Initial Recommendations of the Belt & Road Task Force

Note from the Chairman: The ABA International Section’s Belt & Road Task Force was initiated by the Section’s Chairman, Robert Brown, as a vehicle to begin to involve the Section in this enormous and highly consequential area of international law practice. To that end, late in the Fall of 2018 the ABA Belt & Road Task Force was created and it was initially comprised of 3 Committees. One Committee was charged with the task of beginning to develop the possibility of a joint resource development and sharing agreement among disputant nations bordering the South China Sea. A second Committee was asked to examine the Asian Development Bank and other infrastructure project lenders in Asia and make recommendations as to reform or suggest improvements for project financing. The third Committee was to be focused on the improvement of loan documentation and contracts as a means of leveling the playing field between “debtor” nation borrowers and the Chinese BRI lenders.

There were 3 separate Belt & Road programs hosted by the International Section at the recent conference in Washington, D.C. last month which were each extremely well-attended. We are grateful for the extraordinary work to build and shape those successful programs by Paul B. Edelberg, Esq., Diana Tsutieva, Esq., Jonathan Meyer, Esq., and Geoffrey Goodale, Esq.

The Belt & Road Task Force is now being re-tooled to continue its work on an enhanced and continuing basis to meet the legal challenges and opportunities posed by China’s Belt & Road Initiative as well as the response by the United States and other nations over the years to come. As you perhaps well know, there are fascinating and very complex issues involved with this Task Force that run the gamut from international business & trade, needed infrastructure development of smaller & poorer nations, geopolitics and national security.

We know that you will find the initial reports of the 3 Committees of the Belt & Road Task Force which follow most interesting and, in some cases, eye-opening.

David F. Day, Esq.
Chair
JOINT DEVELOPMENT AGREEMENTS:  
*The Case on Bypassing Sovereignty in Favor of Cooperation in the South China Sea* 

Jason Drouyor, Esq

Maritime transportation is estimated to provide roughly eighty (80) percent of global trade volume and seventy (70) percent of global trade value.¹ More than one-third of global shipping volume is estimated to travel through the South China Sea alone.² With these figures, it is not surprising that the South China Sea is of international interest beyond its boarding nations. Further complicating the issue is the fact that the South China Sea is resource-rich with sizable oil and natural gas reserves as well as a thriving fishery.³ These attributes have resulted in multiple territorial claims and immense international pressure to ensure access to the South China Sea.

**INTERNATIONAL LEGAL FRAMEWORK**

It has quickly become clear after the Second World War that codifying international laws regarding the oceans was important to ensure lasting peace and to avoid conflict.⁴ A commission was created and resulted in the adoption of the first UN Conference on the Law of the Sea.⁵ This however did not resolve every issue, and the current treaty in affect today did not come into force until November 14, 1994 (the “UNCLOS”).⁶ UNCLOS has not been ratified by every country, notably the United States of America; but most countries have agreed to operate according to the treaty.⁷

The UNCLOS provides for the division of maritime boundaries into three zones: (1) the territorial sea, (2) the contiguous zone, and (3) the Exclusive Economic Zone (“EEZ”).⁸ The

---

² *Id.* at 11
⁴ A/CONF.13/L.58, 1958, UNCLOS, Off. Rec. vol. 2, 146
⁵ *Id.*
⁷ *Id.*
⁸ *Id.*
territorial sea is twelve (12) nautical miles from the coast, and is regarded as the sovereign territory of the state only requiring the state to allow for innocent passage.\textsuperscript{9} The contiguous zone extends out an additional twelve (12) nautical miles and allows a sovereign state limited powers in order to enforce its control over territorial waters.\textsuperscript{10} The EEZ is two hundred (200) nautical miles from the coast, and provides the sovereign state exclusive control of the zone’s resources.\textsuperscript{11}

UNCLOS also defines that the continental shelf of a sovereign state extends out to a distance of two hundred (200) nautical miles from its coast. However, a state may obtain an extension if it can provide evidence that the continental shelf extends beyond two hundred (200) miles and submits a claim to the Commission on the Limits of the Continental Shelf.\textsuperscript{12} One necessary precondition to such a claim is ratification of the UNCLOS treaty itself. Such an extension permits the state to exploit the natural resources of the extended territory. While codifying these laws have resolved many issues regarding maritime territory, maritime territorial disputes in a few areas such as the South China Sea still endure.

