

一带一路蓝图之宏伟，甚至让万里长城也相形见绌。在本系列报道的第一篇文章中，**ANDY GILBERT** 将从一带一路构想的诞生开始，向读者展示其到目前为止的发展历程

THE BELT AND ROAD INITIATIVE DWARFS THE GREAT WALL OF CHINA, AND PRETTY MUCH ANYTHING ELSE ON EARTH, IN ITS PERCEIVED MAGNITUDE. IN THE FIRST OF A SPECIAL SERIES OF ARTICLES, **ANDY GILBERT** LOOKS AT THE GERMINATION OF THE INITIATIVE AND TRACES ITS GROWTH SO FAR

LOCAL ROOTS GLOBAL IMPACT

"The only local arbitration commission which meets or surpasses global standards" - The Economist Intelligence Unit

"The runner up for the up-and-coming regional arbitral institution of the year (2014)" - Global Arbitration Review



History and background

Established in 1995 as an independent and non-governmental institution, the Beijing Arbitration Commission, also known as the Beijing International Arbitration Center (the "BAC/BIAC"), has become the first self-funded arbitration institution in China and is widely accepted as one of the primary arbitration institutions internationally.

With the aim of delivering trusted professional services, the BAC/BIAC endeavors to promote and encourage the resolution of disputes through efficacious arbitration and a comprehensive understanding of Chinese arbitration practices. Towards this end, the BAC/BIAC actively organizes the Annual Summit on Commercial Dispute Resolution in China, sponsors the Biennial ICCA Conference, and contributes constructively to the UNCITRAL Working Group II's deliberations, as an observer.



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Hearing Room

Structure and Service

- * The BAC/BIAC is run by a Committee comprising of a Chairman and 14 members.
- * The BAC/BIAC's office, headed by the Secretary General, has 30+ case managers.
- * The BAC/BIAC has 500+ arbitrators, including 130+ international arbitrators in its Panel. Nominating arbitrators from outside the BAC/BIAC's Panel are permissible in international cases.
- * The BAC/BIAC has served clients from more than 30 countries, and has facilities to conduct arbitrations not only in Chinese and English but also in other languages.
- * There has been an exponential increase in the number of Arbitration cases filed with BAC/BIAC, from 7 in 1995 to over 30,000 in 2016.
- * Since 2012, the numbers of cases filed with the BAC/BIAC, on average per year, are 2,200+ in domestic cases, and 50+ in International cases.
- * Since 2012, the disputed value, on average per arbitrated case, was 1.5+ million USD, and in 2015, the highest disputed value went up to 1.7+ billion USD!

Recommended BAC/BIAC Model Clause:

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission / Beijing International Arbitration Center for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

如

果说整体大于部分之和,则“一带一路”无疑是迄今为止最大的基础设施项目,通过位于亚洲、欧洲和非洲的六条经济走廊将东亚的活跃经济体与西欧的发达国家市场相连。道路、铁路、港口及电站等基础设施大幅改善,连通 65 个

国家,覆盖的市场拥有近三分之二的世界人口、总 GDP 占全球三分之一、商品和服务占世界近四分之一。亚里士多德若活到近日,也会啧啧称奇。

但“一带一路”究竟是什么?在基础设施方面,“一带一路”的规划是具体可见的,中国政府发起了一项重要的发展战略,即打造现代丝绸之路经济带及 21 世纪海上丝绸之路,促进沿线国家间的经济合作。

不过,“一带一路”背后的深层意义并非表面上如此简单。在一个正在用钢筋水泥构筑的基础设施背后,是中国在全球事务中发挥更大作用的渴望,在钢铁制造和基础设施建设等领域出口过剩产能的需要,以及扩大政治影响力、使人民币国际化、在出口增长放缓和国内需求疲软背景下强力推动经济发展的努力。

“一带一路是一个概念而非一个细节明确的计划,”长盛律师事务所香港办公室合伙人岑君毅表示。“在商业方面,一带一路倡议的主要目标是促进各沿线国家之间的贸易和投资。在非商业方面,其目标是促进相关国家的不同经济体系或其它不同体系间的最终整合。”

但一带一路倡议并非没有任何争议,至少一些人对此持怀疑态度。一些所谓的中国观察家称,一带一路虽然“标价”八万亿美元,但在财政支持上并不健全,也不可持续发展。一些特定项目几乎全部由中国政府提供资金支持,有些分析甚至将其比作中国的经济援助而非双边投资,愤世嫉俗者更质疑其带来的影响。

中国外交部长王毅表示,“一带一路”绝非中国版的“马歇尔计划”(美国通过马歇尔计划在二战后提供数十亿美元的经济援助以重建欧洲,同时也试图通过该计划发挥其在欧洲的影响力并遏制共产主义的传播)。“一带一路

If the whole is greater than the sum of its parts, then the One Belt, One Road (OBOR) initiative is undoubtedly the biggest infrastructure project ever conceived. Six economic corridors running through Asia, Europe and Africa, connecting vibrant economies of East Asia at one end with developed Western Europe at the other. A massive upgrade of the region's infrastructure: roads, railways, ports, power stations; interconnected via more than 65 countries covering almost two-thirds of the world's population, one-third of global GDP, and a quarter of all goods and services worldwide. Even Aristotle might have raised an eyebrow.

But what exactly is OBOR, which has more recently, and perhaps more accurately, been labelled the Belt and Road initiative? In terms of infrastructure, it's perfectly tangible. A significant development strategy launched by the Chinese government to create a modern day Silk Road Economic Belt and 21st Century Maritime Silk Road, promoting economic co-operation among countries along its land and sea routes.

In other ways, however, it's perhaps not quite what it seems. Layered beneath the millions of tonnes of concrete lies China's push to take a bigger role in global affairs, its need to export excess production capacity in areas such as steel manufacturing and infrastructure construction, and so expand its political influence, internationalize the renminbi, and kick-start its economy amid slowing growth in exports and fragile domestic demand.

“OBOR is a concept rather than any detailed plan,” says Ronald Sum, a Hong Kong-based partner at Troutman Sanders. “On the commercial side, the OBOR initiative is predominantly to promote trade and investments among various OBOR countries. On the non-commercial side, it is the ultimate integration of different systems – economy or otherwise – within the OBOR countries.”

It's certainly not without controversy, or scepticism at the very least. Some China watchers have called the initiative financially unsound and unsustainable, with a price tag in the region of US\$8 trillion. Certain projects, almost entirely financed by Beijing, have

[一带一路] 关键的制度框架和
相应的融资机构已经建立

*The key institutional framework and
corresponding funding bodies
[for OBOR] have been established*

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Firm Profile:

Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. Boga & Associates also operates in Kosovo (Pristina) offering full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga was also Managing Partner of KPMG Albania. The firm maintains its quality through the skills and determination of a team of attorneys and other experienced professionals. The team's extensive foreign language capabilities help to ensure that its international clientele have easy access to the expanding Albanian and Kosovo business environment. Over the years the firm has advised on privatization transactions, concessions, real estate transactions, setting up businesses, credit facilities and custom and tax issues, all with a keen sensitivity to developments in the Albanian business environment.

