競天公誠津師事務所 JINGTIAN & GONGCHENG



### Latin American Investment and Dispute Resolution Seminar

拉丁美洲投资及争议解决专题讲座

Wednesday 2 March 2016 | 1:30 p.m. – 5:10 p.m.

2016年3月2日(星期三)下午1:30-下午5:10

Mandarin Oriental Pudong, Shanghai上海浦东文华东方酒店

## Welcome Address致欢迎词

- Gao Xiang, Managing Partner of Jingtian & Gongcheng **竞天公诚律师事务所**管理合伙人高翔
- Elaine Lo, Senior Partner, Asia Chair of Mayer Brown JSM **孖士打律师行**首席合伙人、亚洲区董事会主席罗婉文

## Honoured Speaker致辞

Yu Jianlong

Secretary-General China International Economic and

**Trade Arbitration Commission (CIETAC)** 

特邀嘉宾

干健龙

中国国际经济贸易仲裁委员会 秘书长

### Panel Discussion:

# Investment in Latin America Countries 专家研讨会:投资拉丁美洲国家

- Alejandro Salas, Trade Commissioner, ProMexico 墨西哥投资贸易局 贸易专员
- Paulo Alves Neto, Consul for Trade and Investment, Consulate-General of Brazil in Shanghai 巴西驻上海总领事馆总领事 贸易与投资领事
- Cesar Suarez, Commercial Representative of Chile in Shanghai 智利驻 上海总领事馆 商务代表
- Moderator 主持人: Gustavo Fernandes,合伙人Partner of Tauil & Chequer Advogados in association联营律师行with Mayer Brown