**MARITIME CLAIMS AND INTERESTS**

Maritime territorial disputes in the South China Sea are as numerous as they are complicated. Boarding states such as China, Philippines, Malaysia, Vietnam, and Brunei are all vying for sovereign control over some portion of the South China Sea. Other countries, such as the United States, are applying pressure to keep the region designated as international waters, and are not afraid to assert their stance in the region.\textsuperscript{13}

Non-bordering countries that depend on global trade are motivated to ensure the South China Sea remains international waters. However, bordering-countries are attempting to claim rights to low-tide elevations and the area surrounding them. To combat these claims, the United States of America has held multiple demonstrations in the South China Sea.\textsuperscript{14} These demonstrations have been named Freedom of Navigation Operations, and they attempt to assert

\begin{itemize}
\item \textsuperscript{9} *Id.* Article 19: UNCLOS defines innocent passage and provides restrictions on vessels transiting through the territorial waters of a sovereign state.
\item \textsuperscript{11} *Id.*
\item \textsuperscript{12} *Id.* at Article 76.
\item \textsuperscript{14} *Id.*
\end{itemize}
an international right to the region by engaging in actions beyond what is permitted for innocent passage.\textsuperscript{15}

Actors within the region have also been active in asserting their claims within the region. The Philippines instated an arbitration action against China on January 22, 2013.\textsuperscript{16} The arbitration was focused on historical rights and entitlements in the South China Sea while addressing actions in the region undertaken by China to assert their territorial claims.\textsuperscript{17} The Philippines was ultimately successful and received its final award on July 12, 2016.\textsuperscript{18} China chose to not accept or participate in the arbitration, and the Philippines has not signaled any strong intent to assert the award. In fact, the Philippines and China signed a Memorandum of Understanding on joint oil and gas development on November 20, 2018 (the “MOU”).\textsuperscript{19} While nothing has progressed any further, it is clear that all parties concerned are looking to address the issues revolving the South China Sea.

\textbf{JOINT DEVELOPMENT AGREEMENTS}

The South China Sea is crucial because of its geographical location and its rich natural resources. However, the region is plagued with undefined maritime boundaries and multiple conflicting claims for sovereignty. Any attempt to resolve sovereignty claims to the South China Sea is usually unavailing. However, most parties can see the benefits of joint exploration and development of the disputed region’s natural resources. This is where a joint development agreement (“JDA”) is most useful.

JDAs are not new and have been used successfully in multiple areas with disputed maritime boundaries. Once such area where joint cooperation has been seen is within the North Sea. The United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway have worked together in the region for decades. The 1998 framework agreement provided a

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} (2017). MOU: Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People's Republic of China and the Government of the Republic of the Philippines
\end{itemize}
structure for future JDA in the region.\textsuperscript{20} When it became necessary to address additional aspects affecting joint exploration of the North Sea, a new framework agreement was signed on April 4, 2005.\textsuperscript{21} As is demonstrated, successful cooperation is not contingent upon structuring a perfect agreement or framework, but on an ability to foster continued communication among the parties to achieve a common goal. Each exploration in the North Sea is typically governed by its own agreement that is drafted and informed with the aid of these framework agreements. Agreements such as this provide the unique opportunity for parties to come together and communicate.

As for the South China Sea, the world is focused on the next steps needed in the region. Tensions are high. A JDA in the region offers an opportunity for the parties to focus on a common goal. The parties will have to undergo extensive negotiations because these agreements do not come in any one single form. Agreements can be structured bilaterally among certain countries, or multilaterally with all countries within a region. They can be as detailed to leave little ambiguity as to operations or defer future operations to a representative committee. While it is important for parties undergoing negotiations to understand the potential implications and ramifications of their decisions, this process should be fluid and allow for flexibility for the parties to learn what works for their particular situation. It is through this communication greater cooperation, an avenue for ongoing communication, and greater stability can be achieved in the region.

\textsuperscript{20} Treaty Series No. 9 (2003) Cm 5762
\textsuperscript{21} Norway No. 1 (2006) Cm 6792
The Asian Development Bank and other Asia-Pacific Regional Lenders

Elizabeth G. Chan, Esq. & David F. Day, Esq.

