

Minimizing Risks and Maximizing Opportunities in China-Latin America Investment

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On June 1, 2017, Skadden hosted the webinar “Minimizing Risks and Maximizing Opportunities in China-Latin America Investment.” Topics of discussion included the increasing importance of Chinese investment in Latin America, the type of disputes that may arise from China-Latin America relationships and effective dispute resolution planning. Skadden speakers were Rory McAlpine, Julie Bédard, Chiann Bao and Jennifer Permesly, all of the international litigation and arbitration practice.

The webinar began with an overview by Ms. Permesly, who is based in New York and is fluent in Spanish, of the trends in Chinese investments in Latin America over the past decade. Latin America accounts for a significant percentage of all Chinese outbound foreign direct investments and contracts entered by Chinese parties, and, over the past decade, Chinese companies have invested approximately \$125 billion in the region. Chinese state-owned and private parties have focused on acquiring assets in natural resources, particularly in the minerals and oil and gas sectors. Traditionally, China has had strong relationships with Brazil, Argentina, Peru, Venezuela and Ecuador, but in recent years, it has begun to increase its investments into Colombia, Mexico and Chile.

Ms. Bao, who is based in Hong Kong and is fluent in Mandarin, highlighted China’s deep commitment to the region. She noted the country’s 2015 announcement that it planned to invest an additional \$250 billion in the region over the next decade and diversify its investments into technology and agriculture, in addition to continuing to invest in the traditionally important energy and construction sectors. Latin American support for China’s “One Belt, One Road” initiative, along with increased lending practices by China-backed policy banks, all promise to continue the trend of growing Chinese presence and influence in Latin America.

With this investment climate in mind, Ms. Permesly, joined by Ms. Bédard, who works in the New York and São Paulo offices and is fluent in Spanish and Portuguese, turned to a discussion of the types of challenges that are often seen in connection with Chinese-Latin American relationships. The speakers highlighted challenges that Chinese-Latin American parties may confront, including environmental and other issues raised by local communities in mineral or energy development projects, legal uncertainty that may arise in developing areas of Latin American legislation and allegations of corruption in the making or continuing of contractual relationships.

Chinese claimants have brought several investor-state arbitrations in the mining, raw material and infrastructure sectors challenging regulatory actions or expropriation

Key Takeaways

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conduct by Latin American states. Furthermore, as Chinese parties turn to joint ventures and acquisitions to structure their investments, post-acquisition disputes may increasingly occur. In this regard, Ms. Bédard emphasized the importance of conducting adequate due diligence on environmental, accounting and compliance issues in connection with preventing potential disputes. She also highlighted the importance of carefully negotiating closing conditions, including obtaining regulatory and government approvals on both the Latin American and Chinese sides where necessary.

Finally, Ms. Bédard noted the impact of corruption and other illegalities on contractual disputes and investor-state claims, pointing out that China and all Latin American countries are parties to the United Nations Convention Against Corruption. She provided examples from investor-state arbitrations where tribunals declined to hear the claims of investors.

Mr. McAlpine, who is based in Hong Kong, addressed ways to minimize risks through dispute resolution planning. He began by noting that among Latin American and Chinese parties, arbitration has emerged as the preferred method of dispute resolution. Whether parties should insist on arbitration in their China-Latin America agreement will depend on numerous factors, but generally speaking, the neutrality, agility of the arbitral forum and enforcement of arbitral awards are the key factors tilting the balance in favor of arbitration.

Mr. McAlpine discussed the choice of arbitral seats and institutions. He explained that an arbitration-friendly seat should be neutral and also have courts supportive of arbitration. He then reviewed a number of arbitral seats that may be utilized in connection with China-Latin America relationships, including the generally arbitration-friendly seats of Hong Kong and Singapore, both of which are attractive to Chinese parties, and Brazil, which has become a popular seat of arbitration in Latin America. Mr. McAlpine also discussed the preference of both Chinese and Latin American companies for institutional rather than ad hoc arbitration and explained the advantages and disadvantages of the various arbitration institutions most often chosen by parties from China or Latin America.

With respect to disputes involving state-owned entities, Ms. Bao highlighted that agreements with those types of entities often arise in the context of Chinese-Latin American investment and raise special considerations, such as sovereign immunity. Parties

should consider incorporating express waiver language in their contracts to address these issues, she said.

Ms. Bédard discussed the enforcement of arbitral awards in Latin America. Generally speaking, the track record for such enforcement has been steadily improving in recent years, and therefore it has become easier for foreign investors to enforce awards in Latin American countries. Nevertheless, Ms. Bédard explained that some barriers to enforcement remain.

Ms. Bédard and Ms. Permesly then turned to a discussion of bilateral investment treaties (BITs), which may provide important protections for Chinese investors looking to invest in Latin America. China is party to 128 BITs or treaties with investment protections in force today, including 11 with Latin American countries. (Notably, Brazil — a leading destination for Chinese investment in Latin America — is not party to any BITs providing protection of investments.) These international agreements set forth the terms and conditions for investment in one country by nationals of the other country and typically include substantive protections such as requirements that foreign investors receive “fair and equitable treatment,” the right to fair market value compensation in the event of expropriation and nondiscriminatory treatment. Latin American countries have had significant experience with investment treaty arbitration, which has led to an extensive body of arbitral decisions but also has prompted some Latin American countries to withdraw from certain BITs. Ms. Bao highlighted the experience of some Chinese investors with arbitrations under BITs and explained that Chinese investors appear to increasingly be willing to engage in investment treaty arbitration to protect their investments abroad.

In conclusion, Ms. Bao reiterated that buyers and sellers of business assets should expect that China will continue to be a key player in the Latin American region well into the next decade. While there will inevitably be dispute risk associated with such transactions, careful dispute resolution planning can assist in countering some of these risks while maximizing the opportunities that will come from a dynamic and growing China-Latin America business and investment relationship.

This webinar was the second of two Skadden webinars on the subject of China-Latin America investment risks and dispute planning. A summary of the February 6, 2017, webinar is available [here](#).