

C/M/S/

Law.Tax



Belt and Road Initiative

The view from **Asia-Pacific**

2020

APAC caution

59% of APAC participants report negative sentiments towards the Belt and Road Initiative (BRI), compared with 18% a year ago.

Twin track?

Only **44%** of APAC participants aim to maintain or increase their involvement in BRI, compared with 90% from China.

Working together

77% of Chinese participants will consider BRI joint ventures and partnerships. But only 44% of APAC participants feel the same.

Mixed experiences

Just **24%** of APAC participants are satisfied with the outcome of their involvement in BRI, compared with 75% from China.

Legal concerns

A top risk for **73%** of APAC participants and 71% of Chinese participants, legal and regulatory risk is a major concern in BRI projects.

Dispute resolution

45% of APAC participants have been in BRI disputes, highlighting the need for strong dispute resolution strategies.

BRI 2.0

Despite international caution, BRI 2.0 offers many possibilities. 50% of APAC respondents believe it will make BRI more open to non-Chinese participants.

Green focus

BRI 2.0 will help to promote the environmental priorities of many BRI participants, as well as new partnerships and more sustainable projects.

Health Silk Road

The Covid-19 pandemic is leading to changes, including more investment in BRI healthcare projects, anticipated by 93% of APAC respondents.

Contents

Introduction	5
Finding a way forward	6
The impact of Covid-19 on BRI	10
Interview: Jennifer Tay, PwC	14
Belt and Road 2.0: Looking to the future	16
Interview: Seth Tan, Infrastructure Asia	22
Overcoming obstacles	24
Insurance for BRI projects	30
Dispute resolution	31
International arbitration and BRI	32
Demystifying the China International Commercial Court	34
Spotlight on sectors and regions	36
A Belt and Road future	41

Methodology

In the first half of 2020 Acuris, on behalf of CMS, surveyed 500 senior executives to gauge their views on various aspects of the Belt and Road Initiative. Of the 500 respondents, 150 were either based in the Asia-Pacific region or predominantly working on BRI projects in the region, and are referred to in this report as ‘APAC respondents’ or ‘APAC participants’. Another 100 respondents were from Chinese entities. All respondents were either currently active or planning to participate in BRI projects. In order to ensure confidentiality, the identities of all respondents will remain anonymous.



In September 2013, Chinese President Xi Jinping proposed a Silk Road Economic Belt and in October, a 21st-Century Maritime Silk Road, together now referred to as the Belt and Road Initiative. The initiative attracted considerable attention from the international community and won a positive response from the countries involved. It integrates the historical symbolism of the ancient Silk Road with the new requirements of today. The initiative is a Chinese program whose goal is to maintain an open world economic system, and achieve diversified, independent, balanced, and sustainable development, and also a Chinese proposal intended to advance regional cooperation, strengthen communications between civilizations, and safeguard world peace and stability.

The Leading Group on the Construction of the Belt and Road, May 2017



Belt and Road Initiative

The view from Asia-Pacific

China's Belt and Road Initiative (BRI) may be the most ambitious development strategy ever. The numbers are staggering: it has already involved at least 138 countries with a combined GDP of USD 29trn and 4.6bn people. There is no official database of BRI projects (and no international consensus on exactly what constitutes a BRI project), but most observers believe that over 3,000 have already been started.

Since it was launched in 2013, BRI has evolved into an ambitious global plan for transnational infrastructure, trade and economic development. As well as creating infrastructure, BRI has sought to support priorities such as policy coordination, connectivity, unimpeded trade, financial integration, and connecting people. But in 2020, as the global pandemic rages, and trade and globalisation are buffeted by tariff wars, BRI faces unprecedented headwinds.

At CMS, many of our offices are in BRI countries and many of our clients have participated in BRI projects. Building on a major new survey of BRI participants, we are publishing a series of reports to assess the challenges for BRI and the steps that BRI participants can take to achieve both success for themselves and a positive future for BRI. The reports will all be made available over the coming months at cms.law/bri.

This is the second of our reports, focusing on sentiment about BRI in the Asia-Pacific region outside China. We should like to thank all those who participated in the survey, and in particular our two interviewees: Seth Tan of Infrastructure Asia and Jennifer Tay of PwC Singapore. We are also delighted to have been able to cooperate with David Gu of leading Chinese law firm TianTong.

We hope you find this report interesting and would be delighted to discuss any of its contents further with you.



Adrian Wong
Partner, Projects and
Infrastructure
CMS Singapore
T + 65 9091 8722
adrian.wong@cms-cmno.com



Dr. Nicolas Wiegand
Managing Partner
CMS Hong Kong
T +852 3758 2215
nicolas.wiegand@cms-hs.com



Finding a way forward

Key points

- » We found diverging attitudes to BRI, with international enthusiasm weakening much more than Chinese support.
- » International participants have found the BRI process harder than those from China, and report lower levels of satisfaction with the outcome.
- » Partnerships and joint ventures can be highly effective but have sometimes caused problems.
- » Covid-19 has affected a majority of BRI projects – but many participants feel the biggest changes may be yet to come.

The last year has been marked by geopolitical and macroeconomic upheaval. Most obviously, the Covid-19 health crisis and subsequent global disruption have ushered in an extremely challenging and uncertain time.

This uncertainty is illustrated in split attitudes towards future participation in BRI. While we found that a large majority (90%) of Chinese respondents will maintain or increase their involvement in such projects, only about half (51%) of our respondents from outside Asia-Pacific intend to do the same, with the rest expecting their involvement to decrease.

The number is even lower for respondents who are based in – or whose main activity is in – the

Asia-Pacific region outside China (APAC respondents). With 56% expecting their involvement to decrease, only about one in four (27%) intend to increase their involvement in BRI.

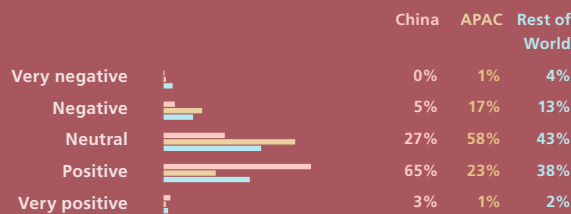
These sentiments reflect a dramatic turn in opinion over the past year. Well over half (59%) of APAC respondents now report negative sentiments towards BRI, which only 18% say they felt a year ago. This is notably more negative than responses from the rest of the world, although there has been a general shift in sentiment during the period. Even in China, nearly a quarter of respondents (24%) feel negative, and the number now reporting positive sentiments (44%) is well down on the majority (68%) who were positive a year ago.

Enthusiasm for BRI

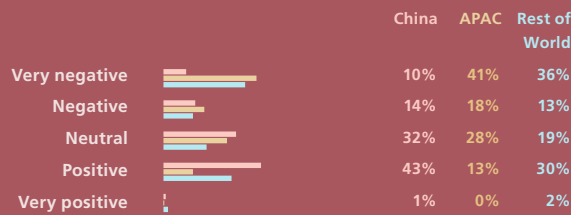
Which of the following best describes your organisation's intentions regarding involvement in BRI-related projects?



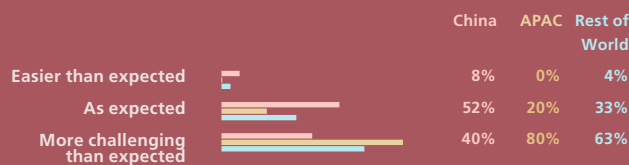
In overall terms, what was the sentiment of your organisation regarding BRI 12 months ago?



What is it now?



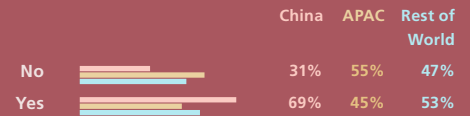
How would you rate the process of participating in BRI-related projects, based on your experience?



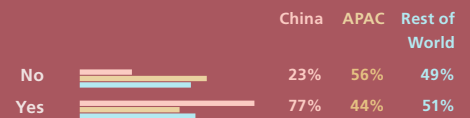
Generally, what has been your level of satisfaction in terms of the process and outcome of your involvement in BRI projects?



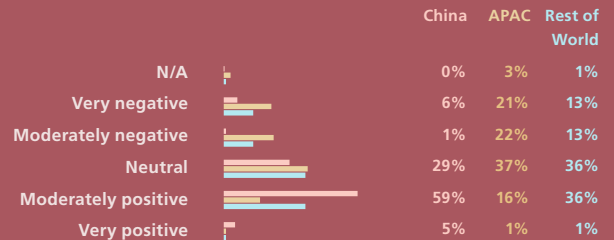
Have you participated in a partnership/JV as part of your involvement in BRI projects?



Would you consider such partnerships in the future?



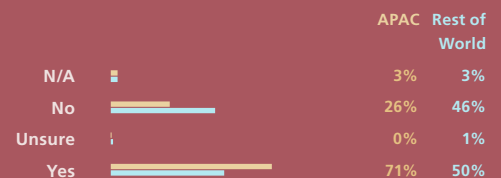
How would you rate the overall experience of working with Chinese partners/JVs?



How would you rate the overall experience of working with cross-border, non-Chinese partners/JVs?



Have you encountered any differences in working with Chinese partners/entities on BRI projects compared to non-BRI projects?



If yes, was it generally easier or more difficult to work with a Chinese partner/entity on a BRI project compared to a non-BRI project?



Process challenges and common hurdles

Four-fifths (80%) of APAC respondents have found the process of participating in BRI projects more challenging than expected, compared with 40% of Chinese respondents. So it may be unsurprising that while three-quarters (75%) of Chinese respondents have been satisfied with the process and outcomes of their involvement in BRI, only a quarter (24%) of APAC respondents feel the same.

The challenges cited by APAC respondents range from cultural differences between stakeholders to the absence of sufficient ESG considerations in construction projects. Some respondents point to a lack of collaboration between parties and failure to develop a comprehensive plan from the start to see the project through to completion.

Other respondents say that a lack of communication was behind their negative experience. Sometimes changes were made to previously agreed plans without consultation. Speaking about the experience of working with a Chinese partner, the head of strategy at a

Singaporean EPC contractor says, “The main problem for us was that we were not updated about changes in plans and the reporting structure was not functional.”

While delays sometimes result from these problems, other respondents have seen projects pushed through too quickly. “There was a rush to complete the project, which impacted the overall quality. I think BRI projects need to be handled by parties adept at project management rather than by [those] with relatively lesser experience,” says a senior executive from an energy company with operations in Asia-Pacific.



APAC participants say

44%

aim to maintain or increase their current level of involvement in BRI

56%

are unsatisfied with the process and outcome of their involvement in BRI projects

59%

now report negative sentiments towards BRI, up from 18% a year ago

Working together

A majority of international participants have encountered differences in working with Chinese entities on BRI projects and on non-BRI projects. Most of them said this involved some degree of difficulty, and half said it was much more difficult to work with their Chinese partner on a BRI project than on a non-BRI project.

Joint ventures (JVs) are well suited to many BRI projects. Strong working relationships can help to mitigate risk, share skills, encourage local acceptance and move projects forward more rapidly.

Many APAC participants, however, may be missing out on the opportunity that JVs and other partnerships have to offer, with only 45% having participated in such collaborations in BRI projects, compared with 69% of Chinese respondents.

And while some APAC participants are enthusiastic about future collaborations, such as the infrastructure operator from Pakistan who is “seeking new joint venture opportunities to strengthen operations”, large numbers are not, with 56% saying they will not consider a JV or other partnerships in future BRI projects.

APAC participants who have worked on BRI projects with partners or in JVs reported mixed outcomes. Those cooperating with Chinese partners had more negative experiences (43%) and fewer positive experiences (17%) than those working with cross-border, non-Chinese partners (12% and 31% respectively).

A majority (71%) of these APAC respondents have noticed differences between working with Chinese participants on BRI projects and working with them on non-BRI projects. Most of those who observed a difference said collaboration was more difficult on BRI projects. Lack of trust and transparency were common complaints. “Transparency within BRI framework was lacking. Chinese entities did not create an environment of trust or try to promote mutual development plans,” said one APAC CEO. “During non-BRI projects, they are open to others’ expertise and acknowledge experience in the industry.”

Other APAC respondents reported problems in communication regarding timelines, flexibility, decision-making and project strategy, like the managing director of a Singaporean bank who says that “the systematic intent that is normally practised by Chinese partners was not evident when working on BRI related projects.