## Latest Developments Impacting China Outbound Investment 中国境外投资的新影响因素

 Dai Guanchun, Partner of Jingtian & Gongcheng 竞天公诚律师事务所合伙人戴冠春

孖士打律师 行



2015年,我国对外直接投资流量上亿美元的国家/地区有54个,其中10亿美元以上13个,分别为

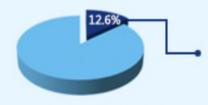


美国、荷兰、老挝、新加坡、卢森堡、中国香港、开曼群岛、澳大利亚、哈萨克斯坦、印度尼西亚、加拿大和巴西、英属维尔京群岛。

#### 我国企业

共对"一带一路"相关的49个国家进行了直接投资,投资额合计148.2亿美元。





投资主要流向新加坡、哈萨克斯坦、 老挝、印尼、俄罗斯和泰国等。









同比增长18.2%, 占 **↑** 总额的12.6%

<sup>\*</sup>本页幻灯片数据引用自搜狐网



<sup>\*</sup>本页幻灯片数据引用自国家统计局



### 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

### 政府进一步简化海外投资的法律程序

- 国家层面:由核准制转为备案制
  - ▶除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

### 政府进一步简化海外投资的法律程序(续)

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。

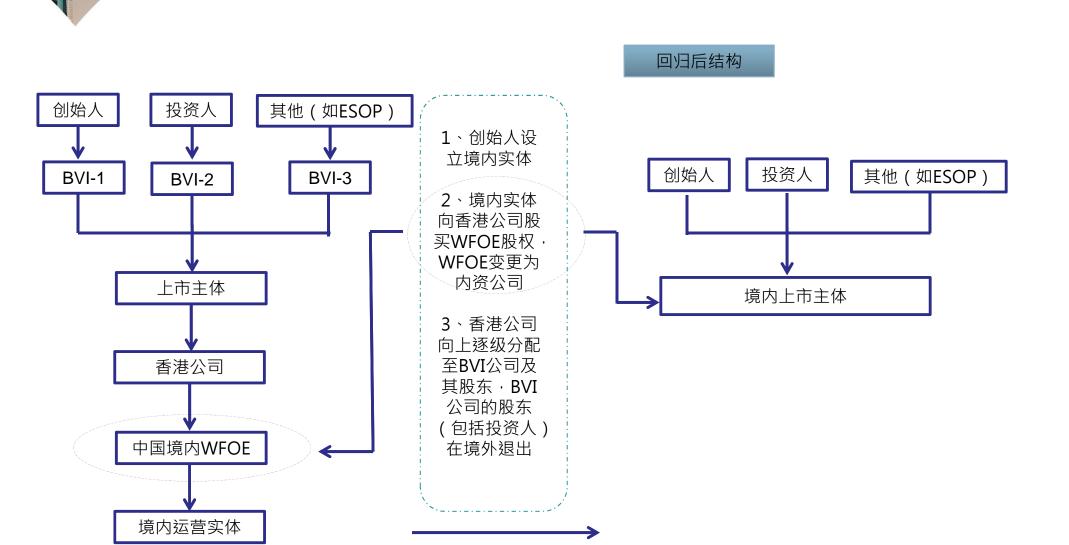
### 海外投资的驱动多元化

### 传统驱动

- 政府的资源 / 技术引进 战略
- 开拓出口市场
- 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