Areas of Practice:

LEGAL: Corporate, Mergers and Acquisitions, Banking and Finance, Competition, Employment, Construction, Telecommunication, Oil and Energy, Procurement, Environment, Real Estate, IP, Litigation, etc.

TAX: Tax Advice, Compliance, Audit, Litigation.

ACCOUNTING: Accounting, Bookkeeping and Payroll.

律所简介:

Boga & Associates 律师事务所成立于 1994 年, 已经成为阿尔巴尼亚最领先的律师事务所之一, 因其为客户提供高质量的法律、税务和会计服务而赢得了美誉。Boga & Associates 律师事务所还在科索沃普里什蒂纳提供全方位的服务。直到 2007 年 5 月, Boga & Associates 律师事务所是毕马威国际的成员机构, 资深合伙人兼管理合伙人 Genc Boga 先生也是毕马威阿尔巴尼亚的管理合伙人。Boga & Associates 律师事务所通过律师和其他经验丰富的专业人士所具有的专业知识和决心一直保持着很高的质量。团队人员掌握了许多外国语言, 有助于确保国际客户可以容易扩大其在阿尔巴尼亚和科索沃的商业环境。多年以来, Boga & Associates 律师事务所带着对阿尔巴尼亚商业环境发展所具有的敏锐的敏感性, 为许多私有化交易、特许经营、房地产交易、公司设立、信贷措施、海关和税务问题提供了服务。

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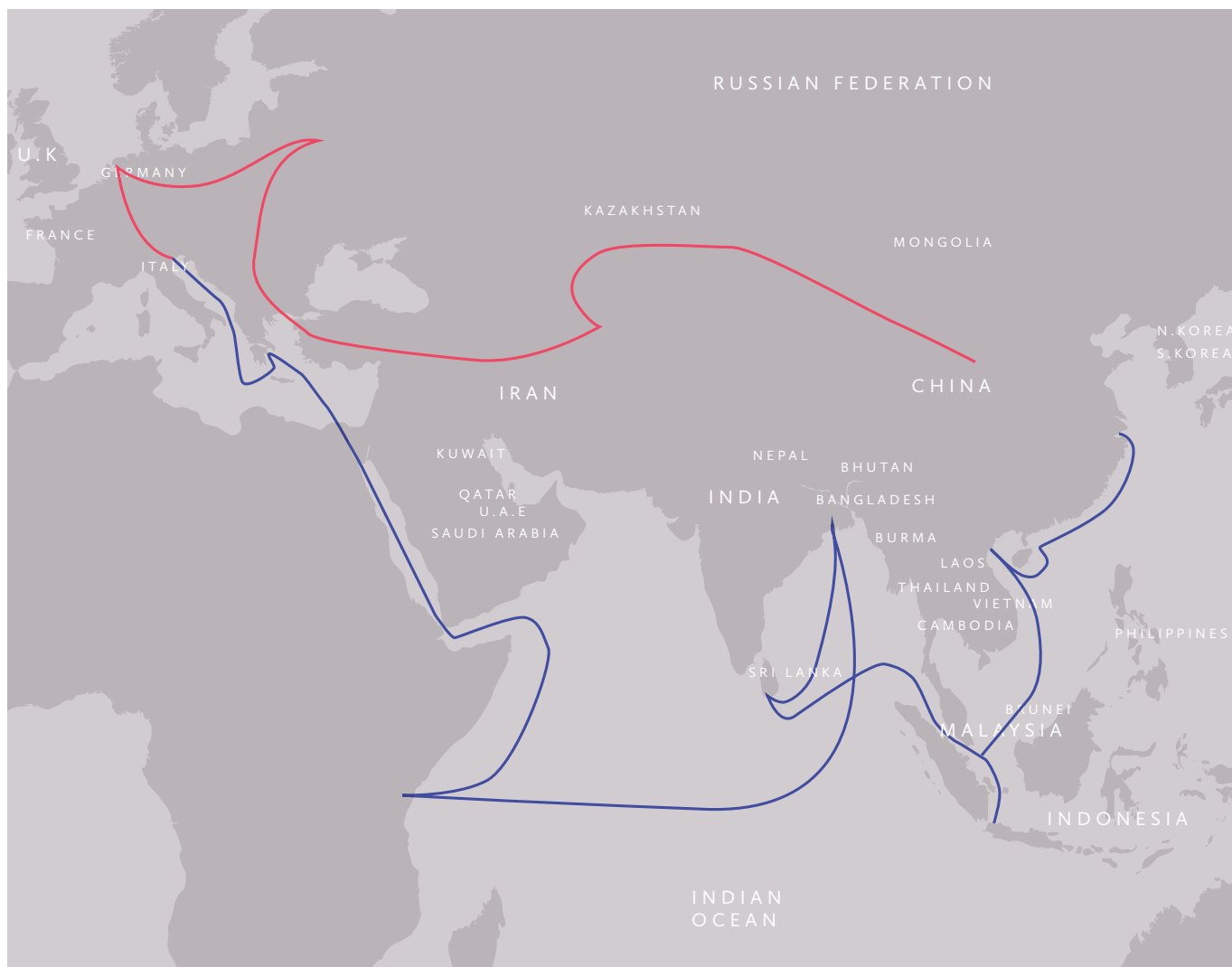
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诞生于全球化时代，它是开放合作的产物，不是地缘政治的工具，更不能用过时的冷战思维去看待，”王毅说。

不论外界怎么看待，一带一路倡议的框架已经得到了有力的巩固。“重要的是，通过实际项目的启动、开发、融资和运营，基础工作已经准备就绪并经过了‘压力测试’，”欧华律师事务所香港和北京办公室中国能源业务（项目融资）负责人董铁英表示。“关键的制度框架和相应的融资机构已经建立，中国企业参与该倡议的动力也已准备到位。”

一带一路不仅在空间上连接各区域，而且在时间上与历史相连接。原丝绸之路连接主要贸易路线，相信已有 2500 多年的历史，不过其正式建立于两汉时代（前 202—220 年），起始于现在的西安，终于地中海，连接中国与罗马帝国。历史上的丝绸之路于唐代（618-907 年）达到鼎盛，但在蒙古帝国统治期间（1271-1368 年），因为沿线的政权分散，丝绸之路逐渐衰落。

当 1453 年，奥斯曼帝国消灭了拜占庭帝国，占据了东西方贸易要冲，丝绸之路的实际作用下降，商人被迫把目光投向海上商路。在接下来的 100 年左右的时间里，欧洲航海家的地理大发现推动了世界各地的互动交流，甚至可视作全球化的开端。

even been likened to Chinese economic aid rather than bilateral investments, with all the resulting influence cynics would point out that brings.