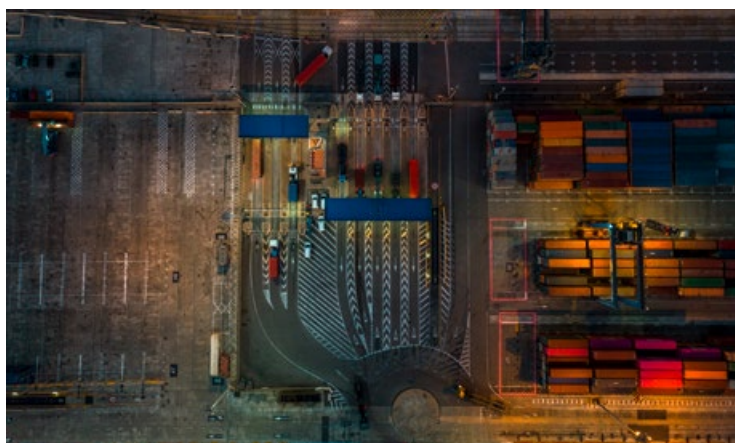
Inconsistency with decision-making led to some challenges in terms of legal disputes and prolonged battles.”

APAC respondents are not the only ones to have experienced problems when working with cross-border partners. Chinese respondents likewise mention areas where foreign partners could have made improvements, like the director of a Chinese fund who lamented a “lack of trust”, and the Hong Kong infrastructure operator who observed that “cultural issues became evident as soon as the initial talks began, and did raise some serious concerns on compatibility.”

For some, the experience is not one they wish to repeat, like the CFO of a Chinese supplier who says that “coordinating with non-Chinese companies will not be targeted, given the earlier pushbacks and challenges that have been faced with negotiations and lack of confidence in the project.”

Chinese respondents also mention the mismatch between the capabilities of their own well-resourced entities and those of their project partners.

“The experience has been challenging because some countries involved are not as developed as China when it comes to talent, resources, finances or machinery,” observed one Chinese executive. “Because of this there have been pushbacks, making the prospects more complicated than we had initially expected.”



The impact of Covid-19 on BRI

The global economy has already been significantly impacted by the Covid-19 pandemic. Inevitably, the pace and scope of BRI has also been affected, although China has been keen to emphasise that many BRI activities are continuing.

According to China's Ministry of Commerce, in the first six months of 2020:

- Chinese enterprises made non-financial direct investments of RMB 57.1bn in 54 countries along the Belt and Road. Investment hotspots were Singapore, Indonesia, Laos, Cambodia, Vietnam, Malaysia, Thailand, Kazakhstan and UAE.
- The number of newly signed contracts by Chinese enterprises in 59 countries along the Belt and Road amounted to 2,289 with a total contract value of RMB 424.02bn.

Clearly, new BRI projects are still happening. Nevertheless, there have been widespread reports of project delays and cancellations. Supply chains and travel have been disrupted, and in some cases it has not been possible for workers to continue on site. In June, Wang Xiaolong, director-general of the Ministry of Foreign Affairs' International Economic Affairs Department, said that about 20% of BRI projects have been seriously affected by the coronavirus pandemic, with another 30–40% somewhat affected and about 40% not affected.



Opinions on the impact of Covid-19 on BRI

In the light of the coronavirus pandemic and its likely economic and political impacts, do you agree or disagree with the following statements?

A greater availability of 'cheap money', through measures to stimulate the international economy, will support more international investment in BRI projects.



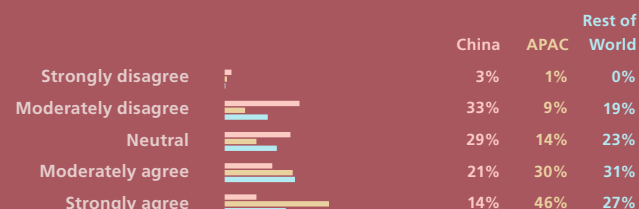
China is likely to reduce its emphasis on BRI in favour of supporting more domestic projects.



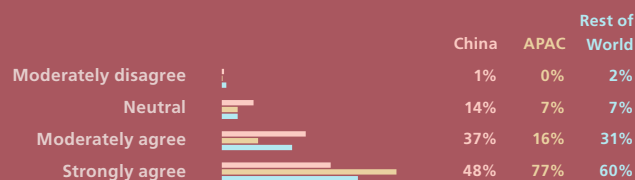
Some nations will be more open to new BRI projects, in the hope that they will provide an economic boost.



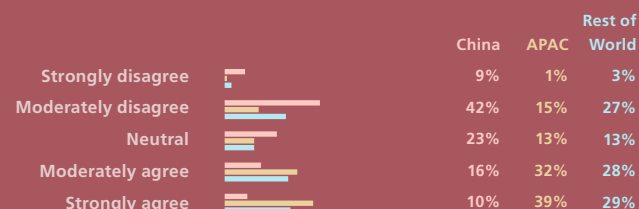
Some governments will use the economic situation as a reason to withdraw from unsuccessful or controversial BRI projects.



The coronavirus crisis will lead to a renewed emphasis on the Health Silk Road, intended to strengthen health coverage in BRI countries through Chinese cooperation and support.



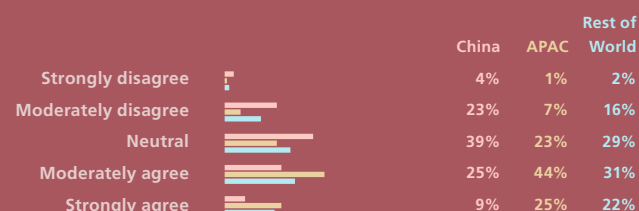
Less commercial funding will be available for BRI projects as banks and investors seek to protect and rebuild their balance sheets.



Some BRI projects will enjoy more favourable terms, as the Chinese authorities seek to create demand for the output of Chinese companies.



Some existing BRI projects will become unsustainable and will have to be restructured or abandoned.





Will some BRI projects be renegotiated or abandoned?

Over two-thirds (69%) of APAC respondents believe some BRI projects will become unsustainable and will have to be restructured or abandoned. Chinese respondents are more split, with 34% agreeing, 27% disagreeing, and the largest cohort (39%) expressing neutrality.

Similarly, while three-quarters (76%) of APAC respondents think some governments will use the economic situation as a reason to withdraw from unsuccessful or controversial BRI projects, only just over one-third (35%) of Chinese respondents agree.

The Chinese authorities have been undertaking various initiatives – such as the Debt Sustainability Framework for Participating Countries of the Belt and Road Initiative, which was published last year by the Ministry of Finance – to promote a long-term, stable, sustainable financing system for BRI countries. But not every project initiated in the earlier years of BRI would meet that standard. In 2018 the Center for Global Development concluded that “it is unlikely that BRI will be plagued with widescale debt sustainability problems. But it is also unlikely that the initiative will avoid any instances of debt problems among its participating countries.”

Covid-19 does not fundamentally change that calculation, although it may see the number of debt problems increase. Indeed, given the sheer volume of BRI projects, it seems a certainty that some will see defaults and that renegotiations will be necessary.

Whether projects will be abandoned is more difficult to assess. Many of our respondents believe some governments will take the opportunity to end controversial projects but it is not clear that China has ambitions significantly to slim down its BRI portfolio in this way if renegotiation is an alternative, particularly as renegotiation may have positive long-term results for both parties.

For example, some foreign commentators made much of Malaysia’s renegotiation of the terms of its BRI East Coast Rail Link in 2019. The line was shortened and its cost reduced. But the negotiation was in many respects a win-win deal for both China and Malaysia: it meant the project resumed after a year of inaction, and it facilitated the revival of the USD 34bn Bandar Malaysia property development in Kuala Lumpur, which had earlier been cancelled, as well as subsequent Malaysian-Chinese deals.

There were signs even before the pandemic that lending and investment by Chinese bodies was slowing, and it should be remembered that some project renegotiations and cancellations in this period may not be due to the pandemic. In February, for example, Egypt shelved what would have been the world’s second-largest coal-fired power plant, at Hamrawein, a USD 4.4bn project which was to have been undertaken by a Chinese-Egyptian consortium. The decision was reportedly motivated by concerns about overcapacity and pollution, rather than the pandemic. (Renewable alternatives to the project are apparently being considered.) It is often said that the pandemic has ‘changed everything’, but not everything that changes is doing so because of the pandemic.



While it has impeded BRI, the pandemic also has the potential to reinvigorate it. Globally, governments have arranged some of the largest stimulus packages in history to support their economies. Chinese respondents in particular believe some of this funding will reach BRI projects.

More than two-thirds (69%) of Chinese respondents expect a greater availability of 'cheap money' for such investments, a view shared by only 24% of APAC respondents. Conversely, 71% of APAC respondents believe that less commercial funding will be available for BRI projects as banks and investors seek to protect and rebuild their balance sheets – a view shared by only 26% of Chinese respondents.

This extreme divergence of opinion may reflect previous experiences of BRI financing. Chinese respondents told us that Chinese state-owned banks (56%) and Chinese state-owned investment funds (27%) had been the primary sources of financing for their BRI projects. The experience of our APAC respondents has been very different from this, with the principal sources of finance being local lenders (32%), international banks (27%) and multilateral financial institutions (19%).

It is certainly likely that commercial lenders will now tend to seek more robust protections and be more selective in the projects they finance. And even before the pandemic, Chinese lenders showed signs of becoming more rigorous in their criteria for financing projects. But most of our respondents rejected the idea, common among some commentators, that China's acceleration of its own 'new infrastructure'

projects as a response to the economic impact of Covid-19 will divert resources from foreign BRI projects. Only 19% of Chinese respondents and 17% of APAC respondents expect this to happen. A number concurred that investment in domestic projects would increase, but most did not think it would affect the flow of finance to BRI.

Furthermore, over three-quarters (78%) of Chinese respondents expect some BRI projects to enjoy more favourable terms, as the Chinese authorities seek to create demand for the output of Chinese companies.

A similarly large majority (81%) of Chinese respondents also believe that some nations will now be more open to new BRI projects, in the hope that these will provide a boost to their economies. (Only 33% of APAC respondents agree, with 40% disagreeing.) In practice this may depend on the project in question. Some, such as renewable energy projects or digital initiatives, could provide a relatively immediate boost. Many benefits from larger and more traditional infrastructure projects will take much longer to come through. There is also the consideration that some countries may seek Chinese involvement if other sources of support for their Sustainable Development Goals are reduced by the economic consequences of the pandemic, or if the demands placed on traditional donors outstrip their ability to respond.

One thing on which APAC (93%) and Chinese (85%) respondents agree is that the pandemic will lead to a renewed emphasis on the Health Silk Road (see page 39).

Interview: Jennifer Tay, PwC

Chinese SOEs are willing to work towards a more collaborative type of partnership with international business.



Jennifer Tay
Partner, PwC Singapore

What's your role at PwC and what's your background in BRI?

I'm a partner with PwC based in Singapore and I head up the infrastructure team in Myanmar. I am co-leading a team which is focused on BRI in South-East Asia. We act as a commercial and financial advisor to large Chinese state-owned enterprises (SOEs). We provide financial and commercial advisory to those projects. We also work for international clients.

I would say the mix was about 60% Chinese and the other 40% would be a mixture of international investors and local governments when they're receiving investments from China.

What are the sentiments towards BRI among your clients?

I think we are seeing two interesting trends. First, Chinese enterprises try to steer clear of labelling their project as being Belt and Road. People can clearly see that it is a Chinese investment, which the Chinese have been doing since 2010 and before that. But it was only after maybe 2013 that people start labelling them BRI projects. I see an increasing trend for Chinese SOEs not to mention too much about Belt and Road.

On the international investor side, I think there is still a lot of interest in working with Chinese investors, whether it's Belt and Road or not.

In terms of mood, Chinese players will naturally be more upbeat about Belt and Road because they will get a lot of Chinese government support either from the policy side or from the government itself in terms of a softer type of diplomatic support.

Foreign investors are probably still cautious about the ability of the Chinese investors in terms of bringing the project to fruition.

Which sectors do you think will provide the biggest opportunities?

Sustainability is a driver and Chinese investors are focusing on renewable projects as well, and not just on traditional gas-fired power plant projects. Healthcare would be another sector with strong growth potential – whether it's healthcare infrastructure or healthcare technology – those will be big areas where you'll see a lot of BRI investments.