The Asian Development Bank, founded in 1966 and headquartered in Manila, is perhaps the leading source of multilateral infrastructure financing in the Asia-Pacific region. The majority of shares in the Asian Development Bank is held by the United States and Japan, with approximately 15.607% held by each country. In contrast, China holds 6.44% of the shares. Traditionally, leadership of the bank is Japanese. The bank president, who has a five year term, has been Japanese since the founding of the bank. The bank’s operational goals include addressing poverty and inequality, gender equity, climate change and sustainability, development of “liveable” cities, rural development and food security, governance, and promoting regional cooperation. In recent years, the bank has focused on results based lending, in which disbursements are linked to the achievement of results. In theory, this lending policy encourages governments to practice good governance in line with bank operational goals, using a principle based approach to exert a positive influence on entire governments and systems.

---

24 Id. Of the Borrowing Shareholders, China and India have nearly the same percentage of shares, with China at 6.4% and India at 6.3%.
28 Id.
The Asian Development Bank’s project development cycle is structured to ensure that appropriate compliance protocols are in place throughout the project development cycle. From an existing country partnership strategy or regional cooperation strategy, the Bank then performs feasibility studies to determine what projects might be developed to best assist the individual country. Once a project has been developed, the Bank then solicits bids, after which the project is funded and construction commences. The project conception and feasibility study phase lasts approximately two to three years, with bidding and funding spanning another year, and actual project construction over approximately four years, for a total project time of five to seven years.

**Project Development Problems**

One of the major issues for projects funded by the Bank is the length of time from project conception to fruition and the “bunching” process, which refers to the number of projects “bunched” together during the 4th quarter to maximize funding use prior to the end of the fiscal year.

---

30 Id.
The length of time needed to march through the full project development cycle in the diagram above means that (1), it is difficult to engender private sector participation over such a lengthy period, and (2), the Bank may find it difficult to respond to urgent crises. An example of this is the reconstruction of Marawi City in the Philippines island of Mindanao. In May 2017, ISIS rebels overran the city. Over the next six months, the Armed Forces of the Philippines laid siege to Marawi City, finally liberating the city in October 2017. The Asian Development Bank performed a preliminary analysis shortly after the city’s liberation. While there were other delays in the project process, further coordinated assistance from the Bank stalled until recently, when the Asian Development Bank announced a comprehensive relief package for the city. The portion of the project to be executed by the Bank is scheduled to be completed in 2024, five years after the project announcement date, which seems quite long for a project intended to be “emergency relief.”

A second project development problem is that member countries often are unable to use ADB funding opportunities due to loan size limits, fiscal limitations, and project limitations. It is interesting to note that China is in fact one of the largest Asian Development Bank borrowers, 36

31 This “bunching” effect negatively affects the Bank’s workload process and adds to funding delays.
33 Id.
35 Id.
36 Karen Lema, ADB chief says bank will continue to grant loans to China, Reuters (April 24, 2019), https://www.reuters.com/article/us-adb-philippines-china/adb-chief-says-bank-will-continue-to-grant-loans-to-china-idUSKCN1S10QN. The ADB argues that the bank earns from its loans to China and hopes that the loans can influence Chinese policies. The impact of such changes remains to be seen. One notes also what a senior Japanese finance ministry official termed the “double standard” of China receiving loans while exerting influence on loans through the AIIB, and the fact that China’s gross national income per capita far exceeds the ADB’s gross national income per capita limits for borrowers. See Yukihiro Sakaguchi, Japan pushes Asian Development Bank to end
using ADB funding for numerous projects, including a Five-Year Plan assessment and a number of Belt and Road related projects. It remains to be seen whether the Asian Development Bank’s results based lending practices will force any sort of lasting governance change there.

**Other Regional Infrastructure Development Lenders**

Other regional lenders aside from the Asian Development Bank may yield faster results that create the impression of addressing specific borrower needs. One such institution is the Asian Infrastructure Investment Bank and its PRC state lender brethren. One advantage of the AIIB and other PRC government lenders is the perception of speed because of lack of limitations as to the “soft” requirements of development banks such as the Asian Development Bank, including less of a focus on human rights issues, poverty reduction, and similar matters. The AIIB is primarily focused on infrastructure projects. To date, it has disbursed only 1.15 billion, far less than the initial expectation of 10-15 billion per year. Thus far China borrows more from the Asian Development Bank than disbursed through the AIIB.