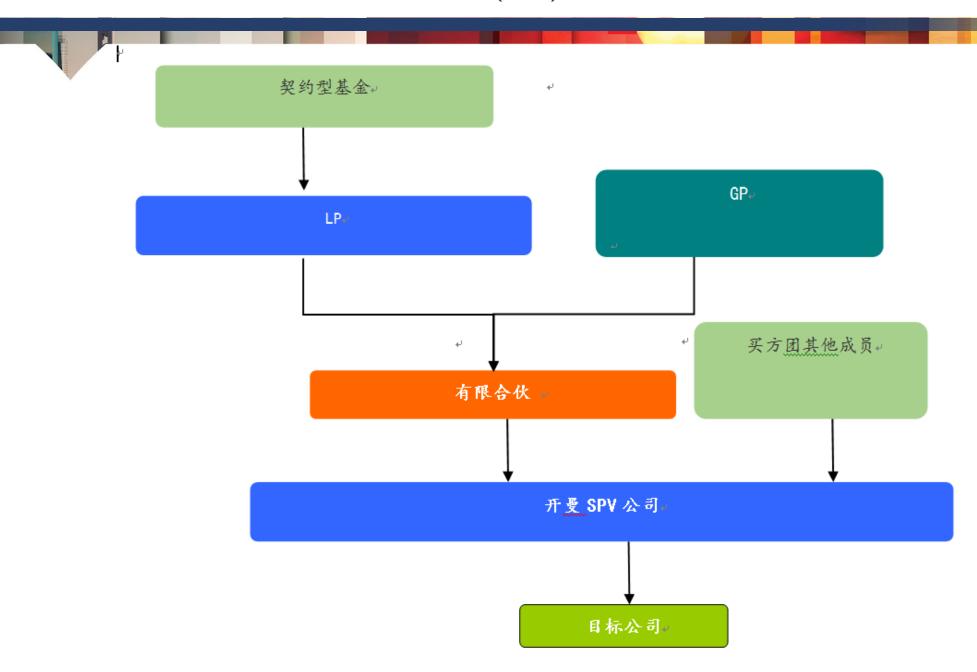


### 海外投资投资和融资结构更加复杂

- 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



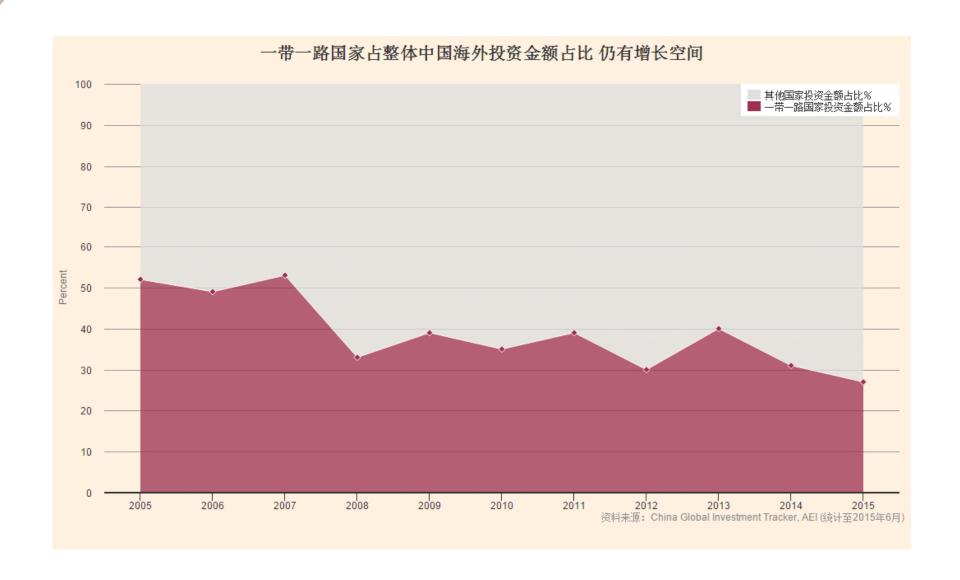


### 海外投资投资和融资结构更加复杂(续)

- ●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

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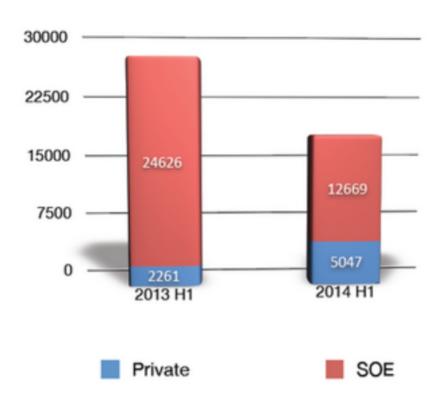


### 从国企为主到国企、民企并举

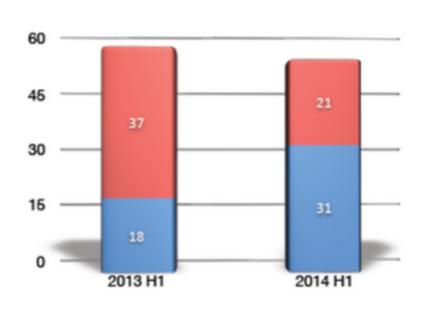
投资产业多元化

发达国家投资比例更高

#### Deal Value (USD Million)



#### **Number of Deals**



**Private** 

SOE

<sup>\*</sup>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顶目的投资者(亿美元)



中国海洋石油总公司 151



双汇集团



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



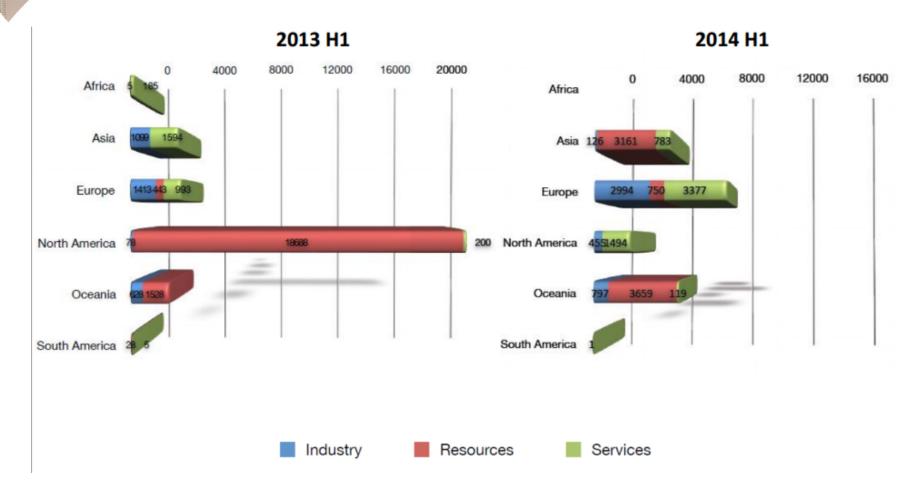
中国石化 **71** 



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。

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

### 中国海外投资国排名(亿美元2002-2014.6)



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

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





交易结构 设计

目标企业 尽职调查 项目交割



• 股权结构(全稀释条件下)

• 核心资产(包括动产、不动产)