Chinese Foreign Minister Wang Yi has dismissed comparisons of the initiative to the US-sponsored Marshall Plan, which gave billions of dollars of economic support to help rebuild Europe following World War II, but also to try to exert its influence while stemming the spread of communism. The Belt and Road initiative is “the product of inclusive co-operation, not a tool of geopolitics, and must not be viewed with an outdated Cold War mentality”, said Wang.

However it's viewed, there has already been strong consolidation of the framework for the initiative. “Importantly, it is now clear that the groundwork has been laid and ‘stress tested’ through actual projects’ initiation, development, financing and operation,” says Carolyn Dong, the Beijing and Hong Kong-based head of energy – China (finance and projects) at DLA Piper. “The key institutional framework and corresponding funding bodies have been established and Chinese corporate momentum is now all firmly in place behind the initiative.”

The Belt and Road will not only connect regions, but connect with the past. The original Silk Road, a network of major trade

正是本着全球化的精神, 2013 年 9 月, 中国国家主席习近平在哈萨克斯坦访问期间首次提出了最初的“一带一路”概念, 他提议中国和中亚国家合作建设丝绸之路经济带。接下来的一个月, 习近平在印度尼西亚国会演讲中提出要建立紧密的中国 - 东盟国家关系, 并提出建设 21 世纪海上丝绸之路 (包括海港和航线), 以及建立总部设在北京、法定资本 1000 亿美元的亚洲基础设施投资银行, 为新建设项目提供资金, 促进区域互联和经济一体化。(目前该银行已经贷款超过 20 亿美元, 最近才为在印度尼西亚和孟加拉国的项目提供资金支持。)

此后, 习近平宣布中国将拨款 400 亿美元成立丝路基金, 为基础设施、资源、工业和金融合作等项目提供投融资支持。中国还参与建立了规模 1000 亿美元的新开发银行, 为金砖国家提供资金支持。

其他中国银行也承诺支持“一带一路”倡议; 亚洲开发银行也与中国中央政府签署了框架协议, 促进了“一带一路”项目融资; 中国与欧盟之间就欧洲战略投资基金与丝路基金开展在“一带一路”沿线国家的合作进行了磋商。

一带一路交易所面临的通常都是复杂的跨法域问题

The issues facing OBOR transactions are typically complex and multijurisdictional



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routes, is believed to have existed for more than 2,500 years, but was formally established during the Han dynasty (202 BC-220), originating from what is now Xi'an and ending in the Mediterranean, linking China with the Roman Empire. It reached its height during the Tang dynasty (618-907), but declined during the rule of the Mongol empire (1271-1368) as political powers along the routes became fragmented.

When the Ottoman empire boycotted trade with the West in 1453, the Silk Road was effectively closed and merchants were forced to take to the sea. For the next 100 years or so, this Age of Discovery led to worldwide interaction – perhaps even the beginning of globalization.

And it was in the spirit of globalization that, in September 2013, the original OBOR concept was introduced by Chinese President Xi Jinping during a visit to Kazakhstan, where he suggested that China and Central Asia co-operate to build a Silk Road economic belt. The following month, in a speech before the Indonesian parliament, Xi proposed building a tight China-ASEAN community, and offered guidance on constructing a 21st Century Maritime Silk Road – sea ports and routes – and establishing the US\$100 billion Asian Infrastructure Investment Bank (AIIB) based in Beijing to finance new construction and promote regional interconnectivity and economic integration. (The bank has already loaned more than US\$2 billion, most recently to finance projects in Indonesia and Bangladesh.)

Xi later announced that China would contribute US\$40 billion to set up the Silk Road Fund to provide investment and financing support for infrastructure, resources, industrial and financial co-operation, and other projects in countries along the Belt and Road routes. There is also a US\$100 billion New Development Bank, a funding source for BRICS countries.

Support for the Belt and Road initiative has also been pledged by other Chinese banks, also a framework agreement has been reached between the Asian Development Bank and China's central government to foster financing of Belt and Road projects, and talks have been held between China and the EU on the co-operation between the European Fund for Strategic Investment and the Silk Road Fund in Belt and Road countries.

The initiative's five major goals are policy co-ordination, facilities connectivity, unimpeded trade, financial integration, and people-to-people bonds, according to China's National Development and Reform Commission. But successfully implementing these goals naturally comes with challenges and risks, legal and otherwise, says Dong from DLA Piper. "Overcoming these risks requires investors and enterprises to undertake thorough due-diligence exercises and form robust partnership and joint-venture arrangements," she says. "More importantly, success will depend on enterprises finding the right partners and having the right support networks providing a thorough understanding of local conditions, regulators, market players and, more generally, 'ways of doing business' in both China and the foreign host jurisdictions."

On-the-ground presence and knowledge of suitable partners and relevant contacts – both for foreign parties in China and for Chinese parties in foreign jurisdictions – is a prerequisite, stresses Dong. And the legal role is "crucial" in this regard, says

根据国家发改委发布的文件,“一带一路”确定的五大目标为政策沟通、设施联通、贸易畅通、资金融通和民心相通。不过,欧华律所的董铁英表示,要成功实现这些目标势必会带来法律和其他方面的挑战和风险。“克服这些风险要求投资者和企业进行彻底的尽职调查,形成强有力的伙伴关系和合资安排,”她说。“更重要的是,能否成功将取决于是否能寻找合适的当地合作伙伴及支持网络,在其协助下充分了解当地的条件、监管机构、市场参与者,以及在中国和当地的‘做生意方式’”。

董铁英强调,对在中国的外国投资者以及在外国的中国投资者而言,在当地市场寻得互相了解的业务伙伴及相关联系人是成功的先决条件。孖士打律师事务所新加坡办公室顾问 Sean Prior 表示,法律在这一过程中扮演的角色也十分重要,在进入“一带一路”沿线国家的过程中,中国开发商和贷款人面临的至关重要的风险便是法律风险。

“投资这么多不同国家面临的一个常见风险是监管方面的未知变数,” Prior 说。“一带一路倡议下大型项目的建设不可避免地会在政治上引起高度关注,并且相关法规在东南亚和南亚也日益政治化。”

“因为该风险与大多数国家的选举周期密切相关,因此没有任何良药可以解决。不过中国很可能可以与任何一个亚洲国家的政府当局建立更加牢固的关系:中国有能力并将努力游说当局建立明智的法规。”

Sean Prior, a Singapore-based counsel at Mayer Brown JSM, adding that legal risk is the most critical type of risk that Chinese developers and lenders will face when moving into Belt and Road countries.