The Japan International Cooperation Agency, a branch of the Japanese Ministry of Foreign Affairs, is very active in the Asia-Pacific region, under the Japanese “Free and Open

---


Indo-Pacific Strategy,”40 and Japanese companies are frequent bidders in Asian Development Bank contracts. Of late, Taiwan has adopted the New Southbound Policy as a mechanism of developing relationships in the region to counter China’s move to isolate Taiwan.41 The New Southbound Policy promotes active regional development and economic relations to further the reach of Taiwan’s soft power and preserve its external ties through economic collaboration.42

Recently the United States passed the BUILD Act, which created the International Development Finance Corporation, a new source of funding for overseas infrastructure development.43 The BUILD Act is a critical component of the new Indo-Pacific Strategy to support American soft power in the Asia Pacific region, again as a counter to China’s Belt and Road Initiative, particularly the Maritime Belt and Road. Other funding sources include other government entities, such as the government of Sweden, which donated water tanks used at Marawi refugee camps, and the Israeli government, which has a number of ongoing projects in the Philippines.44

![Water tanks donated by Swedish International Development Cooperation Agency in Marawi](image)

---

42 Id.
44 See e.g., Philippine-Israel Center for Agricultural Training, https://embassies.gov.il/manila/mashav/Pages/The-Philippine-Israel-Center-for-Agricultural-Training.aspx.
Possible Recommendations

Recommendations to make the Asian Development Bank a more dynamic financing option for infrastructure projects necessarily include accelerating the project development cycle while retaining the Bank’s focus on the “soft” side of risk management, such as governance and human rights issues. The Bank is not a commercial institution, nor should it be – it is still a development bank. Nevertheless, the Bank may occasionally become overly focused on governance affairs while limiting aid to countries that are in need of such aid in order to address the operational goals of poverty and inequality emphasized by the Bank.

Conversely, the Bank should also be aware for the need of thorough, holistic risk assessments that do not isolate issues and allow for ongoing monitoring to adjust for changes that arise during the course of a project.45 The primary problem is not lack of money, but implementation of projects.46 To allow for greater maneuverability, the Bank might also consider focusing on smaller components of projects to increase accessibility, allowing in country participation to further stimulate regional economies. Capacity building and education of local contractors ultimately benefits the client country far more than a foreign contractor and foreign labor executing a contract.47

---

45 This is in contrast to the current “silo” method of segmenting assessments by subject area and performing individual assessments in an isolated environment, without incorporating the input of other subject areas.
47 This is not, however the standard approach to BRI projects. Rather than focusing on the capacity building or educational projects which benefit the host nation, the objective of the Belt and Road Initiative is to export Chinese firms, Chinese labor, Chinese materials, and supporting Chinese concerns, forgoing local expertise almost entirely. When the project is completed, a sizeable portion of the labor used for the project is then “deposited” in the host country as well, ultimately supplanting local labor that then is forced to compete for the same jobs. As an example, the Philippines now has approximately 300,000 “deposited” Chinese workers. If the objective of a development project is to develop the host country, it is not enough to develop only physical infrastructure without simultaneously developing the intellectual and institutional infrastructure of the country. Therein lies the advantage of the Asian Development Bank – as well as an opportunity for the American Bar Association to assist and participate in such development activities.
Financing Infrastructure Along the Belt & Road
- an Agenda for the ABA International Section
Belt & Road Initiative (BRI) Task Force
Working Group on Infrastructure Financing

May 2, 2019
By Ernest Chung, Esq.*

Introduction

China’s Belt and Road Initiative (BRI) has been referred to as the “most ambitious infrastructure investment effort in history.”48 BRI envisions that China will finance investments in infrastructure connectivity of a scale that will create “a new platform for international cooperation to create new drivers of shared development”49 across Eurasia and globally. Reflecting its importance within the Chinese policy framework, BRI was enshrined in the Constitution of the Chinese Communist Party in 2017.50 Since its inception in 2013, BRI’s geographic scope has grown steadily, extending beyond the Asia-Pacific region to include the Middle East, Africa, Europe and Latin America. As of March 2019, according to official Chinese media, China had signed 171 BRI cooperation documents with more than 150 countries and international organizations.51 In March 2019, Italy became the first G7 country and first major European economy to join the BRI.52

