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ESG polices can unlock success in Chile

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Environmental, social and governance practice can provide a better path towards mitigating risks arising in traditional sectors for Chinese investors

Chinese companies lured by the opportunities of the Chilean economy have often stumbled due to a lack of awareness of the Latin American country's well-developed legal and regulatory environment. Putting in place a strategy combining environmental, social and governance practices with local legal expertise can help mitigate risks and ensure investments succeed.

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Differences in the economic and legal environments between these two nations often lead to problems in the implementation and development of projects by Chinese investors. Environmental permits revoked; administrative penalties;

labour issues due to non-compliance; contract disputes with concession granters: these are among issues that can turn promising and mutually beneficial investments into substantial risks and liabilities.

Chile's economy has been of great interest for Chinese investors who have targeted mining, energy, infrastructure, telecommunications and agricultural businesses for the past decade. Chinese foreign direct investment (FDI) has increased more than 18 times since 2016, with forecasts of more to come.

However, the stability and attractiveness of the Chilean economy is a result of a legal framework being enforced "by the book", a complex set of governmental institutions and a well-controlled FDI policy. In some cases, these factors have become obstacles for Chinese investors who are either unaware of or don't factor them in to their business projections.

The use of environmental, social and governance (ESG) practices can be an efficient and effective way to mitigate such risks, especially when implemented alongside a preventive approach and the acquisition of local legal knowledge.

ESG entails criteria used by investors to assess not only the feasibility of a business but also long-term performance. Local regulation and the particular market characteristics may result in a wide spectrum of different ESG applicable criteria required for each investment.

An "ex ante", deep analysis can help prevent an attractive project turning into an unsuccessful one. That could cover, among other aspects: all related rules and legislation; an analysis of the business; its energy use; pollution and waste treatment; its resource conservation programme; its protection of the health and safety of its employees; its impact on local communities; the information flow within its governance; the avoidance mechanisms for conflicts of interest; antitrust measures; compliance; and internal controls.

From an environmental point of view, the Chilean Constitution and Law 19.300 establish the right to live in an environment free of pollution as well as further duties such as the protection of the environment and conservation of nature and

of the environmental heritage. These laws and duties can be enforced before a project is developed – through an environmental impact assessment – or during and after the project has been executed, through legal and constitutional claims presented by affected third parties.

Impact assessments by the environmental authorities can easily delay a project, increasing costs to a point where it is no longer economically viable. Claims by third parties can result in project suspensions, sanctions and fines, and can even reach a point where permits are revoked and projects are cancelled. Thus, comprehensive due diligence processes prior to execution, periodic assessments and dedicated personnel for supervision help companies navigate such risks.

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From the labour standpoint, the Chilean legal system – both the legal framework and the judiciary – are highly protective towards employees. Law 16.744 protects not only the dependent employees but also the contractors, trainees and interns, by requiring employers to have insurance against the risk of accidents or diseases resulting from the performance of their work.

The Chilean Labour Code grants the right for every employee to form and be a member of a trade union, establishes a limit of 45 hours per week (mandating overtime payments) and grants both maternity and paternity leave, among other pro-employee regulations.

The country's free-market economy is tempered by robust consumer protection laws, creating a need for flexibility from companies. Law 19.496 provides a list of consumer protections and suppliers' duties such as full disclosure regarding the products and services provided; the duty to repair and compensate for any material or emotional damage to consumers; to honour the price and conditions advertised and to repair the product, replace it for a new one or provide refunds when the product is faulty or different than advertised and/ or agreed.

In relation to the energy and infrastructure industries, there have been cases of corruption within the processes for granting concessions, licenses and permits. Compliance practices within the investment companies have also gained prominence, as Law 20.393 has expanded the duties and liabilities of companies from the civil law sphere to that of criminal law. Setting up compliance mechanisms such as a crime prevention model pursuant to Law 20.393 have helped mitigate the risks in these matters.

As for telecommunications businesses, Law 19.628 on personal data protection provides that any company dealing with personal data must obtain previous, informed and written consent in order to manage such information, while Laws 19.223 and 21.113 provide a protection for cybersecurity and the information contained therein, with possible prison sentences in case of breaches. These laws have created a new range of duties and liabilities for technology and data companies, the adverse effects of which can be strongly reduced through the use of contractual terms.

All of these aspects must be taken into consideration by investors when exploring a project's practicality, and during its implementation and execution. ESG criteria play the important role of serving as informing principles when deciding on the best risk mitigators for the success of an FDI.

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