“One regular issue with investing in so many different countries is the risk of regulatory uncertainty and change,” says Prior. “Large-scale projects that the OBOR initiative is targeting are inevitably highly visible politically, and regulations in Southeast and Southern Asia have become increasingly politicized.”

“There is no magic bullet to solve this risk, since it is closely linked to the election cycle in most countries. China is probably better placed to forge strong relationships with the government of the day in any particular Asian nation: it is capable of, and will lobby strongly for, sensible regulation.”

Du Yilong, the managing partner of Latham & Watkins’ Beijing office, also cautions Chinese companies that they should be fully aware of the geopolitical environment, because many of China’s neighbours are undergoing complicated political, economic and social changes.

“The issues facing OBOR transactions are typically complex and multijurisdictional,” he says. “The countries along the OBOR are at different stages of legal maturity, meaning that companies will have to be able to adapt to local conditions and formulate good practices to suit the local markets.”

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瑞生律师事务所北京代表处管理合伙人杜以龙也提醒道，中国企业应该充分留意地缘政治环境，中国的周边国家中有不少正在经历复杂的政治、经济及社会变动。“一带一路交易所面临的通常都是复杂的跨法域问题，”他表示。“就法律体系的成熟度而言，一带一路沿线国家尚处在不同阶段，这就意味着中国企业必须要能根据当地条件作出自我调整，并制定适应当地市场的有效策略。”

中国投资者需要咨询各国法规的使用和解释情况。品诚梅森律师事务所北京代表处合伙人陈希佳表示，不同司法辖区存在的法律挑战也会不同。“有些司法管辖区可能会限制外资对关键基础设施的所有权；有的可能限制进口外国劳动力；有些可能会要求在当地执行的工作和服务合同必须适用当地的实体法律，”她说。“有些法域可能会要求在该法域内因建筑工程引起的争议必须在当地解决。”

陈希佳补充道，另一种棘手问题是一些国家法律框架下法规的不完备、不确定并且有时规定之间相互冲突，所有这些法律问题都可能要求中国投资者和承包商寻找化解办法。

金杜律师事务所香港办公室合伙人 Paul Starr 表示，要实施“一带一路”倡议，需要在三个层面上进行框架性法律工作：项目融资；双边及多边国际条约；创建当地工程项目文件。“在全球和区域层面上，为确保一带一路倡议的实施，需要完成的法律工作应确保人员、货物和资金在沿线国家的自由流动，”他表示。“目前，最全面的做法是各国间达成自由贸易协定，如多边或双边投资协定。”

金杜律师事务所所在研究过一带一路沿线国家的投资条约网络后，发现了 50 多份互不相关的双边投资条约和数个多边投资协定。“虽然离落实执行还很遥远，但一个涵盖所有沿线国家的‘超级条约’将是实施一带一路倡议的最有影响力的方式，因为这将减小人员、资金和货物跨境流动的法律阻力，”Starr 说。

当然，贸易壁垒若在大范围内存在，将是实施“一带一路”倡议的主要障碍。

这些壁垒主要包括基础设施不足、贸易关税和低效的海关清关手续等，尽管中国已经与 20 多个一路一带沿

Chinese investors will need to be advised how regulations are used and interpreted in various countries. Helena Chen, a Beijing-based partner at Pinsent Masons, says legal challenges will inevitably differ from jurisdiction to jurisdiction. “Some jurisdictions may have restrictions on foreign ownership of key infrastructure; some may have restrictions on importing foreign workers; some may require the substantive law of works and services contracts to be executed within a jurisdiction to be the law of that jurisdiction,” she says. “Some jurisdictions may require disputes arising from construction projects in that jurisdiction to be seated locally.”

Yet another challenge is the incompleteness, uncertainty and sometimes inter-conflicting provisions in some of the countries’ legal frameworks, adds Chen, and all such legal issues may require Chinese investors and contractors to find ways around them.

To implement the Belt and Road initiative, the legal framework will need to be developed on three levels: funding of projects; international treaties, whether bilateral or multilateral; and creation of on-the-ground project documentation, according to Paul Starr, a Hong Kong-based partner at King & Wood Mallesons.

“On a global and regional level, the legal work that must be achieved to successfully implement the initiative will be around ensuring free movement of people, goods and funds across Belt and Road countries,” he says. “Currently, the most comprehensive way to do that is entry by states into free-trade agreements, such as multilateral investment treaties [MITs] or bilateral investment treaties [BITs].”

King & Wood Mallesons has looked at the investment treaty network across the Belt and Road countries and identified more than 50 separate BITs and a number of MITs. “While still far from being implemented, a single ‘super-treaty’ covering all Belt and Road countries would be the most impactful way to implement the initiative, as it would limit the legal restrictions on cross-border movement of people, funds and goods,” says Starr.

Certainly, trade barriers – taken in a wide context – pose some of the main obstacles to the implementation of the Belt and Road initiative. These are barriers such as inadequate infrastructure, trade tariffs, and complicated and inefficient customs clearance



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一带一路沿线国家的法律制度和商业惯例不同，这是一个重要问题

The existence of different legal systems and business practices across the various OBOR countries is an important issue

有些司法管辖区可能会限制外资对关键基础设施的所有权；有的可能限制进口外国劳动力……

Some jurisdictions may have restrictions on foreign ownership of key infrastructure; some may have restrictions on importing foreign workers ...



陈希佳
HELENA CHEN
品诚梅森律师事务所
合伙人, 北京
Partner
Pinsent Masons
Beijing

线国家签订了自由贸易协定, 有助于克服许多障碍。

“一带一路沿线国家的法律制度和商业惯例不同, 这是一个重要问题,” 霍金路伟律师事务所北京代表处管理合伙人魏军说。“这些法律制度中, 许多既不精密也不支持外国投资。这些法律效率不高或并不可靠。因此, 迫切需要在沿线国家之间实现政策协调, 建立一套共同的原则、规则 and 标准。”

procedures – although the free-trade agreements China has entered into, involving more than 20 Belt and Road jurisdictions, will help overcome many of these hurdles.

“The existence of different legal systems and business practices across the various OBOR countries is an important issue,” says Wei Jun, managing partner at Hogan Lovells in Beijing. “Many of these legal systems are not sophisticated or supportive of foreign



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Tahota is the largest and best law firm in mid-western China and assisted many clients in their cross-border transactions. Currently, there are nearly 100 experienced lawyers primarily focusing on cross-border transactions, of whom 30 lawyers with foreign master degrees and 5 lawyers with JD degree. Several lawyers are licensed to practice in New York State or California State, or as U.S. patent agent. Tahota has long-term cooperation with prestigious law firms in various countries and is able to assist clients' business need in most parts of the world. As the first law firm in mid and western China to set up overseas branch offices, Tahota has established offices in Washington, Hong Kong, Seoul and Busan. Furthermore, Tahota Law Firm has sent representative attorneys to Australia.