There is a lot of hype about so-called new infrastructure in China, and that really means the application of technology to traditional infrastructure or the investment into more digital infrastructure. This trend has been accelerated by Covid-19 where we see that technology is becoming increasingly more important in our day-to-day life.

What effects has Covid-19 had on Belt and Road projects?

We need to split the timeline in two. When China went into a lockdown, the recipient countries tried to move projects ahead, but their supply chain was disrupted, and therefore projects were put on hold. Projects in the midst of construction were unable to continue because there was a lack of material.

When China came out of the lockdown and the rest of the world went in, then we saw slightly different dynamics. Chinese investors were very eager to come back to South-East Asia and the rest of the world to continue with their projects. They then realised that even coming back to Vietnam, Thailand or Singapore, there's very little they could do.

The supply chains by then had woken up in terms of coming in from China, but the construction sites across the rest of Asia were shutting down.



In recent projects, I have seen that the Chinese players were even happy to take a minority stake, and let the international business take the lead.

These were the practicalities. If you look at the sentiment in terms of investing in BRI projects in the region during the pandemic, I have not actually seen a big slowdown in terms of Chinese interest in the region.

When you look at BRI 2.0, how do you think this will affect deals and the involvement of international businesses?

Belt and Road 2.0 will emphasise greater transparency, governance and the involvement of international business. It's actually a good signal that the Chinese government are giving to international businesses that they do want to form partnerships beyond domestic companies.

The last couple of transactions that I have been advising on have been large Chinese SOEs working with regional players or local players more. Around five years ago, you would see that the regional or local players were taking very small minority stakes rather than undertaking a genuine partnership.

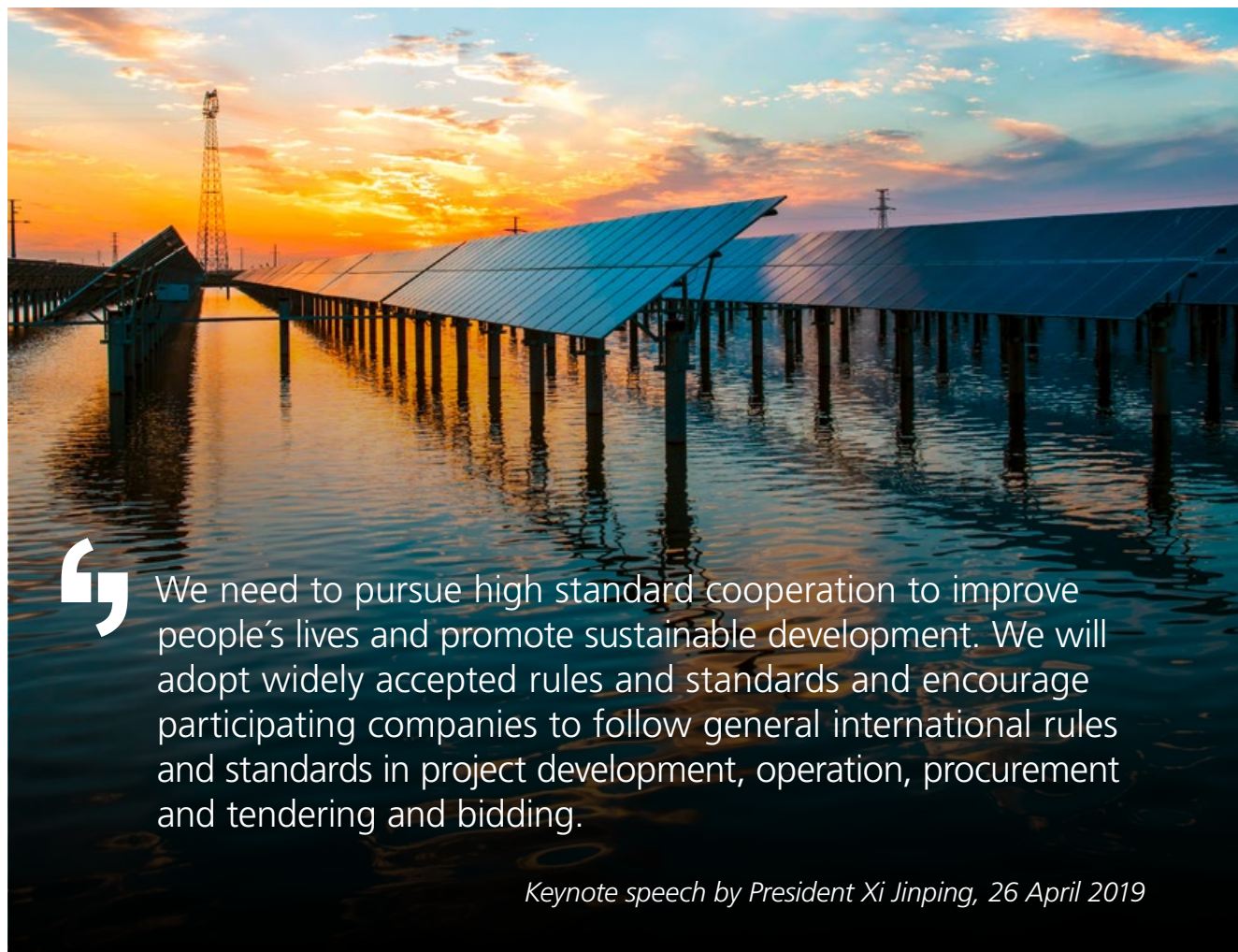
In recent projects, I have seen that the Chinese players were even happy to take a minority stake, and let the international business take the lead.

It shows that the Chinese SOEs have been listening to international businesses in terms of partners and are willing to work towards a more collaborative type of partnership with international business.

What are the long-term prospects for BRI?

BRI should strive to become a more global or international initiative rather than a Chinese initiative. And that's how I think they will garner more international support for their projects.

In the long run, you will see that there will be projects in which the Chinese takes the majority role, but there will also be projects where international business or local partners take a majority role with the Chinese providing support. I think the whole Belt and Road concept is evolving, and I think it will become more of a global initiative.



“ We need to pursue high standard cooperation to improve people’s lives and promote sustainable development. We will adopt widely accepted rules and standards and encourage participating companies to follow general international rules and standards in project development, operation, procurement and tendering and bidding.

Keynote speech by President Xi Jinping, 26 April 2019

Belt and Road 2.0: Looking to the future

Key points

- » Launched last year, BRI 2.0 addresses many of the points that concern international participants.
- » Chinese participants are enthusiastic about e.g. its increased emphasis on environmental and sustainability issues.
- » Many international participants are not yet positioning themselves to take advantage of the opportunities it offers, with some clearly sceptical about the change it promises.
- » The pandemic is expected to boost the Health Silk Road initiative. There are also significant opportunities for BRI participants along the Digital Silk Road.

A new phase of BRI was announced in April 2019 by President Xi Jinping at the second Belt and Road Forum for International Cooperation in Beijing. It was described as 'BRI 2.0' by another speaker at the forum, Christine Lagarde, who at the time was managing director of the International Monetary Fund, and that name is now widely used to refer to it.

President Xi spoke of

- Being guided by the principle of extensive consultation, joint contribution and shared benefits.
- Acting in the spirit of multilateralism, and pursuing cooperation through consultation.
- Pursuing open, green and clean cooperation.
- Making a strong commitment to transparency and clean governance.
- Pursuing a high standard of cooperation to improve people's lives and promote sustainable development.
- Adopting widely accepted rules and standards and encouraging participating companies to follow general international rules and standards in project development, operation, procurement and tendering and bidding.
- Respecting the laws and regulations of participating countries.
- Giving priority to poverty alleviation and job creation so that cooperation benefits the people of participating countries and contributes to their social and economic development.
- Ensuring the commercial and fiscal sustainability of all projects.

President Xi also described reform and opening-up measures that would

- Expand market access for foreign investment in more areas.
- Intensify efforts to enhance international cooperation in intellectual property protection.
- Increase the import of goods and services.

- More effectively engage in international macroeconomic policy coordination.
- Ensure the implementation of related policies, including multilateral and bilateral economic and trade agreements, and the revision and improvement of laws and regulations.

Commentators who saw this only as a response to foreign criticisms of BRI, or a portfolio of policies to align BRI more thoroughly with broader development practice, overlooked President Xi's emphasis on international cooperation and joint contributions. Indeed, some of our respondents feel that a limited response and limited enthusiasm from governments and businesses outside China is preventing BRI from achieving its potential. A key driver behind BRI 2.0 is a wish to ensure more non-Chinese participation in BRI: to spread risk, to share knowledge, to raise the quality of BRI projects and related standards, to secure international trade, and to enable the initiative to move forward more rapidly.

A majority of both Chinese and non-Chinese respondents believe BRI 2.0 will be more open to non-Chinese participants. However, it is clear that many of those non-Chinese participants are yet to be convinced of its potential.

For example, while 86% of Chinese respondents think it means BRI will become more transparent, only 15% of APAC respondents agree. Similarly, only 15% of APAC respondents believe dispute resolution will become easier, compared with 70% of Chinese respondents. And even fewer APAC respondents – only 13% – expect procurement processes to be more open and competitive, compared with 76% of Chinese respondents.

This pessimistic view of BRI 2.0 may be unjustified. As Jennifer Tay notes on page 15, Chinese BRI participants are increasingly prepared to take minority stakes in projects, and to work more closely with regional and international players. In her words, they are "willing to work towards a more collaborative type of partnership with international business."

APAC participants say

50%

believe that BRI 2.0 will be more open to non-Chinese participants, with only 11% disagreeing

15%

think BRI 2.0 will be more transparent

67%

say it is important that their BRI projects be sustainable/eco-friendly

93%

agree that the Covid-19 crisis will lead to a renewed emphasis on the Health Silk Road

Greener and cleaner?

BRI’s scope – in the number and size of projects, as well as its decades-long duration – means it will have a profound environmental impact.

BRI 2.0’s greener focus coincides with a broader investment trend, whereby institutional investors are reallocating capital away from companies and projects with poor ESG credentials in favour of businesses that are prioritising their impact on the environment.

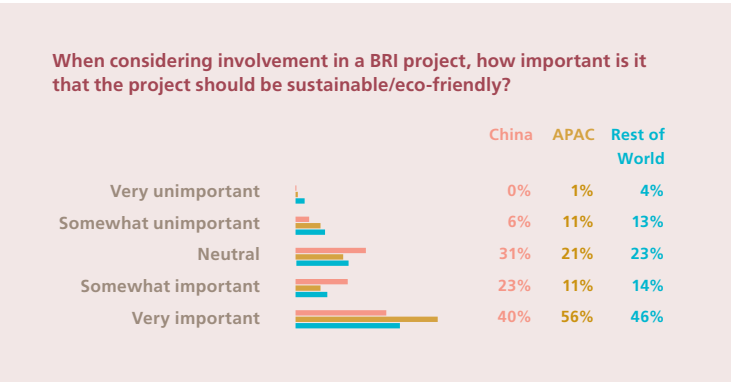
Two-thirds (67%) of APAC participants say it is important for BRI projects to be sustainable and eco-friendly. Indeed, some said improvements to sustainability would make them more willing to participate.

However, recognising that the initiative would benefit from becoming more sustainable and believing that it will are two different things. Our findings show that Chinese respondents are significantly more optimistic about BRI 2.0 delivering on its intentions, with 84% believing that sustainability and environmental considerations will be given greater importance when planning and completing projects. Only 27% of APAC respondents agree.

There are indications that our APAC respondents are underestimating the commitment of their Chinese counterparts to sustainability. As we note on page 20, Chinese BRI participants are increasingly aware that sustainable projects tend to lead to fewer disputes. And as Seth Tan says on page 22, China already has real strength in areas such as renewables, which may be easier to progress in the aftermath of Covid-19.

Furthermore, we are seeing Chinese financial institutions increase their focus on sustainable finance. A number of projects that cannot show financial viability or sustainability have recently been refused loans from policy banks.

As an official report from the Office of the Leading Group for Promoting the Belt and Road Initiative noted last year, “the Belt and Road Initiative is in urgent need of finance” – meaning finance from non-Chinese sources. And China understands that, to attract such finance, projects will have to embrace principles such as sustainability where these are required by international banks and other sources of funding.