Role for Private Infrastructure Financing

As part of BRI, it is envisioned that China may provide more than $1 trillion in financing for overseas infrastructure projects through 2027.53 Infrastructure investment is sorely needed in the Asia-Pacific region. Asian Development Bank (ADB) estimates the level of investment in infrastructure needed by its 45 developing member countries to be $26 trillion for the 15-year period from 2016 through 2030.54 The sheer scale of these needs implies that, even with BRI as the most significant single source of funding available, massive additional sources of capital will be needed to realize the ambitious infrastructure development goals of BRI. Given the scarcity

---

52 Miles Johnson, Italy endorses China’s Belt and Road Initiative, FINANCIAL TIMES, March 23, 2019.
54 ASIAN DEVELOPMENT BANK, MEETING ASIA’S INFRASTRUCTURE NEEDS 43 (2017).
of public sector funding available for infrastructure throughout the region, private sector capital will inevitably be needed to bridge the infrastructure funding gap.\textsuperscript{55} Thus, leveraging BRI funding to attract private sector financing and investment in infrastructure will be essential to realizing the BRI vision.\textsuperscript{56}

China’s leadership has understood the important role that private sector investment and financing must play if BRI’s ambitious infrastructure development goals are to be achieved. In 2016, China led the establishment of the Asian Infrastructure Investment Bank (AIIB), a new multi-lateral agency formed, among other things, for the express purpose of encouraging the private sector financing of infrastructure projects.\textsuperscript{57} To date, however, the overwhelming majority of BRI infrastructure projects have been financed on a sovereign basis, with financing provided in the form of loans made by Chinese government-owned “policy banks” such as the China Development Bank and Export-Import Bank of China,\textsuperscript{58} and with the construction work being awarded to Chinese contractors, often state-owned.\textsuperscript{59}

Despite the positive impacts that BRI infrastructure investments can be expected to bring, the implementation of BRI to date has also attracted controversy. Concerns have been raised regarding the appropriate size and cost of BRI infrastructure projects and the sustainability of related debt burdens for host countries.\textsuperscript{60} The prospect of debt recovery through foreclosure on sensitive infrastructure assets has raised suspicion regarding China’s geopolitical intentions and given rise to accusations of neocolonialism.\textsuperscript{61} BRI projects have faced a wide variety of other criticisms, ranging from lack of transparency in procurement, insufficient consultation with local stakeholders, adverse environmental and social impacts, lack of commercial feasibility and/or sustainability to outright corruption.\textsuperscript{62} A failure to address these challenges could undermine the prestige and reputation of BRI.

**Improving “Governance” in BRI Infrastructure Projects**

Commentators have argued that the key to resolving these issues lies in concepts of improved “governance,” such as open and competitive procurement, transparency and local

---

\textsuperscript{55} Anthony Rowley, *China’s Belt and Road Project Can’t Cover Asia’s Infrastructure Needs by Itself, Never Mind the World’s*, SOUTH CHINA MORNING POST, Sept. 11, 2018.

\textsuperscript{56} Richard Boucher, *China’s Belt and Road: A Reality Check*, THE DIPLOMAT, March 29, 2019.

\textsuperscript{57} ARTICLES OF AGREEMENT OF THE ASIAN INFRASTRUCTURE INVESTMENT BANK, opened for signature June 29, 2015, Chapter I, Article 2(iii).

\textsuperscript{58} MOODY’S INVESTORS SERVICE, BRI REPORT CARD: DEEPER LINKAGES, GREATER CAUTION (Jan. 2019).


\textsuperscript{60} John Hurley, Scott Morris and Gailyn Portelance, *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, CENTER FOR GLOBAL DEVELOPMENT (March 2018).


engagement, environmental and social responsibility,\textsuperscript{63} market discipline, non-discriminatory treatment, sanctity of contract and respect for the rule of law.\textsuperscript{64} Experience has shown that adequate governance is also an essential pre-condition to private sector investment in infrastructure.\textsuperscript{65} Addressing these governance challenges would contribute towards creating an enabling environment for private sector investment and financing of BRI infrastructure.