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现有执业律师：700+

中伦文德律师事务所（中伦文德）起源于1992年，是司法部最早批准设立的第一批合伙制律师事务所，经过多年的发展，现已成为一家扎根于中国并面向国际化发展的大型综合性律师事务所，也是中国第一家在英国伦敦和沙特利雅得设立办公室的律师事务所。

中伦文德现拥有近千名律师及专业人员的规模化团队，除北京总部外，设有16家分支机构，覆盖中国主要的中心城市。此外，中伦文德还在全球范围内设立分支机构，包括香港、伦敦、巴黎、布鲁塞尔、柏林、利雅得等。优秀的律师团队和国际化的地域分布使中伦文德能熟练使用多种语言为全球范围内的客户提供一流的法律解决方案。服务法系涵盖了大陆法系、英美法系、伊斯兰法系等。

中伦文德在每一个法律领域均可提供优质的法律服务，在大多数领域都处于国内领先地位。中伦文德律所及律师多次得到钱伯斯（Chambers & Partners）、英国律师杂志（The Lawyer）、亚洲法律杂志（Asian Legal Business）、商法（China Business Law）、法律五百强（The Legal 500）、LEGALBAND等著名法律媒体的推荐。

2016年5月，中伦文德联合国内外11家律所发起成立第一个全球性的法律服务联盟GLA（Global Legal Alliance），旨在为全球范围内的法律服务机构和法律服务人士提供交流、学习与合作的公益平台。GLA在中国“一带一路”战略大背景下产生，目前已有12个专业委员会，展望未来，GLA将整合自身优势资源，服务于中国“一带一路”发展战略，为中国企业走出去建言献策、保驾护航。

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此外，中伦文德还在伦敦·巴黎·利雅得·里昂·柏林·汉堡等欧洲和中东地区的主要城市设有办公室。

[一带一路] 项目通常会涉及多个合同以及单个合同的多方当事人

[OBOR] projects will often involve multiple contracts as well as multiple parties to a single contract

PAUL STARR

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魏军表示, 违约风险也固然存在, 因为在一些地区特别是欠发达国家问责制薄弱, 缺乏有效的执法措施或可靠的司法制度。在这种情况下, 投资者可以依靠中国与大多数一带一路沿线国家签署的相关条约提供的保护措施以及相关的争议解决机制 (例如在国际投资争端解决中心公约下对仲裁裁定的承认和执行), 直接针对相关国家政府提出索赔请求, 避开当地法院, 否则诉讼过程可能会持续数十年。

随着越来越多的一带一路项目的推进, 争议不可避免地会日趋增加。瑞生律师事务所香港办事处合伙人杨炎龙介绍说, 他们所接办的香港以外的国际仲裁案件几乎都包含属于“一带一路”大概范畴的中国元素。

“一带一路所覆盖的是多个司法管辖区及多种法律制度, 最主要的法律挑战是就争议解决方式达成一个折中方案,” 他说。“采用仲裁有可能是最好的折中方案, 不过也会碰到一些问题, 例如合同所适用的准据法不同、各地对仲裁的支持度还处在不同的发展阶段。”

魏军表示: “无论是通过已经设立的仲裁中心进行仲裁, 如香港国际仲裁中心或新加坡国际仲裁中心, 还是通过针对一带一路专门设立的争议解决机构, 总之需要一套有效的争议管理方式。”

Starr 认为, 尽管确保投资者对一带一路沿线国家法律制度的信心是一大挑战, 但与投资者利益相关的国家法律框架必须是安全、可信的。“在谈判和订约阶段, 大多数当事方并不会去考虑潜在的争议,” 他说。“然而当事方正是需要在这阶段考虑让争议解决律师参与其中, 从而在未来万一出现争议时, 确保可以在安全、可信的平台上以可靠的机制来解决争议。”

“参与一带一路项目的律师需要考虑的一个挑战是, 这些项目通常会涉及多个合同以及单个合同的多方当事人。可能涉及的当事方类型包括主权国家政府、公共或有实体、外资企业和离岸公司等。因此, 在签约时, 各方务必要将适用于所有项目形式的可兼容条款纳入合同中, 在必要时可使用框架协议。预先拟定并协调合同条款可以在第一时间防止法律纠纷的产生,” Starr 表示。

“一带一路”沿线国家的仲裁法律已经出现了一定程

investment. They may be inefficient or unreliable. There is therefore a pressing need to achieve policy co-ordination among the various OBOR countries, and to establish a common set of principles, rules and standards.”

Wei says there is also an inherent risk of breach of contract, especially in underdeveloped countries where there is poor accountability and a lack of efficient enforcement measures or a credible judicial system. In such cases, investors could rely on the protections offered by the relevant treaties signed between China and most of the Belt and Road countries, and the related dispute resolution mechanisms – such as the recognition and enforcement of tribunal awards under the International Centre for the Settlement of Investment Disputes Convention – and bring claims directly against Belt and Road governments to avoid the local courts, a process that could last decades.

The number of disputes will inevitably increase as more Belt and Road projects get under way. Yang Ing Loong, a partner in the Hong Kong office of Latham & Watkins, says almost all of the international arbitration cases they handle out of Hong Kong have a China element which falls within the broad ambit of OBOR.

“The OBOR has a wide variety of legal jurisdictions and systems, and the main legal challenges are to find a compromise in terms of getting disputes resolved,” he says “Potentially arbitration offers the best compromise but one also runs into issues of different governing laws of contracts and different stages of development in terms of the support given to arbitration.”

Wei says there needs to be an efficient way to manage the disputes, “whether through arbitration at well-established arbitration centres – like the Hong Kong International Arbitration Commission or the Singapore International Arbitration Centre – or through the creation of an OBOR-dedicated dispute resolution body.”

Ensuring confidence in the legal systems across Belt and Road routes will be a challenge, but the legal framework throughout the countries in which investors take an interest must be secure and trustworthy, says Starr. “Most parties are not thinking of

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度上的趋同，一半以上的沿线国家在其国内的仲裁法中采纳了联合国国际贸易法委员会（UNCITRAL）的示范法。美迈斯律师事务所香港办公室管理合伙人白乐德（Denis Brock）指出，在大多数案件中依靠现行机制可能就足够了。

“我们现有的仲裁体制已相当精密，” Brock 说。他是香港律师会理事会成员，并将担任该协会于 5 月 12 日举行的以“一带一路：连接、融合及协作”为主题的法律论坛的主持人。“一带一路倡议需要新的仲裁中心吗？我认为并不需要。我们需要制定更多的协议吗？不，我们已经有了《纽约公约》[即《承认及执行外国仲裁裁决公约》]，为 160 多个签署国之间执行仲裁裁决提供便利，”他表示，尽管不是所有一带一路沿线国家都已经是签署国。

习近平对现代丝绸之路的理念是否能成功，最终取决于丝路所经过的所有国家之间的互动，法律界无疑在其中发挥着关键作用。“中国应该继续推进一带一路所需的

potential disputes when they are at the stage of negotiation and contracting,” he says. “Yet this is the time that parties need to start thinking about engaging dispute-resolution lawyers to ensure that if a dispute does arise later down the line, there will be a reliable dispute mechanism to resort to in a secure and trustworthy forum.