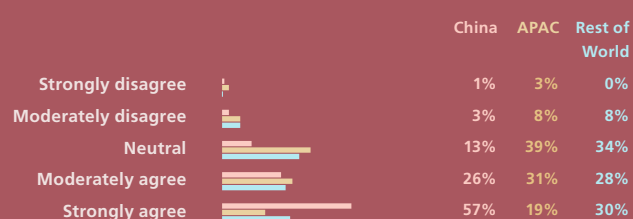
Opinions of BRI 2.0

Do you agree or disagree with the following statements about BRI 2.0 and future BRI projects?

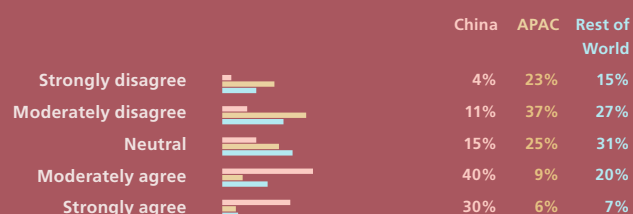
BRI will be more transparent than in the past.



In general, BRI will be more open to non-Chinese participants.



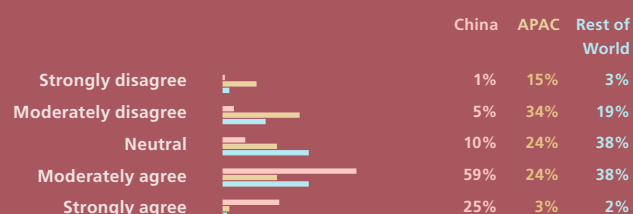
Dispute resolution (including cross-border disputes) will become easier.



Procurement processes will be more open and competitive.



Sustainability and environmental considerations will be given greater importance when planning and completing projects.





Environmental, social and corporate governance issues

About two-thirds of both Chinese (63%) and APAC (67%) participants believe it is important that their BRI projects should be sustainable and environmentally friendly.

Sustainability and environmental, social and corporate governance (ESG) issues are important parts of BRI 2.0. But they have not always featured in past projects, and they are still far from uniform across BRI.

This has been a problem for some non-Chinese participants, such as the Australian investment director who found that “requests for use of more environment-friendly materials have been ignored by Chinese entities” and the Japanese banker who found “a lot of pushback on our suggestions” of a greener approach. (The lesson they drew from this was that “in future projects, we will need to discuss these considerations earlier on instead of waiting for mutual cooperation during the later stages of projects.”)

A number of respondents observed that ignoring ESG issues could create dispute risks, like the Australian infrastructure operator, who said “social problems were not addressed soon enough, which led to disputes between employees and locals.” A number of those interviewed in our survey had been involved in disputes where projects had fallen foul of local environmental rules.

Increasingly, Chinese participants in BRI also see this as a problem, like the investment director of a Chinese bank who said disputes “emerging from non-compliance with environmental regulations” had been “a recurring issue” with projects, and the Chinese professional services provider who experienced multiple environmental disputes and thought that “many Chinese agencies and investment firms have been facing the same issues during overseas investments.”

Overall, Chinese participants are more positive about incorporating ESG principles more widely into their activity. As one Chinese infrastructure operator put it: “Sustainable use of resources and more clarity in supply chain management are required, and these are things that we will primarily consider.” And this will mean more international cooperation – in the words of a Chinese professional services provider: “Involvement by global players in green initiatives and development projects will be useful. We are already enthusiastic about seeing the next phase of existing plans, so hopefully we will see some positives in the near future.”

The shift to digital

While much traditional infrastructure will remain central to BRI 2.0, digital technology will become an increasingly important focus area. Since it emerged as a concept in 2015, the Digital Silk Road (DSR) has not seen as much investment as many other aspects of BRI. But with the new priorities of BRI 2.0 and the worldwide boost given to new technologies by the pandemic, it looks set to achieve much greater prominence over the next decade.

Some DSR projects are traditional BRI-style infrastructure, such as submarine communication cables and mobile phone networks in remote regions. In some cases they are intended to improve connectivity between other BRI projects. But there is an increasing sense that DSR can potentially cover all types of digital development along the Belt and Road, including fintech, artificial intelligence, the Internet of Things, smart cities and digital healthcare.

Many projects so far have been focused on meeting local development goals, but others are commercial ventures that reflect the worldwide advance of the digital economy, enabling China's tech businesses – including e-commerce giants, social media networks and fintech providers – to access new markets. DSR also creates demand for telecoms equipment, smart sensors, data centres etc.

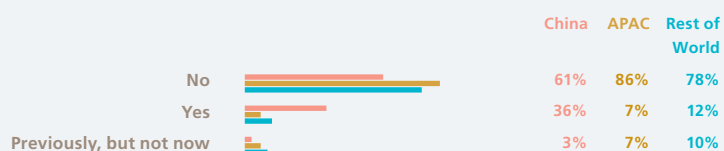
Nevertheless, most of our respondents are not considering DSR projects. Only 7% of APAC respondents are doing so, with another 7% having considered them

in the past. Chinese respondents are more optimistic, with 36% currently considering DSR projects.

Some respondents are keen to be involved in DSR projects, but are wary of potential problems, such as rapidly evolving technical standards, and local sentiments about cybersecurity.

A bigger concern for many is geopolitical tension. The US has recently been pushing back against aspects of the Digital Silk Road, notably with its Clean Network Program, which aims to restrict or eliminate Chinese involvement in, for example, telecoms networks and undersea cables that connect to US networks, and cloud systems and apps that handle US data. This may limit the scope of DSR in certain markets. But with many BRI countries still very much in need of tech and comms infrastructure, which will in many cases bring significant social and economic benefits, there will clearly still be significant opportunities for BRI participants along the Digital Silk Road.

Are you currently considering or searching for investments/projects related to the Digital Silk Road?



Interview: Seth Tan, Infrastructure Asia

In the aftermath of Covid, most countries will need to reboot. And one way to reboot is to focus on infrastructure development.



Seth Tan
Executive Director,
Infrastructure Asia

What is your role with Infrastructure Asia and how does that pertain to BRI?

Infrastructure Asia is part of the Singapore government and it was set up specifically to help facilitate the Singapore-based private sector players to be more relevant in regional infrastructure opportunities. And some of those overlap with the focus countries of BRI.

What specific projects are you looking to support?

First, we are always looking to work with good collaborators because we want to help enable better solutions coming into South-East Asia. There are many good-quality infrastructure players coming up from China and other countries.

Second, we want to make sure that the Singapore-based ecosystem can play a part. Chinese players are now looking for international collaborators or what we call third country collaboration. I think that an openness to work with relevant Singapore-based players is vital.

The third criterion is bringing a value add into individual situations. This is particularly true of the marginally bankable projects where we can work with stakeholders to help make them more bankable or more attractive to international clients.

What do you think is the sentiment towards BRI at the moment?

China is such a big country, and there are good construction companies and average construction companies. Sometimes, there are negative examples, and these are showcased. But having said that, there are excellent Chinese

companies that are still looking to do more in the BRI space.

In addition, infrastructure is a very competitive area. And given the competitive landscape, a lot of companies realise they do also need to give back. Hence, they need to also become long-term players and to make sure that infrastructure projects function.

With good quality Chinese companies, there will always be collaborators, people or countries looking for their support.

How do you think BRI 2.0 is going to change the outlook on the initiative and how do you think it will affect the involvement of international businesses?

BRI is trying to make a more connected world, particularly for the delivery of goods and to facilitate more trade. The basic idea is that if someone devotes time and effort to build connectivity, there will be more growth. I feel that one keyword with BRI 2.0 is quality.

There are some areas in which China is excellent, such as renewables. And if they can bring this to the other parts of the BRI space, that would be very interesting.

The other keyword is transparency. I think this is where country collaboration could help, with not so much falling on the Chinese team. Many countries now have decided that country collaboration makes a lot of sense, because your collaborator could be more familiar with the country.

And that transparency could help bring about better projects into the BRI space.



As a result of Covid-19, anything related to public health or environmental health will be valued more. And I believe the same is true of digitalisation.

How do you see the development of digitalisation in infrastructure? What is the future of the Digital Silk Road?

As a result of Covid-19, anything related to public health or environmental health will be valued more. And I believe the same is true of digitalisation.

We need to digitise many parts of the logistics and supply chain. If the essence of BRI is to try to connect better and facilitate the movement of essential goods and enhance growth, digitalisation is of paramount importance.

What types of projects do you think have the most opportunities?

In the aftermath of Covid, most countries will need to reboot. And one way to reboot is to focus on infrastructure development. So this is where I think infrastructure development can come into play to help with economic recovery, particularly in areas of renewables, logistics, supply chain and digitalisation.

Of these, renewables seem to have the highest chance of getting deployed in the next 12 to 18

months, because you can prepare a lot, particularly for solar. You still have to do the groundwork, but less than on a long road project, for example. And certainly, the supply chain and construction are less complex.

What will be the effect of the Covid-19 pandemic on BRI and on the pipeline of projects?

Public health infrastructure is the most immediate need. I think Covid-19 will drive broader public health infrastructure including environmental public health, water, sanitation and waste.

And we see that governments are trying to push forward with this type of infrastructure. Of course, this will require a few more steps compared to renewables, with greater supply chain consideration, preparation and construction.

How do you feel about the overall future for BRI?

There are so many studies that show that it is beneficial to have a BRI project that helps to connect the regions better so as to facilitate free movement of goods and economic growth.

I think that premise alone makes this an important initiative. And I think that the question of how it will be successful depends on both the demand and the supply side – because on the demand side, I think countries have to prepare well so that they know what projects are for them and what projects will benefit them.

Also, I think countries that are on the demand side need to come up with mechanisms to help them review the project at every stage. To look at the plans, at how they were implemented; whether the project came out as it was proposed. They can't take a passive back-seat approach. I think on the supply side, there's more and more recognition, particularly with this mention of BRI 2.0, of quality and transparency.

I think on the supply side, if we see quality Chinese companies that are open-minded about working with international collaborators, and if they both consciously focus on bringing quality, that would help with a better future. The future cannot be assumed. It is in the hands of both the demand side and the supply side.



Overcoming obstacles

Key points

- » Legal and regulatory issues top the list of BRI risks for both Chinese and APAC participants.
- » Such risks can be managed through a mitigation plan, with appropriate risk identification, management and mitigation measures.
- » A good mitigation plan will include an appropriate strategy for managing disputes, as well as realistic enforcement options.
- » BRI participants have additional means to help projects run smoothly and reduce risk, beyond formal mitigation strategies.

APAC participants say

63%

view legal frameworks as one of the biggest obstacles to their BRI activity

73%

put legal and regulatory issues among their top-three risks

Key legal considerations for different players in BRI projects

A majority (63%) of APAC respondents included legal frameworks among the top three obstacles they had experienced to BRI activity. And nearly three-quarters (73%) also say legal and regulatory issues constitute one of their biggest risks – far ahead of the 41% who named project stability, the second most commonly cited risk.

Parties to a BRI project often come from a number of countries, and may have differing expectations of the operation (and interpretation) of local laws and regulations. This may be compounded by variable legal protection in countries where legal regimes are underdeveloped or corruption is present.

Risks surrounding compliance issues such as bribery and corruption also pose a challenge to international participants.

Notwithstanding the challenges posed, participants can manage such risks through an effective risk mitigation plan with appropriate risk identification, management and mitigation measures, some of which include:

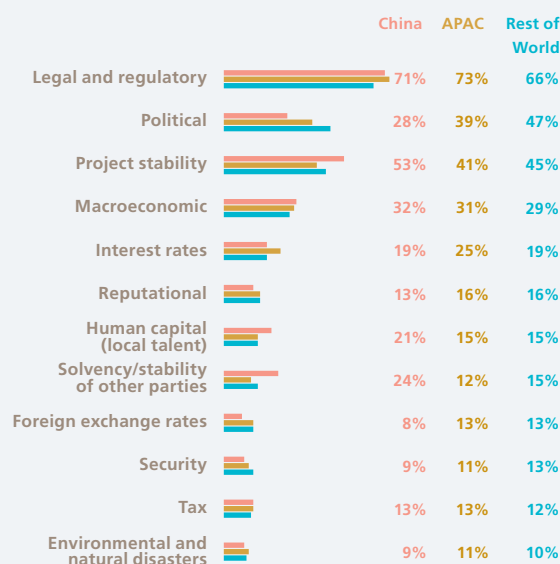
- Conducting robust due diligence on local partners, including their track records on projects, creditworthiness, corporate structures and ownerships, key individuals, compliance with laws, litigation records, connections with local authorities etc.
- Careful negotiation and drafting of contracts to include adequate risk management and allocation provisions, which are supported by clear liability language.
- Effective contract management and compliance with contractual obligations, ensuring that the commercial and project teams are familiar with the relevant contracts.
- Being alive to areas where the risk of corruption is present, such as excessive commissions to third-party agents or consultants, vague consulting agreements, and any close relationships between third-party agents and foreign officials.
- Avoiding shortcuts around compliance requirements, such as engaging a third party to manage government approvals without adequate due diligence or controls.
- Selecting well established and neutral dispute resolution forums. For more on dispute resolution, see the section beginning on page 31.