2

• 知识产权

• 应付税款、账款

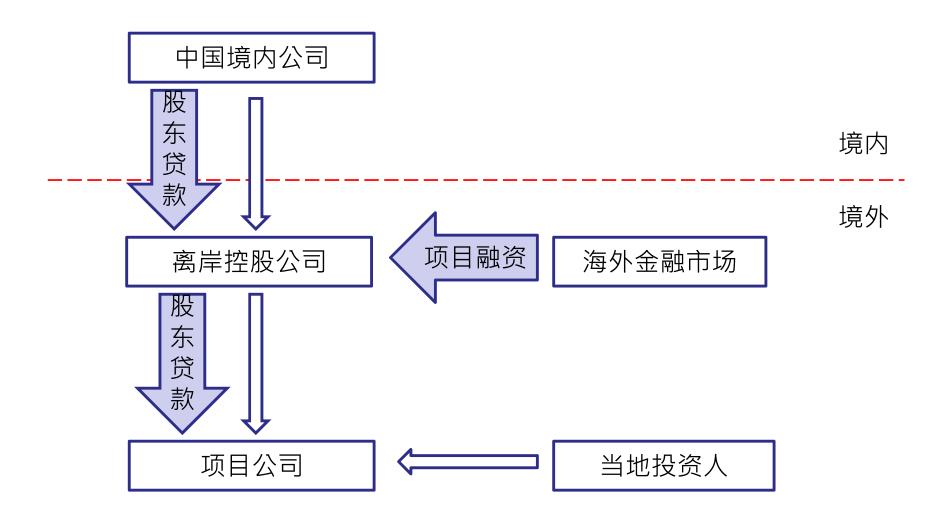
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• 或有负债(诉讼、担保)

-

• 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)







1

• 发展改革部门/外汇管理部门(报送项目信息;申请前期费用汇出)

2

• 国家或地方发展改革部门核准与备案

2

• 商务部或地方商务部门核准与备案

Z

• 外汇管理部门(外汇登记/外汇资金汇出手续)

Ę

• 外汇管理部门(外汇登记/外汇资金汇出手续)

### 竞天公诚近年海外投资重要业绩













- 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

## 競天公誠律師事務所

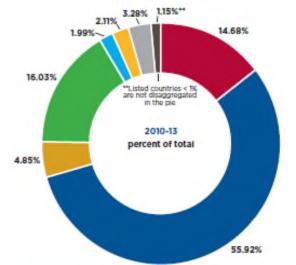
JINGTIAN & GONGCHENG

## Legal Framework Governing Project Investments in Latin America 拉丁美洲项目投资的监管法律框架

- Gustavo Fernandes, 合伙人Partner of Tauil & Chequer Advogados in association联营律师行with Mayer Brown
- Alejandro López Ortiz, 合伙人Partner of Mayer Brown

- Chinese FDI in Latin America has increased in recent years
- From oil & gas, mineral extraction and agriculture, to infrastructure development and manufacturing
- Latin America represents an interesting market
  - Political estability
  - Endemic need for infrastructure
  - Abundance of natural resources
  - Growth of urban population and increased market demands
  - Legal estability

#### FIGURE 4. FDI Inflows from China to Latin America, 1990-2013 (Millions of US Dollars)



COUNTRY	1990-2009 (Millions of US Dollars)	2010-13 (Millions of US Dollars)
Argentina	\$143	\$6,270
Brazil	\$255	\$23,886
Chile*		\$100
Colombia	\$1,677	\$2,071
Ecuador*	\$1,619	\$278
Guyana"	\$1,000	\$15
Mexico*	\$146	\$100
Peru	\$2,262	\$6,846
Trinidad and Tobago	+	\$850
	\$240	\$900
Other		\$1,400
Total	\$7,342	\$42,716

<sup>\*</sup> Less than one percent. Source: Author compliation based on 2015 ECLAC data.



- Napoleonic Civil Law tradition, with influence of Spanish / Portuguese law
- Relevance of French law in civil and administrative matters
- Main features:
  - Written constitution
  - Codified systems
  - Primarily legislative: limited role of case-law
  - Influence of legal scholars
  - Specific courts for different fields of law (habitually including a specific Administrative Law Jurisdiction –not in Brazil)



- Influence of the Civil Code of France (Napoleon)
  - Through the civil codes of Spain, Portugal, Chile and Argentina
- Main contracting principles
  - Freedom to contract
  - Pacta sunt servanda (sanctity of contracts)
  - Privity of contracts
- But also other general principles of law which may apply
  - Good faith
  - Rebus sic stantibus (Hardship and unforeseeable circumstances)