“A challenge that lawyers involved with OBOR projects need to consider is the fact that these projects will often involve multiple contracts as well as multiple parties to a single contract. The types of parties that could be involved include sovereign states, public or state-owned entities, foreign and offshore companies, etc. Therefore, it is essential that at the time of contracting, parties incorporate compatible clauses across all project instruments, using framework agreements where necessary. Forethought and harmonization of clauses across agreements can help prevent legal disputes arising in the first place.”

首要顾虑 HIGH-LEVEL CONSIDERATIONS

中国的开发商和贷款人面临着与“一带一路”相关的高法律风险。孖士打律师事务所新加坡办公室顾问 Sean Prior 概述了法律顾问可以发挥作用的主要领域。

国家风险分析：不同国家之间的法律架构和解决关键问题的方法都有很大差异，如：（1）中国投资者是否可以持有项目 100% 的所有权；（2）可以引进中国劳动力进行施工和经营吗？如果可以，到什么程度？（3）法规变更的频率如何，现有项目是否可以得到保护或豁免？解决了这些类型的问题，投资者才需要进而考虑如何设立合资企业、如何有效签订合同及获得融资等技术问题。优秀的律师还要有能力解释实际情况与纸上规则如何不同。这种前期分析对于任何投资都至关重要。

结构：中国投资者需要知道如何设计投资结构，以最大限度地获得税收优惠、扩大双边条约覆盖面及提高企业和集团效率。该地区的律师应该知道有哪些结构可供选择并能够解释这些结构，其替代方案及每种选项的风险。

融资和信贷增值：根据投资和管辖权的具体情况，中国企业可以利用多种融资结构和增信方式，包括多边发展机构的保障，出口信贷机构的参与以及保险。每一组选项都有自己的风险结构和定价情况。律师是评估和实施这些选项的专家。

稳健的合同和争议解决：一旦国家风险、结构和其他最重要的顾虑得到解决，投资者需要符合当地所有法律要求和国际最佳标准的稳妥可靠的文件。他们也希望选择适合相关国家和投资情况的最有效的争议解决平台。

China’s developers and lenders face high levels of legal risk associated with the Belt and Road initiative. Sean Prior, a Singapore-based counsel at Mayer Brown JSM, outlines the main areas where commercial lawyers are likely to be called upon to add value.

Country risk analysis: Each country will differ significantly in its legal structure and approach to key questions such as: (1) Can



a Chinese investor own 100% of a project; (2) Can it import Chinese labour to carry out construction and operation? And if so, to what extent; and (3) How regularly do regulations change, and do they protect or exempt existing projects? These types of questions must be answered before an investor can even get into the technical requirements of how to enter into joint ventures, contract effectively, obtain finance,

and so on. Good lawyers will also explain what actually happens on the ground, and whether that differs from what the rules are on paper. This upfront analysis is essential to any investment.

Structuring: A Chinese investor will want to know how to structure its investment to maximize tax benefits, bilateral treaty coverage and corporate and group efficiencies. Lawyers in the region should know which structures work and will be able to explain them, their alternatives, and the risks each option carries.

Financing and credit enhancement: Depending on the investment and the jurisdiction, there are significant numbers of financing structures and credit enhancement options that Chinese companies can take advantage of, including multilateral development agency cover, export credit agency involvement and insurance. Each set of options carries its own risk profile and pricing. Lawyers are expert at assessing and implementing these options.

Robust contracts and dispute resolution: Once the country risk, structuring and other high-level considerations are settled, investors will need strong, robust documentation that complies with all local requirements and international best standards. They will also want to be comfortable that they have chosen the most effective dispute resolution forum that suits the country and the investment.

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“一带一路”包括丝绸之路经济带的路基基础设施，以及21世纪海上丝绸之路的港口和航线。不过随着电子商务越来越多有力地促进着沿线大部分的贸易，这条“丝路电商高速公路”可能会变得更加重要。

飞驰在这条电商高速公路最前沿的是全球最大的电子商务企业阿里巴巴集团，其B2B和B2C平台的目标不仅仅是推动贸易，而且也旨在新成立的电商企业更好地从“一带一路”计划中受益。

“我们公司的企业法务在这方面发挥了重要作用，”阿里巴巴集团资深法律顾问许逸仙说：“对于我们法务顾问来说，相关的工作包括设计结构、制定方向，理解每个国家在国际贸易方面的限制，研究海关法、税法、消费者保护措施、贸易壁垒、反垄断法、反竞争法律等。”

克服不同市场之间的语言障碍，了解当地的习俗和做事方法也很关键。“就法律挑战而言，当我们试图进入一个本地市场时，显然已会有本地的企业存在，”许逸仙说。“那么我们如何与他们合作并了解当地市场，同时为我们的业务争取一定比例的市场份额？这是一个法律挑战，因为尽管我们不是本地企业，我们仍然需要了解当地有哪些限制，例如税收限制和海关限制，才可以确保我们业务的成功和发展规模。”

The Belt and Road may be the land-based infrastructure of the Silk Road Economic Belt and the ports and shipping routes of the 21st Century Maritime Silk Road, but a third avenue – the Silk Road e-highway – is likely to become perhaps even more important, as e-commerce increasingly facilitates most of the trade along its routes.

At the forefront of this is China's Alibaba Group, the world's biggest e-commerce company, whose B2B and B2C platforms are aiming not only to facilitate trade but also to educate the newest players who are likely to take advantage of the Belt and Road initiative.

“Our in-house lawyers play a significant role in this regard,” says Cindy Hui, senior legal counsel at Alibaba Group. “For our lawyers it's about coming up with the structures, with the direction, understanding the limitations of each country in terms of international trade, research on customs laws, tax laws, consumer protection, trade barriers, anti-trust laws, anti-competitive laws.”

Overcoming the language barriers between markets and understanding local customs and methods is also key. “In terms of what the legal challenges are, when we try to break into local markets there are obviously existing local players,” says Hui. “So how do we collaborate with them or understand the market and make a proportion of market share for our businesses? This is a legal challenge because we need to understand, without being a local, what the restrictions are, such as tax restrictions and customs restrictions, so we can make our businesses successful and scalable.”



许逸仙 CINDY HUI

There is already some harmonization of arbitration laws involving OBOR countries, with more than half adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law in their domestic arbitration laws. And Denis Brock, the Hong Kong managing partner at O'Melveny & Myers, points out that existing arrangements are likely to be adequate in the majority of cases.

