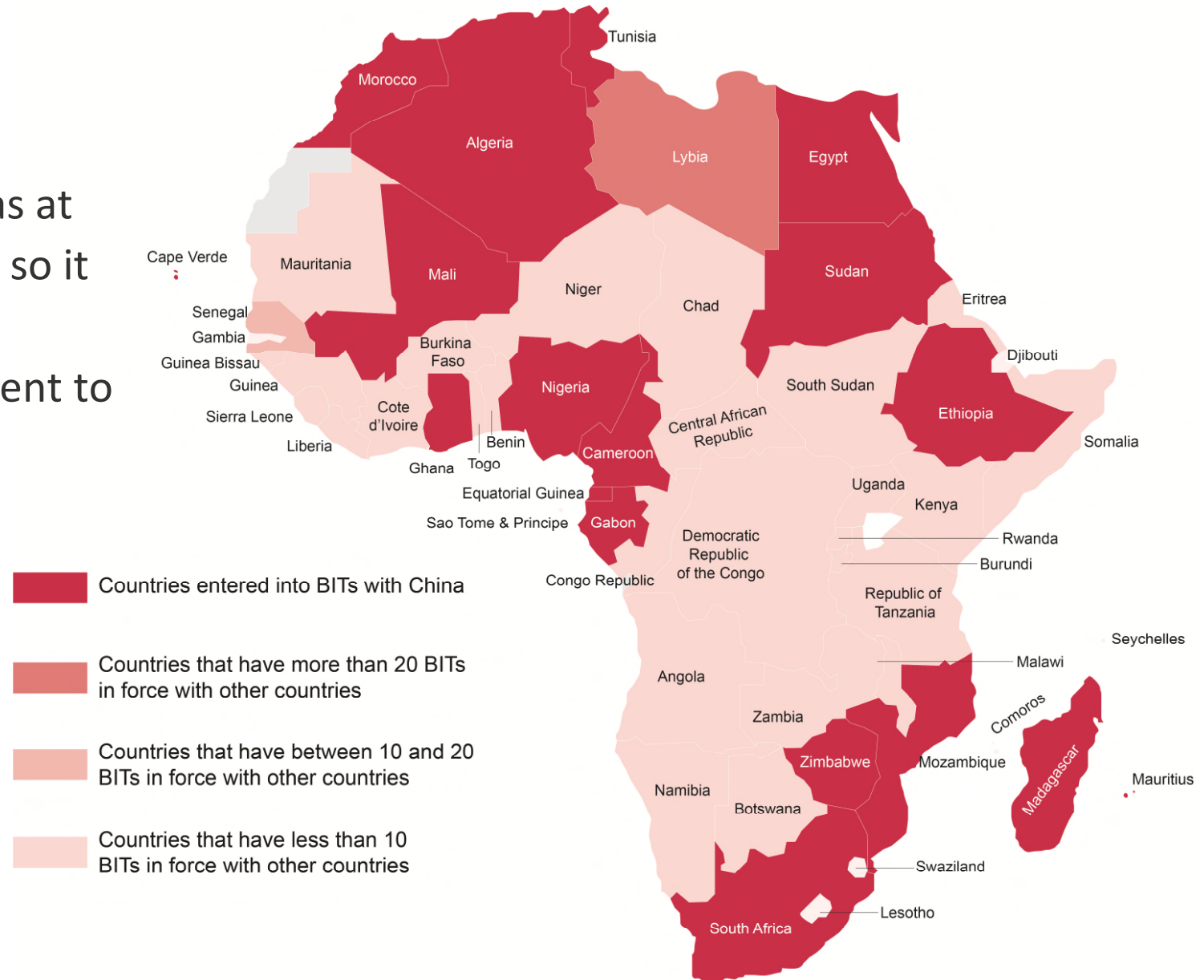
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African BITs in Force

- 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

Networking Break

Panel Discussion: Dispute Resolution in Africa – Commercial and Investment Arbitration Issues

Closing Remarks

- Xie Ruoting, Partner of **Jingtian & Gongcheng**

Networking Cocktail Reception

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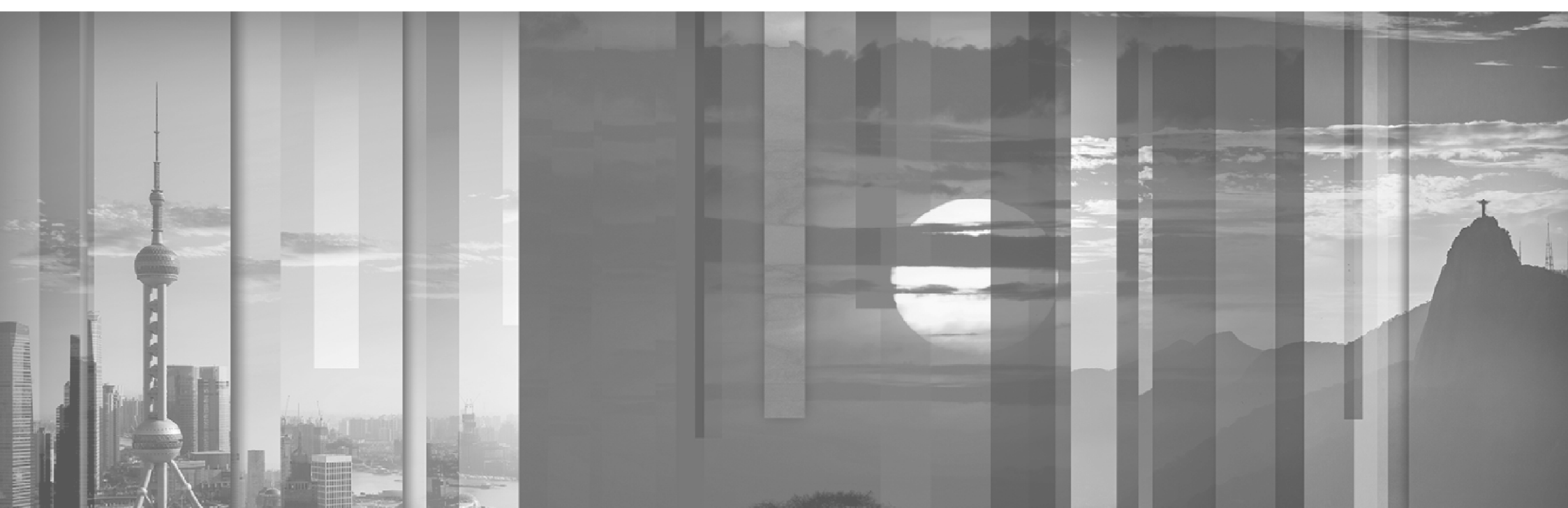


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