- Regulates all relationships between private parties and State or State entities
- Influenced by French administrative law
- Heavily regulated and very procedural
- Administrative contracts
  - Public procurement
  - Public bids for contracts
  - Public administrations enjoy "exorbitant prerogatives", including the right to modify the contract (ius variandi)
  - In exchange, the contractor has the right to "contractual rebalance"
- Existence of a specific jurisdiction for disputes with the administration
  - Not in Brazil

### Spanish-Speaking Latin America

- Includes a very wide range of countries, from Mexico to Argentina
- Legal systems have some common features
- But difficult to generalize



- Main features shared with other Latin American countries:
- Specific features:
  - Constitution provides for a Presidential System, a Federal State (The Union plus 27 states and municipalities) and separation of powers. There are Federal, State and Municipal Legislative Chambers with separate and specific competences
  - However, the new Code of Civil Procedure (2016) will confer greater powers to courts to create binding precedents
  - There are both Federal and State courts with different jurisdictions
  - No administrative courts in the French style

- Specific laws on Arbitration and Mediation including disputes
  with the State and its entities provide for effective alternative
  dispute resolution (ADR). Brazilian courts supportive of ADRs in
  Brazil.
- Specific governmental agencies regulate a myriad of areas where private investments are possible (Telecommunications (ANATEL); Power (ANEEL); Sanitary (ANVISA), Aviation (ANAC), Motor-roads (ANTT), Health Services (ANS), Waterways (ANTAQ) and Waters (ANA), among many others).

- Foreign Direct Investment in Brazil regulated by Law no. 4131 of 1962 also known as the "Profit Remittance Law".
  - Foreign Investor's Federal Taxpayer Registration
  - Foreign Capital Registration: The Brazilian Central Bank controls and regulates all inflow and outflow of capital in Brazil. Investments made in the financial and capital market are subject to a different regulation set forth in Federal Resolution no. 2689 of 2000.
  - Exchange controls: Corporations and individuals are allowed to perform exchange transactions as long as those transactions are properly registered with the Central Bank.

- Brazil's recent Cooperation and Investment Facilitation Agreement (CIFA)
  - Colombia, Malawi, Chile, Mexico, Angola and Mozambique
  - Focus on cooperation and investment facilitation, not on investor protection
  - Will probably work as a model agreement for future agreements
  - Not in force yet



- Declaration of incoming foreign capital (Chile, Colombia, Argentina, Ecuador, Venezuela)
- Registration of investment project (Mexico and Peru)

# **National content requirement**

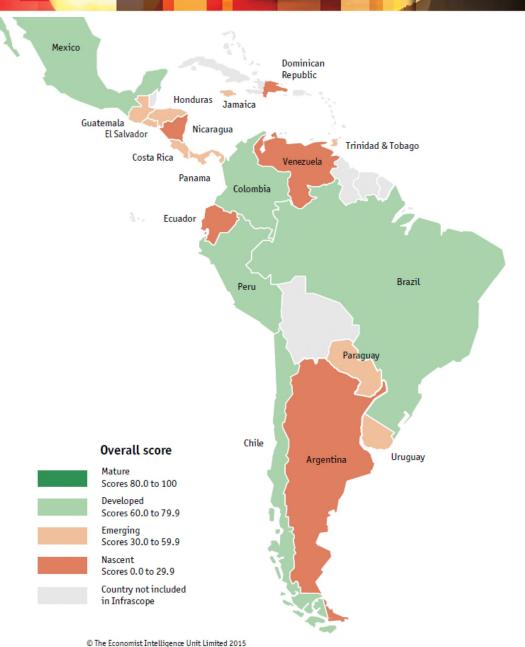
 Minimum of national employees (Chile, Colombia, Costa Rica, Mexico, Peru, Venezuela)

### **Restricted or limited sectors**

- Media (Argentina, Colombia, Dominican Republic, Mexico, Venezuela)
- Hydrocarbons (Bolivia)
- Transport (Costa Rica)
- Electricity: transmission (Costa Rica, Dominican Republic, Honduras,
   Nicaragua and Venezuela) and distribution (Costa Rica and Venezuela)