“What we have in place at present is a fairly sophisticated existing arbitral regime,” says Brock, a council member of the Law Society of Hong Kong and a moderator at its upcoming 12 May conference titled The Belt and Road: A Catalyst for Connectivity, Convergence and Collaboration. “Do we need a new arbitration centre to service the initiative? No, I don't think so. Do we need more treaties? No, we have the New York Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], which facilitates as between the 160-odd signatories,” although not every Belt and Road country is necessarily a signatory, he adds.

The success of Xi Jinping's vision of a modern-day Silk Road will ultimately depend on the interaction between all the countries through which it passes, and of course on the legal profession, which is playing a key role. “China should keep pushing through the necessary legal reforms and policies that are needed to facilitate OBOR, but the co-operation of OBOR countries

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我们需要制定更多的协议吗？
不，我们已经有了《纽约公约》，
为160多个签署国之间执行
仲裁裁决提供便利

*Do we need more treaties?
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法律界必须牵头在所有一带一路
沿线国家建立健全的法律平台

*The legal profession must lead the way
to create a sound legal platform in
all the OBOR countries*

法律改革和政策制订,但是一带一路沿线国家间的合作是至关重要的,他们那边还有大量工作需要完成,”霍金路伟律所的魏军表示。

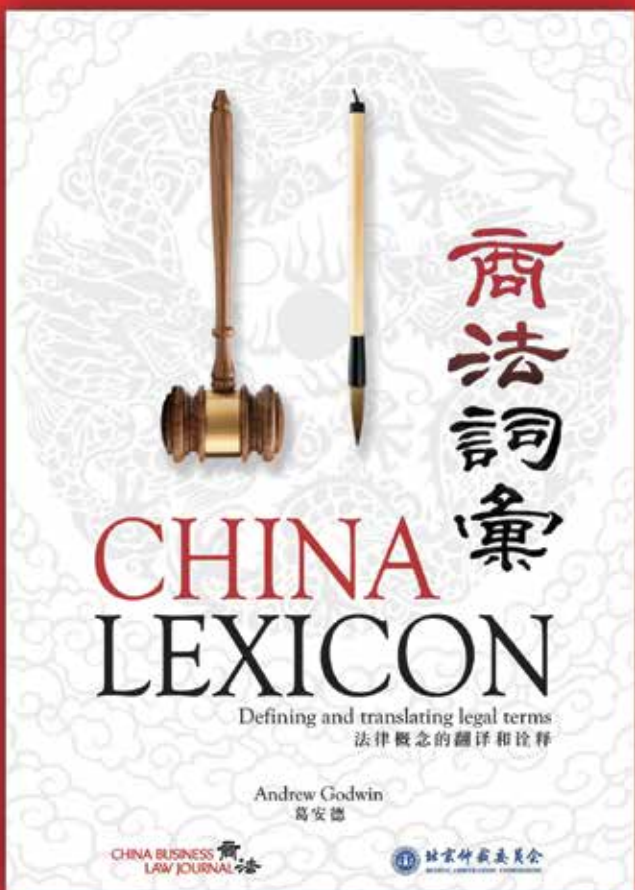
一带一路计划肯定会给所有人都带来大量机遇,不过站在最前沿的是律师,长盛律所的岑君毅表示。“法律界必须牵头在所有一带一路沿线国家建立健全的法律平台,”他说。“有了理解、互信和相互认可的法律制度,贸易和投资将蓬勃发展,惠及经济和各界人士。这是一个长远的目标。”▲

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Partner
Troutman Sanders
Hong Kong



is essential and substantial work remains to be done from their side,” says Wei from Hogan Lovells.

The Belt and Road initiative certainly throws up a plethora of opportunities for everyone, but it is the lawyers who are on the front line, says Sum, from Troutman Sanders. “The legal profession must lead the way to create a sound legal platform in all the OBOR countries,” he says. “With understanding, trust and a mutually acceptable legal system, trade and investments will flourish, benefiting the economy and all walks of life. This is a long-term goal.” ▲



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The author, Andrew Godwin, is a former partner of Linklaters who spent more than a decade in China and is currently an associate director of the Asian Law Centre at Melbourne Law School in Australia.

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哈萨克斯坦与 一带一路

Kazakhstan and the Belt and Road



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Kazakhstan has high ambitions in the China's Belt and Road initiative, as it is geographically an ideal junction between China and the West and its interest in the Belt and Road is indisputable, with the Kazakh government already involved in *Nurly Zhol* (the Path of Light), a US\$9 billion domestic economic stimulus plan to develop and modernize roads, railways, etc.

Kazakhstan's economy has been suffering from oil price declines since late 2013 and its future economic growth, therefore, depends on the development of infrastructure and regional trade. The country aims to become the largest business and transit hub of the Central Asia region, a bridge between Europe and Asia. It considers China's Belt and Road initiative as a means to this end.

Kazakhstan is important for the energy security of China. Its oil, gas, coal and uranium reserves are among the 10 largest in the world, and it has a strategic geographical location to control oil and gas flows from Central Asia to the East and the West. Its geographical proximity, the safety of transportation routes and the absence of any hostile rivals in the region are the main advantages of Kazakh energy for China. That is why, even years before President Xi Jinping's official declaration of the Silk Road Economic Belt initiative in 2013 in Astana, China had already begun to invest heavily in oil & gas infrastructure in Kazakhstan.

POTENTIAL PROBLEMS

There may be some roadblocks for Chinese foreign direct investment (FDI) in Kazakhstan. A Chinese investor planning an investment project in Kazakhstan, as in any other emerging nation, may

哈萨克斯坦对中国“一带一路”倡议怀有极大雄心。从地理上讲，该国是中国与西方的理想交汇点，其对一带一路的兴趣无可讳言，哈萨克斯坦政府已经在实施“光明之路”，这是一项投资90亿美元的国内经济刺激计划，致力于建设和推进公路、铁路等基础设施。

自2013年底以来，哈萨克斯坦经济因石油价格的下跌而遭受拖累，因此哈萨克斯坦的未来经济增长取决于基础设施和区域贸易的发展。该国制定的目标是，在作为亚欧桥梁的中亚地区成为最大的商业和中转枢纽。该国认为，可借力中国的一带一路倡议来实现该目的。

哈萨克斯坦对中国的能源安全具有非常重要的意义。哈萨克斯坦的石油、天然气、煤炭和铀矿储量均居世界前十。在控制从中亚到东方、西方的石油和天然气流量方面，哈萨克斯坦具有战略性地理位置。对中国而言，其地理距离的临近、运输路线的安全性以及该地区不存在敌对势力，是哈萨克斯坦能源的主要优势。习近平主席2013年在哈萨克斯坦首都阿斯塔纳正式提出新丝绸之路经济带倡议，不过在此前许多年，中国其实早已开始在哈萨克斯坦大力投资石油和天然气基础设施。

潜在的问题

但中国在哈萨克斯坦的外国直接投资可能会面临一些障碍和陷阱。中国投资者计划在哈萨克斯坦投资项目时，与在其他新兴国家一样，会面临法律环境和监管环境的不稳定性、以及现行法律的连续性和合同的可执行力问题。尤其是，哈萨克斯坦最近通过了《仲裁法》，如果投资者与准主权实体和/或国家机构发生争议，国际仲裁条款可执行性方面的不确定性会对外国投资者构成特别的风险。

因此，迄今为止中国在哈萨克斯坦的大型能源直接投资中，中国投资者通常采取的做法是以不同形式获得一般法律没有规定的额外法律

have to face an unsettled legal and regulatory environment, and uncertainty about the continuity of existing laws and enforceability of contracts. Uncertainty regarding enforceability of international arbitration clauses in disputes with quasi-sovereign entities and/or state bodies because of the recently adopted Arbitration Law, in particular, poses particular risks to foreign investors.