Appropriate local advisors, familiar with the regulatory environment and relevant authorities, can be invaluable in due diligence, risk analysis and risk management.

Which of the following have presented the greatest obstacles to your BRI-related activity? (Select top three)



Which of the following represent the most serious risks as they relate generally to involvement in BRI projects? (Select top three)





Some key risks

Contractors

In the light of the ongoing Covid-19 pandemic, the health and safety of those involved in BRI projects is of paramount importance. This includes both workers on site and people in the communities where projects are underway. Disruptions in the supply of goods and workers have caused severe delays to some projects, and ensuring that robust contingency plans are in place has become essential.

Additionally, compliance with environmental and workplace laws may require contractors to engage with the relevant unions and local communities. Seeking local legal advice and professional guidance is important to mitigate these risks.

Investors

For investors, the baseline consideration has always been the proper identification and mitigation of risk. BRI countries have a wide range of legal and economic systems, and in some there is significant investment risk in the form of change in law or government, land acquisition risk and currency and inflation risk. Other categories of risk include foreign investment restrictions, corruption and bribery, and dispute resolution (and enforcement) certainty.

Investors are often keen to allocate these risks away or to employ measures to mitigate sufficiently against them.

Lenders

Macroeconomic concerns present a key threat to BRI investments and may be even more unpredictable than political issues.

BRI projects with currency discrepancies in revenue and financing streams could be adversely affected by currency volatility and resulting depreciations which lenders will need to consider.

Encouraging local currency financing is usually the preferred mode of financing, though this is not always available in BRI markets.

Operational issues

Operational difficulties are another major challenge, and 59% of APAC participants say such issues are one of their top three obstacles. Again, there are various risk mitigation strategies. But there are also things that all BRI participants can do to help projects run smoothly and reduce risk, even if they are not part of a formal mitigation strategy.

Some are as simple as having clear objectives, and being flexible when considering the structures you can adopt to protect your interests in BRI projects and partnerships.

Finding and cooperating with partners

Positive cooperation – either generally or through structures such as joint ventures – can help to mitigate risk, share skills, encourage local acceptance, avoid local legal difficulties and move projects forward more rapidly.

Finding reliable partners can be challenging, and if not done well can bring its own risks. Businesses need a range of knowledge about their partners, ranging from their financial strength to their technical capacity. Both these priorities inevitably involve a degree of transparency and information-sharing.

To form effective partnerships, organisations also need to understand where conflicts could arise, and ensure there are effective mechanisms for dealing with them. These include dispute resolution mechanisms, but also processes that can help to avoid conflicts, or to resolve them before they become serious disputes.

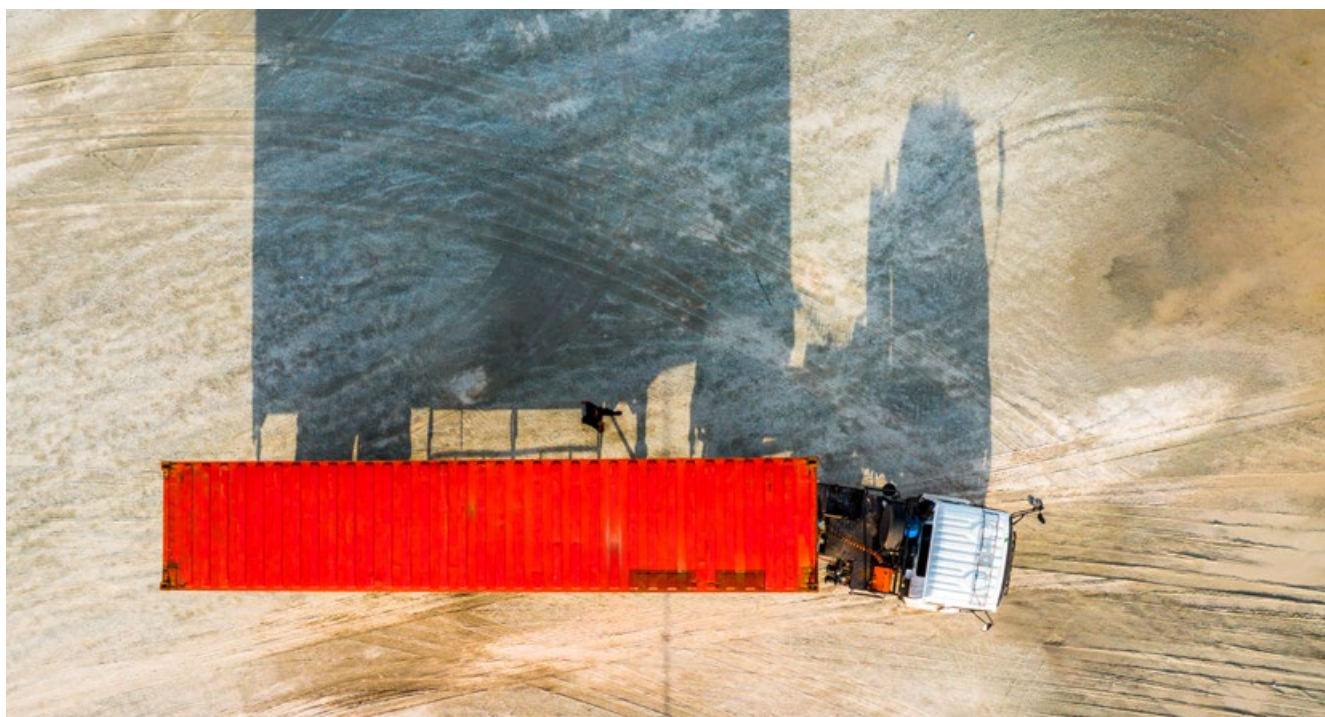
Flexible structures and partnerships are likely to be more effective in dealing with problems. But these should not be confused with ill-defined structures. Clarity about the nature and degree of flexibility available provides certainty for all parties.

It is also important to consider potential cultural conflicts or misunderstandings. Some respondents see this as a stand-alone problem to be addressed with

APAC participants say

59%

view operational difficulties as one of the greatest obstacles to their BRI activity



training from their HR department, but there are those who view it as a potential opportunity, such as the Chinese supplier who noted that in dealing with different BRI countries “we have learnt many new things and business concepts that will be useful in future projects.”

Not all BRI participants are enthusiastic about partnerships, like the CIO from Hong Kong who told us that “during these tough times, we prefer to work independently” and the Chinese professional services provider who said “partnerships will be avoided for the most part because we prefer control on decision-making.” But for every comment like that, we gathered many more positive ones, such as this from an Australian bank: “We have participated in several partnerships in the past because we believe that establishing our presence with the help of local partners creates more scope and acceptability for proposals. Regulatory and legal hindrances are minimised because of their experience.”

Comprehensive due diligence

Any project requires due diligence, and the more high-risk the project, or the

market, the more wide-ranging and thorough it should be. Yet in some cases due diligence is cursory, or is undermined by participants making faulty assumptions based on limited experience.

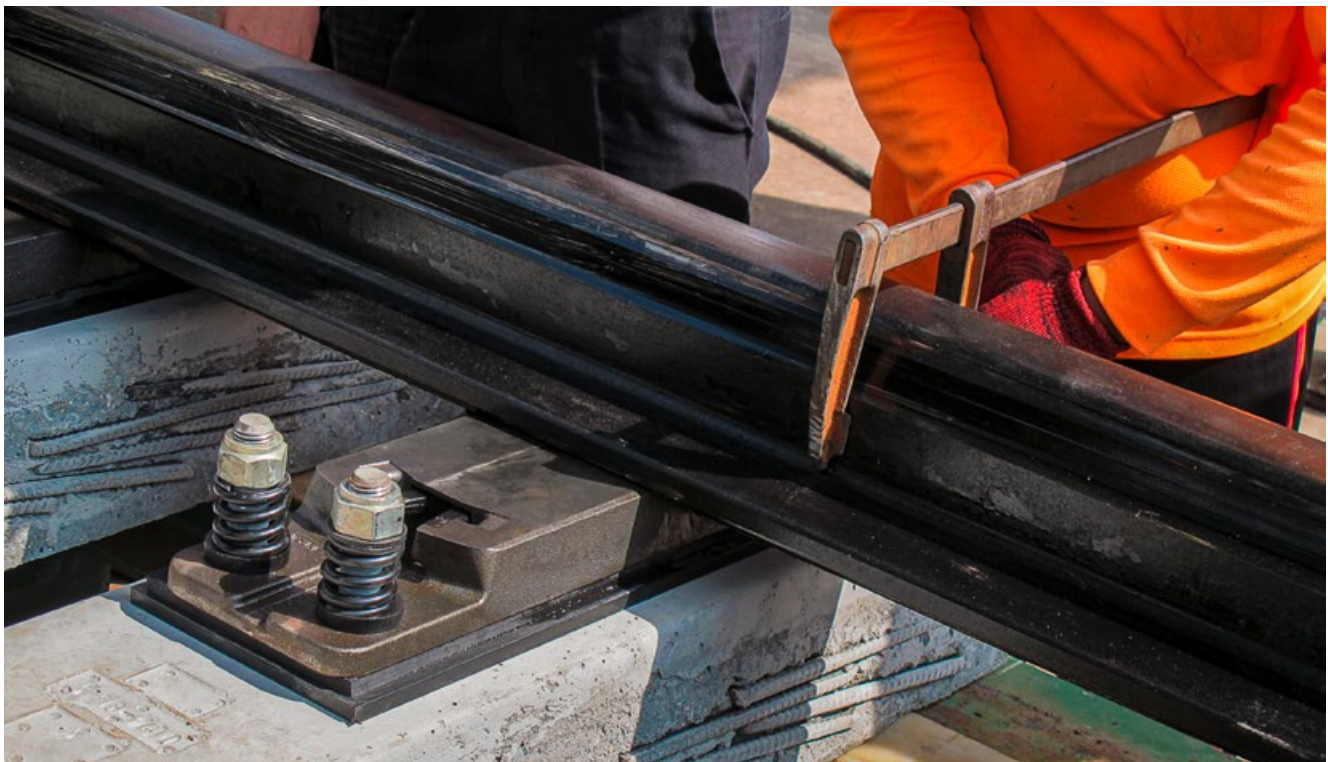
Due diligence should also aim for more than a ‘stop/go’ conclusion. It is a way of understanding the risks you are taking on, enabling the early identification of potential problems and, crucially, facilitating an appropriate risk management strategy. If it is treated simply as a way of identifying risks, rather than understanding them, it will not fulfil its commercial potential.

Effective due diligence and risk management are essentially collaborative. Identifying risks at the earliest possible stage, especially where local or specialist knowledge is needed, will probably involve expertise not only from within but also from beyond the organisation. Participants in a project will also benefit from working together, wherever possible, in risk management. Combined efforts are likely to reduce the risk profile of their project in a way that uncoordinated individual risk management strategies will not.

Using technology

Some respondents are addressing operational challenges through the use of technology to improve communication and to ensure projects run more smoothly, like the investment director of a Chinese investment firm, who says: “Adding new technological capabilities helped in communication and coordination among multiple parties and added more confidence to various critical processes. This helped to mitigate operational challenges.”

Many of our respondents highlighted the importance of technology for their BRI participation. For some it is a way to improve planning and project management, while others feel that, during the pandemic, remote access to projects and data has become critical. Some contractors hope that mechanisation and automation will reduce the number of people needed to work on projects, which is an issue where freedom of movement is restricted to control infection. And some plan to use technology to monitor the health of workers, particularly in remote projects.





MoUs, MITs and BITs

According to official sources, by the end of January 2020 China had signed 200 BRI cooperation documents with 138 countries and 30 international organisations. These documents include cooperation agreements, 'intergovernmental documents', memoranda of understanding on various aspects of BRI, 'joint statements' on various initiatives, and documents relating to particular projects.