#### PPP in Latin America

- Increased use in last two decades, for constructing, managing and financing major infrastructure projects
- Structure is attractive to local governments, particularly where finance is limited
- Creates profits for investor
- Thorough planning and feasibility studies required
- Challenges:
  - Burdensome bureaucracy;
  - Lack of full understanding and preparation by local authorities; and
  - Need for long-term political stability



# PPP in Latin America



D 1		2047	
Rank		2014 score	•
1	Chile	76.6	+0.2
2	Brazil	75.4	+3.8
3	Peru	70.5	+0.9
4	Mexico	67.8	+4.8
5	Colombia	61.0	+1.4
6	Uruguay	52.9	+3.4
7	Guatemala	46.3	+2.8
8	Jamaica	44.4	+14.1
9	El Salvador	41.6	+2.3
10	Costa Rica	39.0	-
11	Honduras	37.7	+3.7
-12	Paraguay	37.0	+7.1
-12	Trinidad & Tobago	37.0	+2.6
14	Panama	34.0	-
15	Dominican Republic	24.2	-1.8
16	Ecuador	22.1	+2.1
17	Nicaragua	20.6	-
18	Argentina	16.0	-1.6
19	Venezuela	3.2	-2.1

MATURE (80-100)

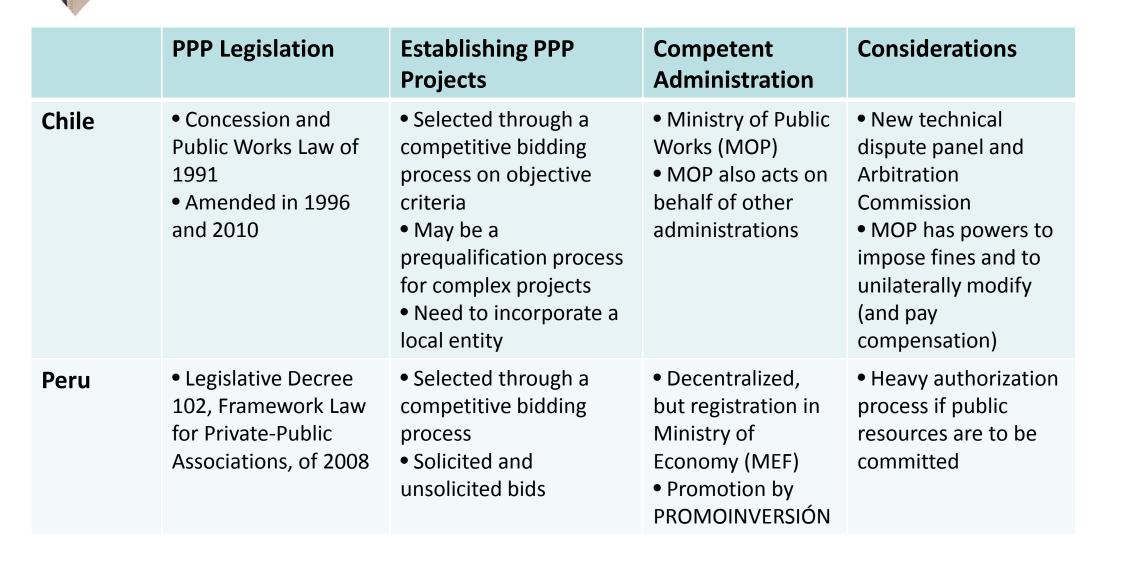
DEVELOPED (60-79.9)

EMERGING (30-59.9)