Major Chinese energy investments made in Kazakhstan so far, therefore, can be distinguished by specific approaches that Chinese investors take in terms of obtaining additional legal protections in one form or another, which otherwise are not provided for in the general law. For instance, just to make the China Oil Pipeline and the Central Asia China Gas Pipeline projects bankable, unprecedented international treaties between Kazakhstan and the PRC have been signed and ratified by the Kazakh parliament, which created specific legal frameworks for these particular two projects and which prevail over any conflicting Kazakhstan legislation.

The author believes, however, that such a unique foreign investment model could prove problematic and not acceptable for Kazakhstan if expanded for implementation of all future investments under the Belt and Road initiative.

Kazakhstan's multi-vector energy policy. China already controls up to 30% of the oil industry of Kazakhstan. Since 2000, Kazakhstan has moved from being fully dependent on Russia for oil and gas exports towards more diversification, but now there are concerns that Kazakhstan has become dangerously dependent on China. To address this, Kazakhstan has developed legal tools to be able to prevent further expansion of Chinese, Russian or any other country's control in its energy sector, if

保护。例如，为了中哈石油管道和中国-中亚天然气管道项目可从银行融资，中哈两国之间签署了多份前所未有的国际条约并经哈萨克斯坦议会批准，从而为这两个特定项目构建了具体法律框架，在与萨克斯坦立法存在任何相互冲突时，其优先级高于萨克斯坦立法。

但是，我们认为，如果将这一独特的外国投资模式推广到一带一路倡议下的所有未来投资项目，可能会有难度，而且使哈萨克斯坦无法接受。

哈萨克斯坦的多元能源政策。中国已控制哈萨克斯坦石油行业的约30%。自2000年起，哈萨克斯坦的石油和天然气出口从完全依赖俄罗斯转向更为多元化，但现在有人担心哈萨克斯坦对中国的过度依赖。为应对这一风险，哈萨克斯坦制定了特别的法律工具，以在需要时防止中国、俄罗斯等国对其能源行业的控制进一步扩大，包括国家有购买/准予转让所谓“战略资产”的优先权以及购买/准予转让底土使用权的优先权。这可能会对中国在一带一路倡议下的一些能源项目构成障碍。

聚焦哈萨克斯坦

哈萨克斯坦在世界银行的全球经商便利指数排行榜的排名大幅攀升，现居第35位。世界银行还将其列为全球20个最具吸引力的投资目的国之一。为推动哈萨克斯坦经济的工业化和多样化进程，哈萨克斯坦法律规定了优惠制度，例如税收和关税豁免，政府甚至对施工、设备组装和采购相关的成本提供上限为30%的补贴。这促进了在交通基础设施、农业、精炼石油产品生产和发电等领域的直接投资。

“ 哈萨克斯坦需要通过多元化和创新来考虑替代性增长模式，而不仅仅依赖自然资源
Kazakhstan needs to think of alternates for growth by diversifying and innovating itself instead of relying solely on natural resources

needed, including the state's priority right to purchase/permission to transfer so-called "strategic assets" and the state's priority right to purchase/permission to transfer in the area of subsoil use. This may be an obstacle for some energy projects initiated by China under the Belt and Road initiative.

FOCUS ON KAZAKHSTAN

Kazakhstan has climbed the World Bank's Ease of Doing Business index and is now ranked 35th. The World Bank also ranks it as one of the 20 most attractive countries in the world for investors. With the intention of promoting industrialization and diversification of its economy, the law in Kazakhstan provides a system of benefits and preferences – for example, tax and customs duties exemptions and even compensation by the government of up to 30% of the costs relating to construction, assembly and acquisition of equipment – that supports direct investments in certain areas, including transportation infrastructure, agriculture, manufacture of refined petroleum products, as well as the generation of electric power.

In 2013, feed-in tariffs and guaranteed off-take have been introduced to facilitate development of renewable energy projects, and in 2015 the PPP Law was adopted, which provides a good legal framework for public-private partnership (PPP) projects in any sector of economy.

2013年，哈萨克斯坦引入上网电价和担保承购，以促进可再生能源项目开发；2015年，通过了《公私合营法》，为各经济行业的公私合作项目提供了良好的法律框架。

因此，在对投资者已非常友好的一般立法框架下，一带一路倡议下的中国直接投资项目可能会并应该能在哈萨克斯坦得以实施。

抓住机遇

哈萨克斯坦需要通过多元化和创新来考虑替代性增长模式，而不仅仅依赖自然资源。一带一路倡议为哈萨克斯坦提供了一个吸引中国资金和技术、发展为亚欧大陆最大中转枢纽、向中国出口有机食品的独特机遇。

总之，就吸引外国直接投资而言，哈萨克斯坦有良好的法律体系，而且该国还有大规模的私有化计划。这场雄心勃勃的私有化运动的目标是，到2021年将国营企业在经济中的份额降低到15%。因此，哈萨克斯坦有机会成为中国企业在一带一路地区中的最佳投资国，并成为中国通往欧亚经济联盟（一个拥有1.83亿人的单一市场）的大门。

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Chinese FDI under the Belt and Road initiative, therefore, must be implemented in Kazakhstan under the general legislation framework, which is already very investor-friendly.

SEIZING OPPORTUNITIES

Kazakhstan needs to think of alternates for growth by diversifying and innovating itself instead of relying solely on natural resources. The Belt and Road initiative provides a unique opportunity for Kazakhstan to attract Chinese money and technologies, become one of the largest transit hubs in Eurasia, and to venture into exports of organic foods to China.

Kazakhstan has a good legal system for attracting FDI and with its massive privatization programme, the nation aims to reduce the presence of the state in the economy to 15% by 2021. Therefore, Kazakhstan has a chance to become the best country within the Belt and Road initiative for Chinese companies to invest in, and the door for China to the Eurasian Economic Union, a single market of 183 million people.

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