To its credit, China has acknowledged many of the criticisms levelled upon BRI implementation to date, and is taking concrete steps seeking to address them. In the domestic Chinese infrastructure context, measures have been introduced to mandate competitive procurement, transparency and local consultation in the procurement of infrastructure projects.\textsuperscript{66} Significant initiatives are also underway within the Chinese legal and judicial systems, aimed at providing greater certainty for the interpretation of BRI contracts and establishing more efficient and reliable methods for resolving contract disputes for BRI infrastructure.\textsuperscript{67} At the recently convened Second Belt and Road Forum for International Cooperation (Second BRI Forum), held in April 2019, China’s Ministry of Finance released detailed debt sustainability guidelines, based upon World Bank and International Monetary Fund (IMF) recommendations, designed to encourage consideration of debt sustainability in the context of BRI infrastructure investments.\textsuperscript{68}

**Leveraging Public Funds to Attract Private Sector Financing for BRI Infrastructure**

The goal of “leveraging” public funding to attract private sector investment and financing for BRI infrastructure featured prominently in official pronouncements surrounding the Second BRI Forum.\textsuperscript{69} At the conclusion of the forum, President Xi, along with 37 other heads of State and the Secretaries General of each of the United Nations and the International Monetary Fund, endorsed a joint communiqué calling for greater mobilization of international investors and private capital into Belt and Road infrastructure projects and, in that connection, recognizing the importance of the rule of law, transparency, a level-playing field, environmental, fiscal and social sustainability and compliance with international best practices.\textsuperscript{70} In calling for increased private sector investment in BRI infrastructure, the Joint Communiqué calls upon market

\textsuperscript{63} Jamie P. Horsley, *Can China Deliver a Better Belt and Road?*, FOREIGN POLICY, Apr. 22, 2019.

\textsuperscript{64} OECD Outlook 2018, 127-128.

\textsuperscript{65} OECD Outlook 2018, 104-108, 113-128.


\textsuperscript{67} Jennifer Ingram, Wu Yin and Jia Quan, *China’s ‘Belt and Road’ Blueprint: Promoting Unilateral Ambitions or Multilateral Gains?*, CHINA LAW CONNECT, CHINA GUIDING CASES PROJECT, STANFORD LAW SCHOOL (Sept. 2018).

\textsuperscript{68} MINISTRY OF FINANCE OF CHINA, DEBT SUSTAINABILITY FRAMEWORK FOR PARTICIPATING COUNTRIES OF THE BELT AND ROAD INITIATIVE (April 2019) (hereinafter DEBT SUSTAINABILITY FRAMEWORK).

\textsuperscript{69} Governor Yi Gang of People’s Bank of China (China’s central bank) is reported to have said in official remarks, that going forward, “Government funding will be mainly to leverage capital from the private sector, meaning that private sector financing will be the main force, while government funding will only play a guiding role, a leverage role.” *China Pledges to Build ‘Open’ Financing System for Belt and Road*, BLOOMBERG NEWS, Apr. 24, 2019.

\textsuperscript{70} *Belt and Road Cooperation: Shaping a Brighter Shared Future*, JOINT COMMUNIQUÉ OF THE LEADERS’ ROUNDTABLE OF THE 2\textsuperscript{nd} BELT AND ROAD FORUM FOR INTERNATIONAL COOPERATION, April 27, 2019 (Beijing, China) (hereinafter JOINT COMMUNIQUÉ), Articles 6, 17, 18 and 30.
participants to utilize “public-private partnerships (PPP)” and to promote projects that are “investable” or “bankable”.71

“Bankability”, or the state of being “bankable”, is a concept familiar to international project finance professionals, meaning that a project has the attributes that enable it to be financed on a private sector basis.72 Although the concept of “bankability” defies a one-size-fits-all definition, its attributes are well recognized. In order for an infrastructure project to be “bankable”, it must be commercially viable (it must be capable of generating sufficient revenue to ensure an adequate return on investment), and all project-related risks, such as (but not limited to) commercial, political and legal risks, must have been mitigated to the extent possible, or allocated to parties who can sustainably bear them.73 Risk mitigation and risk allocation in privately-financed infrastructure projects are primarily achieved through detailed and carefully negotiated contracts, and the enforceability of those contracts is a key element of “bankability”.

Creating a Bankable Infrastructure Project Pipeline for BRI

While China’s incipient governance-related reforms (as described above) are laudable and necessary first steps, much more needs to be done if the goal of creating a vibrant pipeline of bankable private sector-financed BRI infrastructure projects is to be achieved. To this end, China’s commitment to make significant public funding available to be leveraged for this goal could be instrumental if it is deployed wisely. How to deploy such public funding wisely, to maximize its potential multiplier effects by “crowding-in” private sector investment in BRI infrastructure, is not self-evident, however.