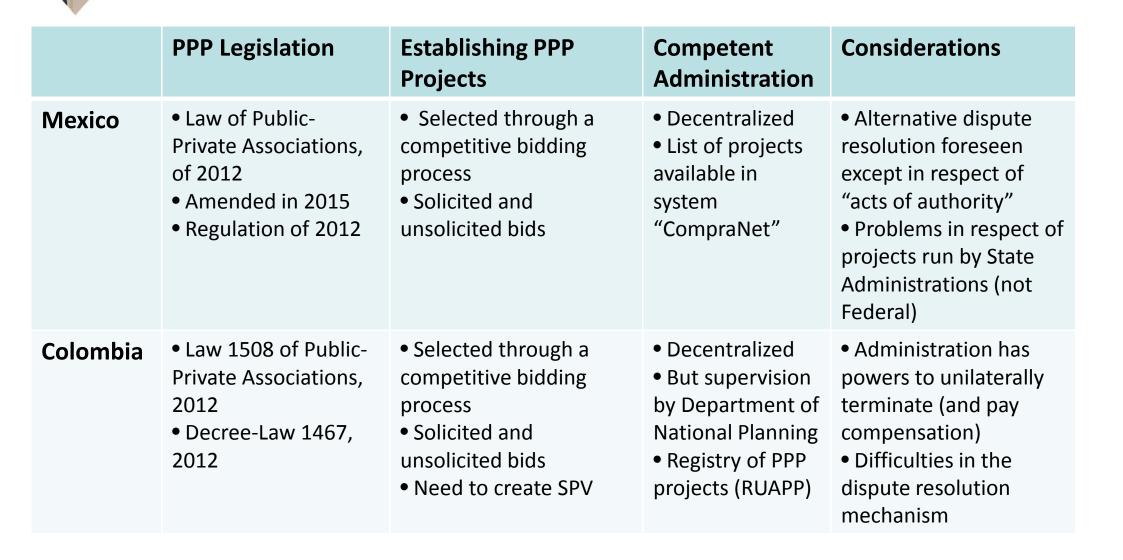
NASCENT (0-29.9)

1. REGULATORY FRAMEWORK					
Rank		Score			
-1	Chile	75.0	-		
-1	Mexico	75.0	+9.4		
-1	Peru	75.0	+		
4	Colombia	68.8	+6.3		
5	Brazil	65.6	: <del></del> -		
-6	Guatemala	59.4	+6.3		
-6	Jamaica	59.4	+34.4		
8	Uruguay	56.3	+		
9	El Salvador	46.9	+9.4		
10	Honduras	43.8	+18.8		
-11	Costa Rica	40.6			
-11	Panama	40.6	+		
-11	Paraguay	40.6	+9.3		
14	Trinidad & Tobago	34.4	+9.4		
-15	Dominican Republic	25.0	:-		
-15	Ecuador	25.0	+3.1		
17	Nicaragua	21.9	-		
18	Argentina	9.4	-		
19	Venezuela	0.0	-		

# PPP Projects in Latin America: Chile and Peru



## PPP Projects in Latin America: Mexico and Colombia



- Federal Laws no. 8.987 of 1995 (Concessions); no. 11.079 of 2004 (Federal PPPs) and no 8.666 of 1993 (Public Bids and Administrative Contracts) in addition to specific legislation for specific industries (telecommunications, oil and gas, transport, power, natural gas, among others);
- State regulation: several states have their specific PPP laws
   (Amazonas; Bahia; Ceará; Distrito Federal; Goiás; Mato Grosso do Sul; Paraná; Pernambuco; Piauí; Rio de Janeiro; Rio Grande do Norte;
   Rio Grande do Sul; Santa Catarina; São Paulo; Sergipe and Tocantins.

孖士 打律师 行

- Mercosur /Mercosul
- Alianza del **Pacífico**
- ALBA TCP





- Latin America is 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 dispute resolution legislation
- However, country-risk is still high in some jurisdictions
- Important to be cautious
  - Chose experienced local counsel
  - Avoid corruption
  - Use investment protection



- Dany Khayat, 合伙人Partner of **Mayer Brown**
- Alejandro López Ortiz,合伙人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. Necessary to check specific text

# Introduction: investment protection under international law



- 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



- 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

- 13 BITs in force
- 3 FTAs in force



- Definition of "investor" under applicable Treaty
- Different criteria:
  - Individuals: nationality, domicile, etc.
  - Corporations: place of incorporation, place of headquarters, place of control
- China Peru BIT (1994)

2. The term "investors" means:

2.1 The term "Investor" means:

in respect of the People's Republic of China:

- (a) natural persons who have nationality of the People's Republic of China in accordance with its laws;
- (b) economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China;
- a Natural person
  - Natural persons who, have nationality of either Contracting party in accordance with the law of that Contracting Party;
  - b. Legal entities including companies, associations, partnerships and other organizations, incorporated or constituted under the law of either Contracting Party and have their seat, as well as substantial business activities in the territory of the same Contracting Party;
  - c. Legal entities not established under the law of that Party but effectively controlled, by natural persons, as defined in paragraph 2.1.b.