Though differing in legal implication from country to country, a memorandum of understanding (MoU) will generally be aimed at increasing cooperation within the BRI framework and substantiating the legitimacy of the initiative. An MoU's basic structure generally covers five key cooperation priorities:

- policy coordination;
- facilities connectivity;
- unimpeded trade;
- financial integration; and
- people-to-people bonds.

Regardless of whether MoUs are strictly legally binding, they arguably influence and guide the way China engages with these countries and organisations.

China has also signed a number of BRI-related bilateral investment treaties (BITs) and multilateral investment treaties (MITs). These are international law instruments agreed between two states (BITs), or between more than two states (MITs).

Unlike other trade or investment treaties, the BRI is an informal network of states participating in development initiatives under non-binding agreements. Therefore, while China may have previously existing BITs and MITs with some BRI participants, there is no BRI-specific investment treaty.

That said, investors should familiarise themselves with BITs and MITs between China and the BRI country where an investment is being made. This is because BITs and MITs frequently contain certain guaranteed protections in respect of investments (which are defined under the relevant BITs and MITs). Some common forms of guaranteed protections include:

- compensation for expropriation or nationalisation of an investor's assets by a state;
- fair and equitable treatment, which creates an obligation to provide a stable and predictable investment environment, and to act transparently and consistently;
- full protection and security, which provides a positive obligation to protect investment by the exercise of reasonable care;
- protection against discriminatory measures: e.g. taxes, fines, penalties, licences, permits, visa restrictions; and
- 'umbrella clauses', i.e. clauses which may be incorporated into contracts entered into between a host state and investors as BIT obligations.

Insurance for BRI projects

A key element of any risk management strategy is the consideration of appropriate insurance cover. This is not always easy in a BRI context.



Kelvin Aw
Partner, Infrastructure
and Construction,
CMS Singapore



Lynette Chew
Partner, Infrastructure
and Construction,
CMS Singapore

In some respects BRI projects are similar to other infrastructure projects in their insurance needs, with each stage of a project requiring different categories of coverage, as well as a likely requirement for specialist insurance products, depending on the nature of the project. But BRI can also raise specific insurance issues.

In some BRI countries, for example, local insurance markets are not well developed, and have limited experience in covering major projects. Some nations present heightened political risk (and risk to people), and a number are significantly exposed to natural risks, ranging from earthquakes to floods – and, increasingly, exposed to climate change events.

The latest insurance issue to affect BRI is, of course, Covid-19. The limited healthcare coverage in many BRI countries, and their vulnerability to economic, social and political shocks resulting from the pandemic, will be issues to which insurers are paying very close attention – as will, for example, the impact of Covid-19 on travel and supply chains. Insurers are likely to be paying out for project delays, and parties may find it harder to source cover for some new projects that meets their risk management needs at an acceptable cost.

There have recently been calls for insurers to provide more integrated products to cover the lifecycle of a BRI project, capable of addressing both local and wider BRI needs, and to provide solutions that, for example, can combine the various specialist project-related covered cover that may be needed along the Belt and Road. There is demand for insurance products that can satisfy both the expectations of Chinese participants and the needs of international companies for coverage that will dovetail with their global insurance strategies.

Specific initiatives

Chinese insurers have provided insurance coverage to BRI projects since the initiative's earliest days. But some specific insurance initiatives have also been launched around BRI, some addressing the sort of demand mentioned above. For example:

- In July 2020, 11 reinsurance companies and insurers formed the China Belt and Road Reinsurance Pool (CBRRP) to support insurers covering BRI projects. The pool has various aims, including leveraging institutionalised arrangements and commercialised models to focus on special risk areas where overseas

risk management is urgently needed but domestic technology is relatively weak. Members have described its long-term goal as being to “provide more comprehensive and stable risk protections” for BRI projects and to “become an important supporting force of the BRI risk protection system.”

- A key member of CBRRP is China Re, the largest reinsurer in China and Asia, which has built a global service network to serve BRI projects, establishing BRI partnerships with many overseas insurance institutions which can provide local service channels for China's interests around the world. In 2019, China Re also launched the first domestic political violence insurance for Chinese businesses involved in BRI construction projects.
- The Monetary Authority of Singapore co-created the BRI Insurance Consortium with the industry to provide top-up capacity and specialised insurance coverage for BRI projects in APAC, bringing together Singapore-based insurers, reinsurers and brokers to contribute insurance capacity and provide risk management services.
- Hong Kong's Insurance Authority has a platform called the Belt and Road Insurance Exchange Facilitation (BRIEF) that helps domestic and foreign insurers gain access to BRI and provide insurance coverage for risks such as terrorism.
- Starr Companies is working with China's PICC Health Insurance Co. Ltd. to provide insurance for Chinese company employees working overseas in BRI countries.



Dispute resolution

One in five (21%) of our Chinese respondents have been involved in a BRI project that has generated disputes. The proportion rises to 34% for respondents from outside the region and to 45% for APAC respondents – numbers that show concerns about legal and regulatory risk are well founded.

The failure of parties to meet contractual obligations was commonly cited as a problem by our respondents, as were land-use and environmental issues. Such risks can be mitigated – for example, project partners should understand their responsibilities under local environmental laws before projects get underway, as well as the need for ongoing measurement of a project's impact – but some element of risk will always remain, making an appropriate strategy for managing disputes essential.

BRI participants should put their dispute resolution strategies in place before a project starts. Having a good contract – with a robust arbitration clause – is of course advisable. But it is just as important to consider enforcement, and whether contractual obligations are enforceable in the jurisdiction where the project will be carried out.

In this section, lawyers from CMS and TianTong give an overview of some of the options that BRI participants can consider when developing those strategies.

Have you been involved in a BRI project that generated legal disputes?



International arbitration and BRI

What is the best way to resolve disputes concerning BRI projects? One option is to rely on established mechanisms. The most prominent of these is international arbitration: either commercial arbitration based on the agreement between two commercial parties, or investor-state arbitration based on an investment treaty concluded between sovereign actors.



Dr. Nicolas Wiegand
Managing Partner
CMS Hong Kong



Dr Tom Pröstler
Counsel
CMS Hong Kong

Some commentators have noted that traditional international arbitrations tend to be influenced by western common law concepts and procedures, and suggest that new dispute resolution mechanisms should be created in the framework of BRI, which better fit with Asian and Chinese traditions. In fact, several dispute resolution forums and initiatives aimed at BRI-related disputes have been established by both international institutions and the Chinese government. On page 34 David Gu of TianTong discusses one of these – the China International Commercial Court – in more detail.

Generally, the same legal instruments exist to protect BRI projects as exist for any other foreign investment project. Next to a properly drafted contract, including well considered choice of law and dispute resolution clauses, international investment law can serve as an important safeguard. With a few exceptions (such as Ethiopia, Yemen and Turkmenistan), BRI states are signatories of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which obliges them to enforce international arbitral awards.

Many BRI states have also concluded bilateral investment treaties (BITs) with foreign states including China and many other traditional Asian and European investor states. However, investors should be aware that not all these BITs offer the highest level of protection. This may be a particular issue for Chinese investors, as many of China's BITs were signed in the 1980s and early 1990s, when China was still an investment-receiving state, and therefore offer only limited protection to investors. For example, in some cases arbitral tribunals cannot rule on the legality of an expropriation as such, but only on the compensation to be paid.

The older BITs also provide for only ad hoc arbitration and not institutional arbitration.

Arbitral institutions for BRI

China's arbitral institutions have started a number of initiatives and created new arbitration commissions to attract international BRI-related disputes. For example, its largest and most internationally active arbitral institution, the China International Economic and Trade Arbitration Commission (CIETAC), has opened two new arbitration centres. The CIETAC Silk Road Arbitration Center in Xian, the starting point of the ancient Silk Road, is intended to handle commercial BRI-related disputes. The CIETAC Investment Dispute Settlement Center in Beijing deals with investment arbitrations under the new CIETAC Investment Arbitration Rules. These rules and the Beijing centre (as well as the older CIETAC Hong Kong Arbitration Center) are not aimed exclusively at BRI-related investment arbitrations, but one of their main functions is to cater for such disputes.

Several international bodies – including the International Court of Arbitration of the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) – have also introduced their own BRI initiatives.

- The ICC has set up a Belt and Road Commission to drive the development of its existing procedures and infrastructure to support BRI-related disputes and to raise awareness of it as an arbitral institution of choice for BRI projects. It also seeks to profit from the fact that it has secretariats in Hong Kong and Singapore which can administer cases on the ground in Asia.



- SIAC has released updated arbitration rules and its new SIAC Investment Arbitration Rules, and has been strongly promoting itself as a neutral Asian forum for both commercial and investment arbitrations and thus a go-to institution for BRI disputes.
- HKIAC has also been active, advertising its services for the resolution of BRI-related disputes. Like the ICC, it has established an advisory committee to help develop its BRI-related business. In addition, it has launched an online platform providing information on BRI and on how its dispute resolution services can best be utilised for BRI projects.

Preparing for and resolving disputes

Companies participating in BRI projects, as well as the host states of BRI projects, should pay careful attention to negotiating dispute resolution and choice of law clauses.

For the many BRI projects which mostly involve Chinese companies, a strong role for Chinese arbitral institutions and courts makes sense. However, although the new specialised Chinese BRI arbitration centres and courts are advertised as providing neutral, efficient and cost-saving dispute

settlement, non-Chinese parties may prefer a more traditionally neutral dispute resolution forum, not least because of the potential difficulties in the international enforcement of national court judgments.

In many contracts, the choice of a neutral forum which is well equipped to handle BRI disputes is therefore paramount. In Asia, Singapore and Hong Kong are the obvious choices. South Korea and Japan can also serve as good seats for international arbitrations but will be less agreeable to most Chinese parties. Beyond Asia, the traditional European arbitration hubs are of course also possible choices.

If a neutral forum is agreed, it is additionally important to choose an arbitral institution well equipped to handle BRI-related disputes. As shown above, several reputable institutions have created specific initiatives to serve such disputes – but an established institution with a proven record of handling large-scale international infrastructure and plant construction arbitrations may be a good choice even if it lacks a specific BRI initiative.

It is also important to draft a comprehensive contractual agreement and choose a substantive law which

serves all contractual parties. In the many BRI projects that concern construction, for example, form contracts published by the International Federation of Consulting Engineers (FIDIC) are often employed as a contractual basis. When selecting substantive law, due account should be taken of the legal traditions of the parties. Thus, in cases involving only parties from civil law jurisdictions, the reflex of some lawyers and in-house counsel to press for English or another common law as purportedly neutral law should be resisted. In some situations, international parties may be prepared to accept Chinese substantive law in exchange for a neutral dispute resolution forum.

When entering into contracts for BRI projects, as for most other international projects, international parties are generally well advised to choose a neutral dispute resolution mechanism. While the dominance of Chinese actors within BRI will inevitably and naturally lead to a greater role for Chinese arbitral institutions and courts in the resolution of BRI-related disputes, several reputable international arbitral institutions have also strongly committed themselves to handling such disputes. Therefore, international parties are left with a good selection of suitable arbitral institutions to agree on.

Demystifying the China International Commercial Court

We have heard many questions about the new China International Commercial Court. This article tries to answer some of them, in the hope that non-Chinese parties may become more willing and confident in future to refer BRI-related and other international commercial disputes to CICC for resolution.



David Gu
Partner
TianTong Law Firm

With the continuous construction and advancement of BRI projects in the world, more cross-border commercial disputes arise therefrom than ever before. As reported from 2013 to 2017, Chinese Courts of various levels handled more than 200,000 foreign-related civil and commercial cases, many of them related to BRI projects.

Against this backdrop, the Supreme People's Court of China (SPC) on 29 June 2018 established the China International Commercial Court (CICC) for:

- adjudicating international commercial cases according to law in a fair and timely manner;
- equally protecting lawful rights and interests of Chinese and foreign parties;
- creating a stable, fair, transparent and convenient "rule of law international business environment"; and
- serving and safeguarding the construction of BRI.

So far, CICC is present in two cities, with the First International Commercial Court in Shenzhen, and the Second International Commercial Court in Xi'an. Since CICC is part of the SPC, any decision rendered by CICC is a first instance court decision but becomes final and binding according to the Chinese civil procedural rules.