Fortunately, the international project finance community has tremendous experience to share in this area. To this end, the American Bar Association (ABA) International Section has convened a BRI task force (the ABA-BRI Task Force) to make the collective experience of its members available as a resource for BRI policy-makers, host countries and other project participants. Its members have decades of experience advising public and private sector entities on implementing bankable cross-border infrastructure projects in both developed and developing markets. Their familiarity with legal and financial techniques that have been used to promote the successful private sector development and financing of infrastructure projects can be a valuable resource for BRI project participants.

Suggestions for Legal Cooperation

Members of the ABA-BRI Task Force working group on infrastructure finance convened in early 2019 to explore constructive ways that legal practitioners could contribute to the aspiration of BRI participants to encourage private sector financing of BRI infrastructure.

---

71 Id, Article 18.
Preliminary suggestions included the following:

- **Consider Adopting or Adapting International Best Practices in Governance.** China and its BRI partners have committed to improving “governance” of BRI implementation – ensuring open and competitive procurement, local consultation, environmental and social sustainability, responsible lending practices and the prevention of corruption, to name a few. As discussed above, acceptable governance is a necessary precondition for private sector infrastructure finance. However, articulating the specific substance and content of governance concepts is challenging, and the implementation of them will be even more so. Fortunately, existing organizations and initiatives have produced valuable compendia, toolkits and guidelines, distilling to writing and making recommendations on international best practices in a number of governance-related areas, including (but not limited to) infrastructure project procurement, environmental and social sustainability, responsible sovereign lending practices, the prevention of corruption in infrastructure and the promotion of private sector infrastructure investment in infrastructure generally. A number of these have gained wide market acceptance. While no guidelines will be appropriate for all circumstances, consulting these and other compendia of international best practices, and adapting relevant portions of them with BRI characteristics (with the assistance of experienced legal professionals), could be an efficient way for BRI policymakers to make meaningful governance improvements.

- **Develop Capacity to Effectively Negotiate and Administer “Bankable” Infrastructure Contracts.** Infrastructure projects typically involve the creation of long-term relationships, necessitating the negotiation and conclusion of long-term contracts. Infrastructure concession agreements having terms of 50 or 99 years are not uncommon. As with any long-term relationships, however, a degree of symmetry must be achieved; contracts that are too imbalanced tend to be unsustainable over the long term. This is all the more true in the infrastructure context, where the subject matter of the contracts can have a politically sensitive nature, due to the strategic importance of infrastructure assets or because of the infrastructure’s role in the delivery of essential public services. One-sided or fatally imbalanced contracts can occur when one or more of the parties has limited expertise with the type of contract in question, or is lacking information or the experience and capacity to negotiate and administer complex contracts. One-sided project agreements, or contracts

---

whose implications were poorly understood when signed, have resulted in failed or renegotiated BRI projects and these failures can erode popular support for BRI as a whole.\textsuperscript{79}

Therefore, when negotiating and implementing BRI infrastructure contracts, it is in the interest of all BRI participants for every participant (even those in a nominally adversarial posture) to have sufficient knowledge, expertise and capacity available to it, so as to be in a position to negotiate fair and balanced, bankable project contracts, reflecting a rational allocation of project benefits and risks. Assisting BRI participants to develop or procure that capacity with public sector grant funding would be a modest but worthwhile investment. Delivering and disseminating infrastructure capacity building programs in collaboration with existing multi-lateral agencies such as the AIIB, ADB, The World Bank and the United Nations Development Program (UNDP), each of whom has existing programs designed for this purpose, could be another effective way to leverage public sector resources to help host countries and other BRI participants to develop capacity to effectively negotiate and implement privately-financed infrastructure projects.

- **Utilize International Agreements to Support a Stable Legal Environment for Investment.** An enabling legal environment, which allows for the enforcement of long-term contracts on a stable and predictable basis, is an essential pre-condition to private sector infrastructure finance. In the BRI context, infrastructure projects are inherently cross-border in nature, and the relevant legal environment will likely consist of multiple jurisdictions – China, the infrastructure host countries, and potentially numerous other jurisdictions, such as those of the providers of financing, investment, equipment or services and the end-users of infrastructure. Establishing an enabling legal environment across multiple jurisdictions multiplies the difficulty of the task, particularly where (as can be the case in BRI projects) the domestic legal systems in each relevant jurisdiction can be very different from one another.\textsuperscript{80} Moreover, many BRI countries lack well-developed domestic laws authorizing private sector ownership, financing and operation of infrastructure. In this context, international agreements – both bi-lateral and multi-lateral – can contribute to creating a stable legal environment to support private investment and financing of cross-border infrastructure projects. International agreements, such as bi-lateral investment treaties (BITs), can supplement local laws to provide additional stability in the context of cross-border investment contracts, for example by providing nationals from each signatory State assurances against expropriation of property, discriminatory treatment, restrictions on currency transfers and certain changes in law. In some cases, BITs may provide investors who are nationals of a signatory State with access to dispute resolution mechanisms, such as international arbitration, in disputes with the host State.\textsuperscript{81} In certain legal systems, rights