 China – Colombia BIT (2008)

- Hong Kong has its own Treaties
  - But only one with Latin American States (Hong Kong Chile FTA)
- Chinese Treaties do not apply to HK territory, unless specifically extended (Art. 153 Basic Law)
   (<a href="http://www.doj.gov.hk/eng/laws/table2ti.html">http://www.doj.gov.hk/eng/laws/table2ti.html</a>)
  - 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 (2008)

- 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

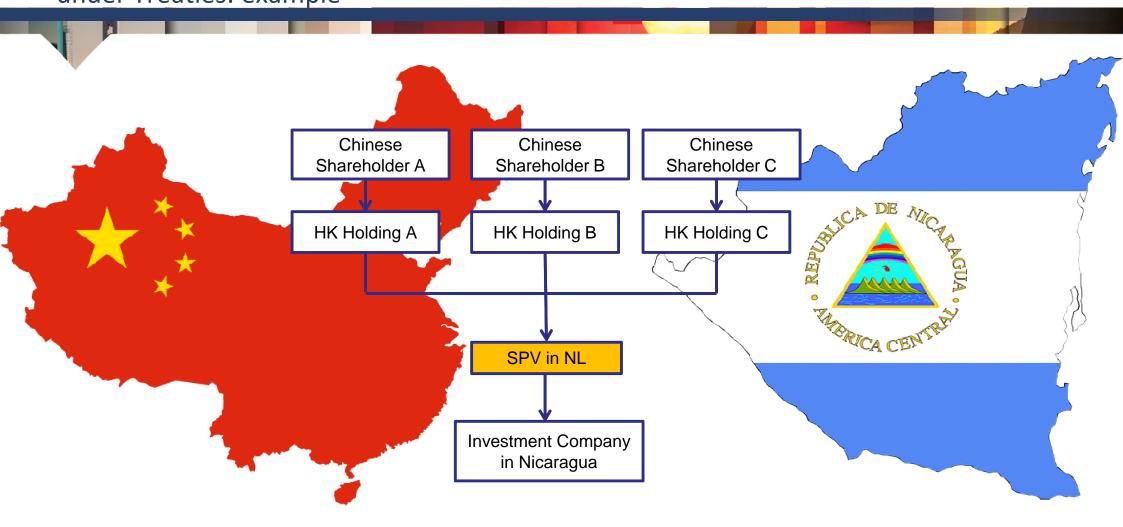


- Investment in Nicaragua
  - No China Nicaragua or HK Nicaragua BITs
  - 13 BITs available (Argentina, Chile, Czech Republic, Denmark, France, Germany, Italy, Republic of Korea, the Netherlands, Russian Federation, Spain, Switzerland and UK)
- Consider content of BITs and check tax status
- Netherlands Nicaragua BIT
  - (b) the term "nationals" shall comprise with regard to either Contracting Party:
    - natural persons having the nationality of that Contracting Party;
    - legal persons constituted under the law of that Contracting Party;
    - 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) above.



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#### Latin American BITs in Force

Every Latin American
 State (except for Brazil)
 has at least one BIT in force, so it is generally 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))

### Definition of "investment" under the Treaties

- Different definitions, depending on the treaty
- Generally, quite broad
- Requirement of a certain "duration"
- China Chile 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, immovable property and other property rights such as mortgages and pledges;
  - (b) shares, stock and any other kind of participation in companies;
  - (c) claims to money or to any other performance having an economic values;
  - (d) copyrights, industrial property rights, know-how and technological process;
  - (e) concessions conferred by law, including concessions to search for 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

China-Latin American
 States BITs in force,
 according to the scope
 of their dispute
 resolution agreements









Dispute Resolution in Latin America – Commercial and Investment

**Arbitration Issues** 

专家研讨会:拉丁美洲争议解决-

商务及投资仲裁中的重要问题

# Closing Remarks致结束词

 Xie Ruoting, Partner of Jingtian & Gongcheng **竞天公诚律师事务所**合伙人谢若婷

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