CICC has jurisdiction to hear cases that are international and commercial, and are either:

- first instance cases in which parties to a dispute over a contract or any other right or interest in property have referred them to be resolved by CICC by an express choice of court clause, with the amount in dispute not less than RMB 300m;

- first instance cases which are subject to the jurisdiction of High People's Courts that nonetheless as considered should be trialled by the SPC, to which leave has been granted;
- first instance cases that have a nationwide significant impact;
- cases where parties in certain arbitration proceedings apply for preservation measures, setting aside or enforcement of international commercial arbitral awards; or
- other cases that the SPC deems appropriate to be trialled by CICC.

A case is international and commercial if

- one or both parties are foreigners, stateless persons, foreign enterprises or other organisations;
- one or both parties have their habitual residence outside the territory of the PRC;
- legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the PRC; or
- the subject matter in dispute is outside the territory of the PRC.

To date, SPC has designated 13 senior judges to serve both the First and Second International Commercial Courts. A collegial panel of at least three judges is convened to hear cases. A decision made by the majority of the panel is final and binding, although minority opinions may be expressed in writing.

All 13 judges are Chinese but are proficient in English. They all have extensive trial experience, and are familiar with international treaties and international trade and investment. Most of them have

a doctorate in law and some of them have studied in the USA, the UK, Canada or Hong Kong.

CICC also has an international commercial expert committee of Chinese and foreign legal experts, well versed in international law and the law of their nations, with solid practical experience. During CICC proceedings, parties may resolve disputes by mediation presided over by any member of the committee, and Chinese judges at CICC may seek advice from the committee members.

Although CICC is an international commercial court, it attempts to integrate with international arbitration and mediation institutions to create an 'one-stop' dispute resolution mechanism. The institutions it works with include the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission, the China Maritime Arbitration Commission, the China Council for the Promotion of International Trade Mediation Centre and the Shanghai Commercial Mediation Centre.

Parties to arbitration cases administered by these institutions may apply to CICC for e.g. evidence, property preservation and injunctions. After an arbitral award is rendered, parties may apply to CICC for it to be set aside or enforced.

The one-stop mechanism may be realised by online court platforms where litigation, arbitration and mediation are streamlined to efficiently and fairly resolve international commercial disputes.

Certain procedural requirements for foreign-related disputes under the Chinese civil procedural rules have been alleviated for CICC proceedings. For example, evidence that is created outside the PRC may be admissible for examination during CICC proceedings, even if it is not notarised or certified according to 'legalisation' procedures. A document in English without a certified Chinese translation copy attached can be directly submitted to CICC if the other party so agrees.

CICC has adopted modern technologies in several aspects of its operation. For example, CICC judges can use a video or audio conference or any other IT communication channel to collect and examine evidence. CICC has also made use of electronic platforms for litigation service, trial procedure information-sharing and other litigation-related services.

The First and Second International Commercial Courts accepted 13 international commercial cases between May 2019, when CICC held its first public hearing, and June 2020. They cover several areas of law, including product liability, commission agreements, the distribution of dividends, the confirmation of shareholder qualification, the liability of infringing company's interests and the validity of an arbitration agreement. The parties involved come from jurisdictions as various as Japan, Italy and the British Virgin Islands.

So far CICC's record is good. It has demonstrated that it can efficiently resolve complex international commercial disputes, concluding five cases out of its first 13 within one year. Moreover, it has announced its decisions publicly in a timely and transparent manner, so that they can be adopted as authoritative reference or guidance for Chinese judges in lower courts.

CICC may add more senior Chinese judges to its panel and expand the scope of its expert committee. Although it is now unrealistic to have international judges sit with their Chinese peers in CICC, it is possible that Hong Kong jurists who are qualified to practise Chinese law may be an acceptable and welcome choice to enrich the composition of the CICC judicial panel and enhance its visibility as a truly international commercial court.



Spotlight on sectors and regions

Key points

- » Many 'classic' BRI sectors such as roads and logistics have retained their popularity.
- » However, BRI participants in all regions are increasingly interested in more overtly sustainable and environmentally-friendly sectors, which are also often seen as lower-risk options.

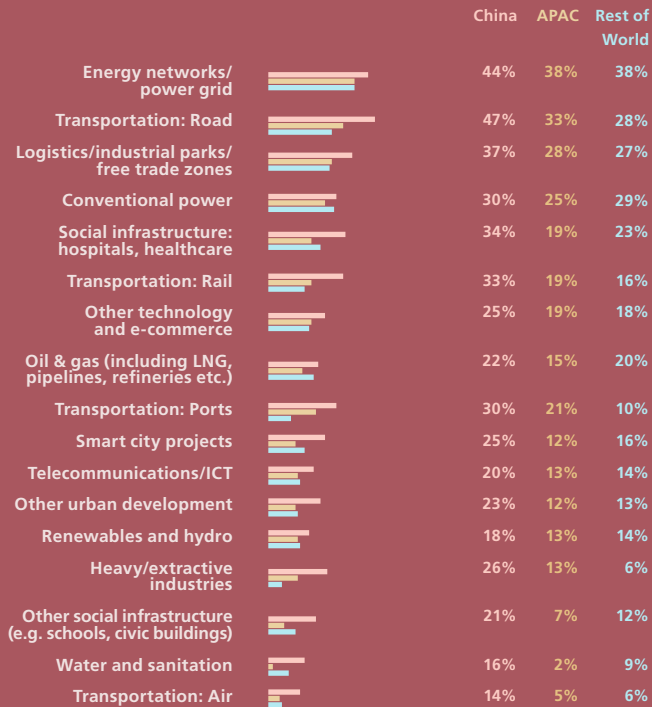
Among APAC respondents, energy networks (38%), road transportation (33%) and logistics etc (28%) are the sectors that have been most targeted for BRI opportunities in the past. Our findings show they are still the top three in APAC participants' future plans. But the sectors in which interest is growing most significantly are those strongly related to sustainability.

For 'classic' BRI sectors such as roads, rail and ports, we typically found that an additional 4% of APAC respondents were interested going forward, compared with those who have sought involvement to date. There was a similar trend in the other direction for sectors which may invite questions about sustainability, such as conventional power projects, which declined by an equivalent 4%.

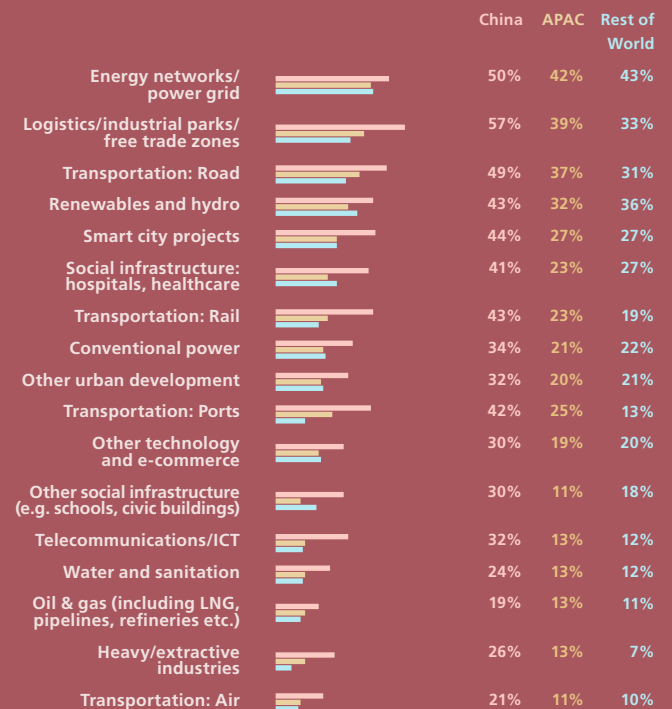
However, we saw greatly increased levels of enthusiasm for sectors such as renewables (where an additional 19% of APAC respondents are interested in future projects), smart cities (+15%), water and sanitation (+11%), and logistics etc (+11%). These findings support our observations of a general shift in interest towards more sustainable projects. Many of these 'rising' sectors are also among those that APAC respondents see as involving the least risk for participants.

Sector opportunities and risks

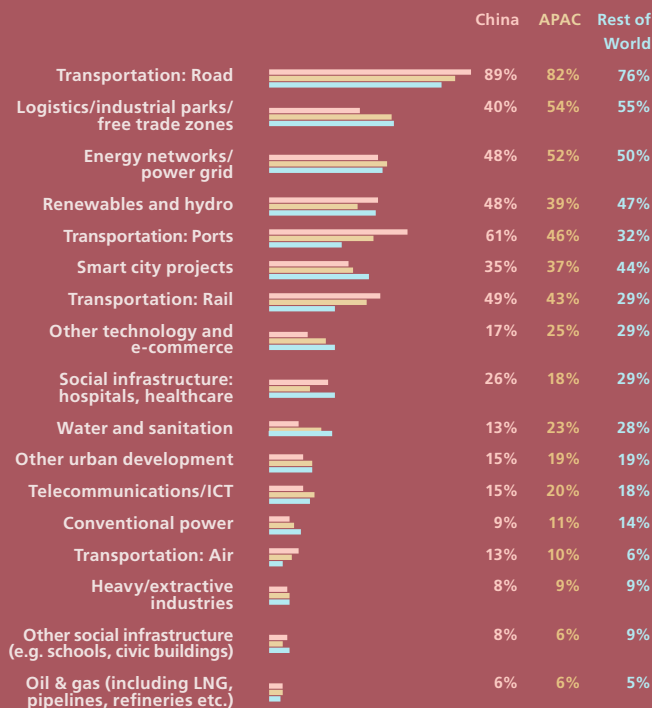
In which of the following sectors has your organisation previously targeted BRI opportunities?



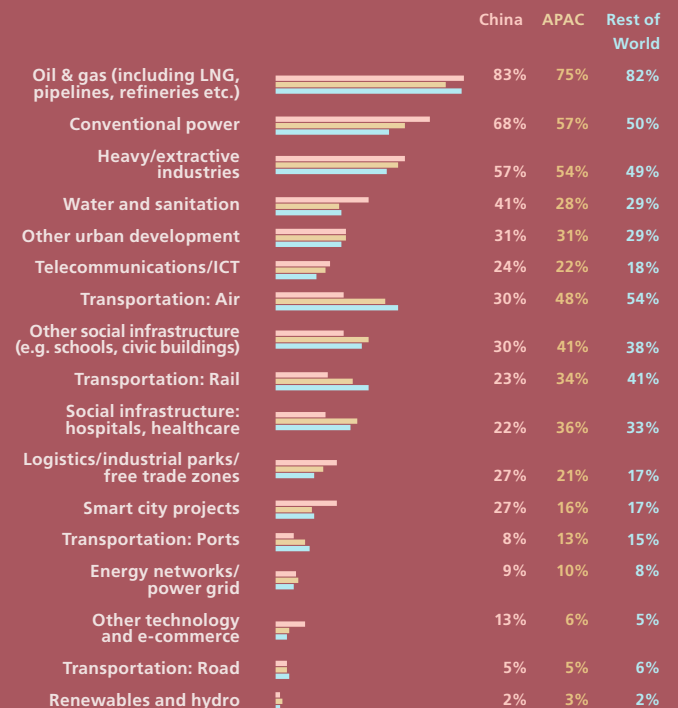
In which of the following sectors does your organisation have plans to target BRI opportunities?



Which of the following sectors offer the greatest number of BRI-related opportunities?



Which of the following sectors are perceived to be the riskiest?



A focus on South-East Asia

APAC participants are largely focused on seeking involvement in projects in South-East Asia (87%), although they are also interested in neighbouring regions such as South Asia (32%), Australasia (24%), China (20%) and East Asia (17%).

This clearly resonates with the view of Chinese investors, for whom South-East Asia (90%) and South Asia (56%) are the regions of most interest after China itself (96%). Such shared views partly reflect economic realities, but also geographic proximity and centuries of shared trading history.

The nations of South-East Asia have also made a commitment to link the Master Plan on ASEAN Connectivity (MPAC) 2025 with BRI. Now in its second phase, MPAC 2025 will go beyond focusing on enhancing physical connectivity to emphasise digital, logistics and regulatory connectivity as well.

Another relevant regional initiative is the Regional Comprehensive Partnership (RCEP), involving the ASEAN nations plus Australia, China, Japan, Korea and New Zealand. (At the time of writing, India has said it will no longer participate, although the other participants are keen for it to do so.) The partnership is set to be signed in November 2020 and will help to shape regional trade and investment patterns in APAC.