\textsuperscript{79} Chun Han Wong and Yantoultra Ngui, *China Chops Price for a Much-Criticized ‘Belt and Road’ Project in Malaysia*, WALL STREET JOURNAL, April 12, 2019.

\textsuperscript{80} Priyanka Kher and Trang Tran, *Investor Protection Along the Belt and Road*, Discussion Paper No. 12, MACROECONOMICS, TRADE, AND INVESTMENT (MTI) GLOBAL PRACTICE, THE WORLD BANK (Jan. 2019).

embodied in international agreements may be given precedence over domestic laws once certain formalities have been met, thereby affording the nationals of each signatory State an important degree of protection from changes in domestic laws. Curiously, despite the proliferation of bi-lateral “BRI cooperation documents” (BRI Agreements) among China and other BRI participating nations, a sample of BRI Agreements reviewed by the working group suggested that the BRI Agreements entered into to date have not, by and large, been concluded for the purpose of improving the underlying legal framework for infrastructure investment. Parties to the BRI Agreements may therefore wish to consider these potential ways that BITs (to the extent they have not already been concluded by the relevant States) and enhanced BRI Agreements may be used to support an enabling environment for private sector infrastructure financing.

There are also existing multi-lateral agreements relevant to cross-border infrastructure development and financing in the BRI region. Of note, the Energy Charter Treaty, whose signatories cover perhaps one-half of the Eurasian land mass (but to which China is presently an observer but not a party), establishes, among other things, a detailed legal framework among its parties providing for BIT-style investor protections and cross-border dispute resolution in energy sector investments, and open and non-discriminatory access to cross-border energy infrastructure, such as oil & gas pipelines and electricity transmission infrastructure. If China were to accede to the Energy Charter Treaty, it would immediately gain access to a substantial legal framework to support private sector investment in cross-border energy-related infrastructure across much of Eurasia. Other BRI nations, particularly those in South and South-east Asia, could also consider the benefits of joining the Energy Charter Treaty. In the longer term, the Energy Charter Treaty could provide a model for similar multi-lateral treaties to facilitate and support cross-border investments in other types of infrastructure networks, such as transportation and telecommunications.

The foregoing are preliminary suggestions and represent only a small sample of possible areas for legal cooperation.

**Call to Action**

At the conclusion of the Second BRI Forum in April 2019, recognizing that legal advice from experienced practitioners will be needed to implement the agreed governance reforms and to create an enabling legal environment for private sector infrastructure finance more generally, the signatories to the Joint Communiqué resolved to invite “legal cooperation, including dispute resolution services and legal assistance for the business sector.” Having articulated a modest list of opportunities for legal cooperation in this note, ABA-BRI Task Force members stand ready to offer their collective experience, and welcome this opportunity to collaborate with Belt & Road participants towards the promotion of private sector financing of BRI infrastructure.

---

83 *Joint Communiqué*, Article 29.

* Ernest Chung is counsel at Nixon Peabody LLP in New York City.
Addendum

There are a number of lawyers who have contributed to the initial work of the Belt & Road Task Force. Their efforts and ongoing contributions are gratefully acknowledged:

Committee on the South China Sea

Michela Cocchi
Attilio Costabel
Andy Danas
**Jason Drouor, Chair**
Albina Gasanbekova
Jeffrey Lawrence
Joseph Mamounas
Phillip Peng
Diana Tsutieva

Committee on the ADB and other Infrastructure Lending Institutions

**Elizabeth Chan, Chair**
David Day
Eugenia Pyntikova
Committee on Standard Form Loan Agreements & Contracts

Caryl Ben Basat
Arianna Chatterjee

Ernest (Ernie) Chung, Co-Chair
Anders Forkman
Christina Heid
Willem den Hertog

William P. Johnson, Co-Chair
Miran Vila