Only a small proportion of APAC respondents are looking significantly further afield for BRI opportunities in, for example, Central and Eastern Europe (10%) or Latin America (11%). Given the volume of more local opportunities that is hardly surprising. But APAC players with BRI expertise who look to more distant regions may find rewarding projects. CEE has close trade ties with Western Europe, whose major economies nearshore not only digital and IT-related services in Eastern Europe but also significant industrial activity, including automotive production. And China recently told various Latin American and Caribbean (LAC) countries that it sees opportunities to advance BRI cooperation in fields including infrastructure, energy and agriculture – and that it also looks forward to building a China-LAC Health Silk Road and a China-LAC Digital Silk Road.

APAC participants say

42%

will target energy network and grid projects, meaning this continues to be the most popular sector

32%

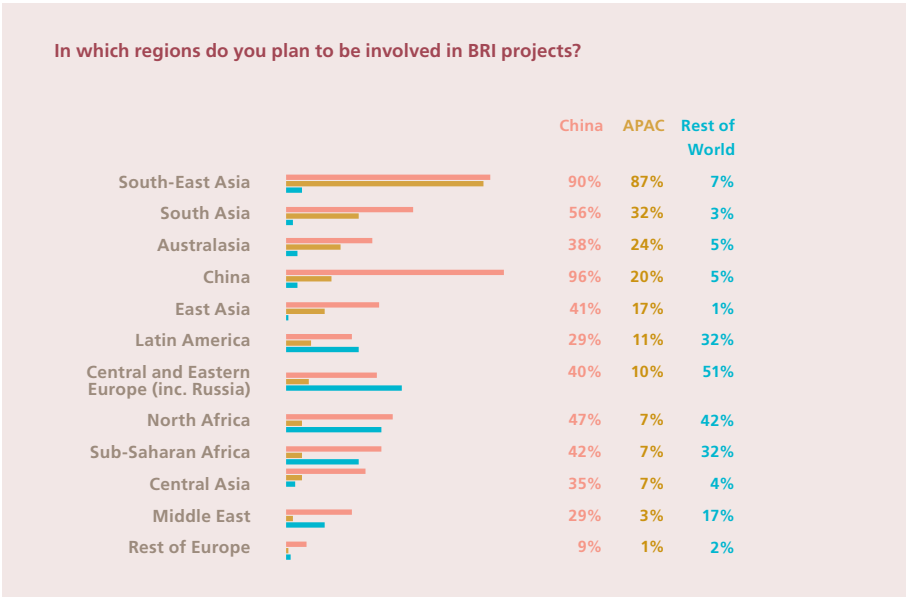
plan to target renewables and hydro projects, compared with only 13% who have been involved in them so far

27%

plan to target smart cities in future, compared with 12% to date

87%

are seeking involvement in projects in South-East Asia



The Health Silk Road

There is a strong consensus that the coronavirus pandemic will lead to a renewed emphasis on the Health Silk Road, intended to strengthen health coverage in BRI countries through Chinese cooperation and support. Nearly all of our APAC respondents expect this to happen.

As long ago as 2015, a three-year plan for Belt and Road health exchange and cooperation was devised, and by 2017 this had evolved into the Health Silk Road (HSR), endorsed by both participating nations and international bodies such as the World Health Organization and OECD.

Much of HSR's initial focus was on policies such as public health and strengthening people-to-people exchanges. But in 2020 the pandemic has emphasised the deficiencies in health infrastructure in many BRI countries.

During the early months of the pandemic, China provided emergency humanitarian aid to about 150 countries and four international organisations, and sent teams of medical experts to 24 countries. But in the longer term, more permanent healthcare projects – including the construction and fitting out of hospitals, health centres and

laboratories – are likely to become more important. Telemedicine and digital healthcare also offer enormous potential, and synergies with DSR – an area in which China may also wish to build on its data-driven successes in combating the coronavirus.

The Health Silk Road may also play a key role in any vaccination programmes that are developed in response to the pandemic. If one or more vaccines are developed to combat Covid-19, billions of people will need to be inoculated, in an international effort of unprecedented size and scope. Whether that effort is globally coordinated or not, all governments will have to address the practical difficulties of protecting their populations, and many in developing countries may look for the sort of assistance that the HSR would be able to provide. Furthermore, if vaccines only offer protection against the virus for a limited time, as seems possible, it may be necessary to develop

infrastructure and other assets – including life sciences and technology assets – to support a permanent programme of repeat inoculations.

“The outbreak has led to a renewed understanding of the importance of the Health Silk Road and how its concepts can help in preventing such a spread in the future, by facilitating faster containment measures,” says the chief strategy officer of a real estate developer in the Philippines.

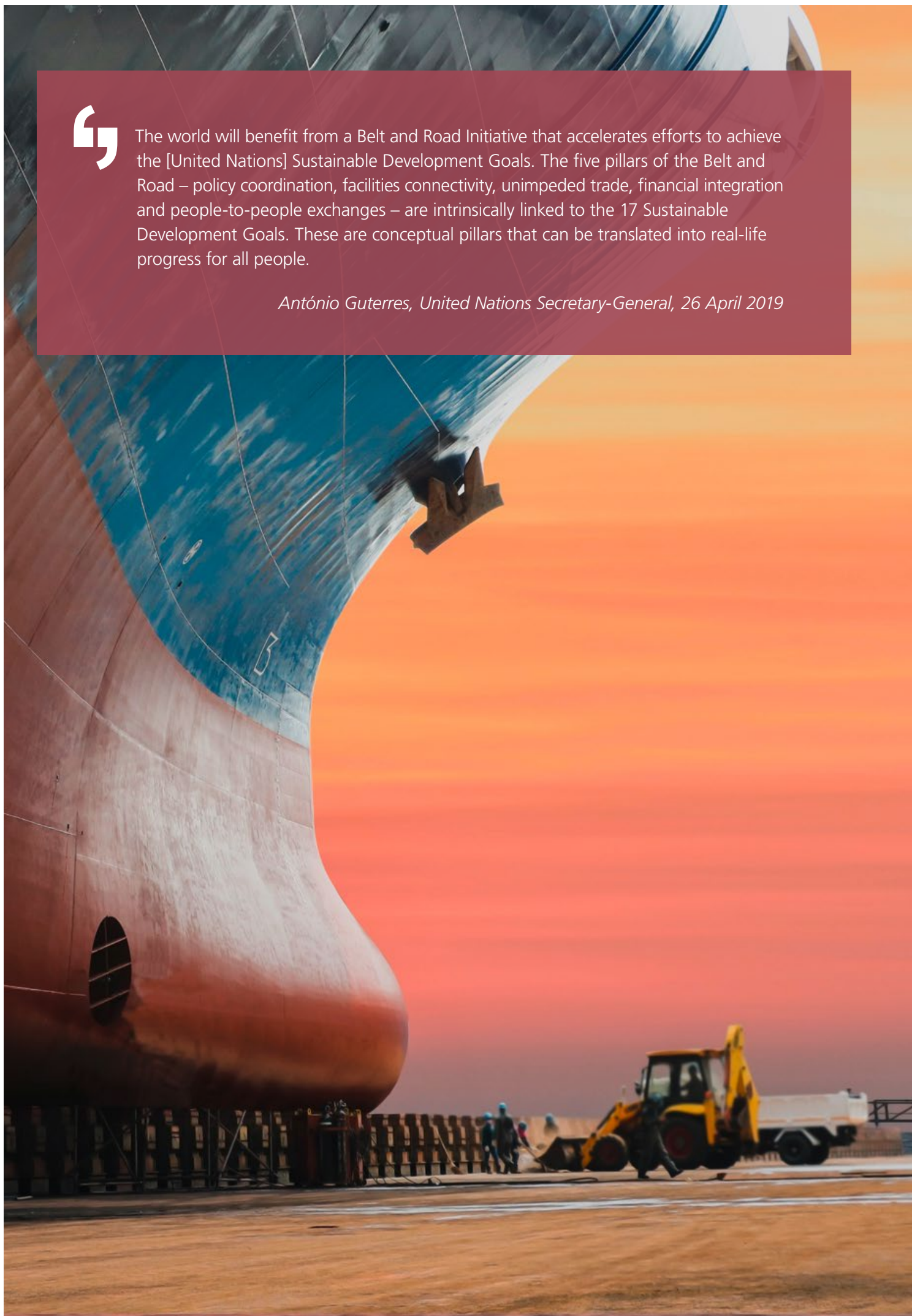
An additional advantage for China in promoting HSR projects and offering medical aid is that controlling the pandemic in BRI countries will facilitate economic recovery and the resumption of other BRI projects. And there is clearly the hope that cooperation on HSR projects – both those related to the pandemic and those addressing other health needs – will help to build strong foundations for similar cooperation on other aspects of BRI.





The world will benefit from a Belt and Road Initiative that accelerates efforts to achieve the [United Nations] Sustainable Development Goals. The five pillars of the Belt and Road – policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people exchanges – are intrinsically linked to the 17 Sustainable Development Goals. These are conceptual pillars that can be translated into real-life progress for all people.

António Guterres, United Nations Secretary-General, 26 April 2019





A Belt and Road future

BRI is a massive policy initiative but it should still be seen in the context of the world's infrastructure requirements. In 2017, for example, the Asian Development Bank calculated that Asia alone would need USD 26trn of infrastructure investment by 2030. However big BRI may be, it is nowhere near that big.

But even though BRI is only one route among many to global development, it seems certain to be the world's largest infrastructure initiative for years – and probably decades – to come. Other recent innovations, such as the US-led Blue Dot Network, the new United States International Development Finance Corporation, the revived Export-Import Bank of the United States, and the 2019 EU-Japan connectivity partnership are all much smaller. Even many of the commentators who have expressed reservations about BRI acknowledge that the world will not be able to meet its goals for sustainable development and a post-carbon future without extensive Chinese involvement and leadership.

BRI will also continue to evolve. Its participants are increasingly looking to meet the trends of the future. Affordable projects, embracing modern technologies and methods, as well the “open, green and clean” approach of BRI 2.0, will often be those that stand the greatest chance of success. So will those that anticipate the genuine future needs of the societies in which they are built.

If BRI had never been conceived, developing countries would still be seeking to fund much-needed infrastructure projects with international financing, often from China, and contractors from China would still be tendering for many of those projects. There would still be a huge need for international development, and the parties involved would still be grappling with complex questions, such as managing risk, negotiating local partnerships, and balancing sustainability with value for money and profitability.

In its early days BRI was widely seen outside China as being primarily an umbrella under which such projects could be grouped. The question now is whether it will come to be appreciated internationally as a vehicle for higher standards of project sustainability and governance, as well as mutually beneficial cross-border partnerships for both Chinese and foreign participants. If it does, then it will truly be possible to describe it as, in President Xi's words, a path of “win-win cooperation”.

Belt and Road Initiative: CMS reports

As a leader in many of the sectors that make up BRI – including infrastructure, energy, renewables, real estate, technology and healthcare – CMS commissioned a survey and interviews of over 500 BRI participants from around the world, to assess in depth their current feelings about BRI and the prospects they see for it.

We are publishing our findings in a series of six reports, beginning in September 2020 with a report on our findings from China, and this report covering the rest of the Asia-Pacific region.

Reports covering Central and Eastern Europe, the Middle East, Africa and Latin America will be published in the coming months.



About CMS

CMS has more than 70 offices in over 40 countries across the world. More than 4,800 lawyers deliver expert advice in their local jurisdictions and across borders. From major multinationals and mid-caps to enterprising start-ups, CMS provides the technical rigour, strategic excellence and long-term partnership to keep each client ahead in its chosen markets.

We have been helping clients do business in Asia-Pacific for over 40 years. With offices in Beijing, Hong Kong, Shanghai and Singapore, we have international expertise in English, French, German and other European languages, as well as Mandarin, Cantonese, Japanese, Korean, Malay, Sinhalese and Tamil. We are one of very few firms in the region providing both civil and common law advice with qualified lawyers from the UK, Germany, China, Hong Kong, Singapore, US, Australia, New Zealand and Malaysia.

With market leading sector specialist teams in Energy, Infrastructure & Project Finance, Financial Institutions and Technology, Media & Telecommunications, we have the right expertise and experience to advise on BRI-related issues.

cms.law

About Acuris

Acuris is a media company specialising in high-value content for financial professionals. Our journalists and analysts cover specific markets in depth, producing insights that are not available anywhere else. We deliver this intelligence through subscription-based online services, helping financial professionals to make the best decisions based on the strongest evidence.

www.acuris.com



Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law

2009-0133190-8