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### The impact of double tax treaties on inward FDI in ASEAN countries

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*Special Issue: Tax*

**A Step Forward for Tax Dispute Resolution between China and  
ASEAN Countries under the Belt and Road Initiative**

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March 2019

**A step forward for tax dispute resolution between China and ASEAN  
countries under the Belt and Road Initiative**

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The views expressed in this paper are solely those of the authors in their own personal capacity and not those of the institutions with which the authors are affiliated.

*\*This paper was completed by the author during her employment at the SMU-TA Centre for Excellence in Taxation*

## 1. Introduction

The Belt and Road Initiative (BRI) was proposed by Chinese President Xi Jinping during his visits in Central Asia and Southeast Asia in 2013. The BRI contains the land-based Silk Road Economic Belt (SREB) and the 21<sup>st</sup> Century Maritime Silk Road (MSR). In March 2015, China officially released the BRI Vision and Actions (the Vision and Actions on jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road), which announced the formal beginning of the strategy.<sup>1</sup> The SREB aims to link China, Central Asia, Russia and Europe by economic and social activities. The MSR connects China's coast and Europe through a route between the South China Sea and the Indian Ocean and a route between the South China Sea and the South Pacific Ocean.<sup>2</sup> As announced by the Chinese government, the BRI aims at building a "community of shared interests, shared destiny, and shared responsibility" among all the participated countries with multilateral mechanisms.<sup>3</sup> The name of the BRI is inspired by the old Silk Road in ancient China.<sup>4</sup> The main business activities are the cooperation on infrastructure building, maritime and land connectivity, trade of goods and services, and other economic cooperation, etc.<sup>5</sup> The BRI was proposed against the background of globalization and global governance.<sup>6</sup> It delivers China's idea of peaceful development via mutually beneficial relationships. On the other hand, the BRI is an effective way to transfer the overcapacity of infrastructure production to other developing countries who are keen for it.

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<sup>1</sup> The National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce, *Vision and Action on Jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road* (2015).

<sup>2</sup> Lingliang Zeng, "Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny" (2016) 15 *Chinese Journal of International Law* 517, 518-519.

<sup>3</sup> Ibid.

<sup>4</sup> Ta Sen Tan, 'Introduction of the Overland Silk Road and Maritime Silk Road' in Tai-Wei Lim and others (eds), *China's One Belt One Road Initiative* (Imperial College Press, 2016), 21-22.

<sup>5</sup> Zeng, above fn.2, 518.

<sup>6</sup> Ibid.

This aims to generate a win-win outcome for both parties. Moreover, the BRI could also enhance China's cultural influences worldwide.<sup>7</sup>

In order to facilitate the finance and funding of the BRI investment, the Asian Infrastructure Investment bank (AIIB) was established in 2015. Since the launch of the BRI, most countries along the route responded positively. Currently, 84 countries have joined the AIIB and the membership is still open but not limited to the BRI region. The project is expanding from Asia to the world.<sup>8</sup> Non-regional countries are major participants as well.<sup>9</sup> Until 2017, 24 projects have been approved by the AIIB and the total loans have exceeded US\$4.22 billion.<sup>10</sup> In 2017, China has signed contracting project contracts with 61 countries under the BRI and the trade volume achieved US\$983 billion.<sup>11</sup>

Under the BRI, particularly the MSR, China and Southeast Asia is building up a closer business relationship. The Association of Southeast Asian Nations (ASEAN) plays an important role in improving the business environment for economic activities stimulated by the BRI. Taxation is a critical factor for almost any business activity under the BRI. Although enterprises always hope to prevent and manage disputes, tax disputes seem to increase in the long term with the expansion of the trade and investment between China and ASEAN countries. The prevention and resolution of tax disputes become an essential part for the business cooperation between China and ASEAN countries.

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<sup>7</sup> Jianren Lu, "The 21<sup>st</sup> Century Maritime Silk Road and China-ASEAN Industry Cooperation" (2016) 7 *International Journal of China Studies* 375, 376.

<sup>8</sup> Statistics are from the AIIB website, available at: <https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> [Accessed May 11, 2018].

<sup>9</sup> Non-regional members are Austria, Canada, Denmark, Egypt, Ethiopia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, and United Kingdom.

<sup>10</sup> Statistics are from the AIIB website, available at: <https://www.aiib.org/en/index.html> [Accessed May 11, 2018].

<sup>11</sup> Dan Lian, 2017, *the "Belt and Road" Construction Entered a New Phase from the Big Idea to the Fine Brushwork*, Economic Daily, 8 January 2018, available at: [http://www.sohu.com/a/215282594\\_118392](http://www.sohu.com/a/215282594_118392) [Accessed May 11, 2018].

The mutual agreement procedure (MAP) is traditionally the major means to solve tax disputes derived from tax treaties. The MAP allows competent authorities of the contracting states to negotiate directly to solve disputes regarding treaty provisions. It guarantees certainty in a business environment for taxpayers. The OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Plans, i.e. Action 14, has integrated effective dispute resolution mechanisms as a minimum standard, which aims to facilitate tax dispute resolution via MAP. Moreover, it includes tax arbitration as an option for willing countries. Meanwhile, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) has also embedded the dispute resolution via MAP and alternatively arbitration for countries to solve tax disputes. The adoption of arbitration is becoming an increasingly accepted method to solve tax disputes. China has signed tax treaties with all ASEAN countries except Myanmar and all of them include a MAP provision. With an increasing business investment under the BRI between China and ASEAN, the MAP cases surge accordingly. It seems an effective way to solve current treaty related disputes. However, the MAP has its limits in effectively solving disputes considering the disparity of tax authorities' competency, resource, and experience in ASEAN countries.

On 7 January 2018, China has established the first BRI International Commercial Court-connected and Mediation Center (the Centre) in Shenzhen Qianhai district. As an international non-governmental organization, this center serves for the resolution of international commercial disputes through mediation and arbitration, especially targeted at the area of the MSR. Whether or not this center could play a role in resolving tax disputes becomes an interesting question. A further question rises as whether arbitration is an effective supplementary choice to the MAP with respect to tax disputes generated under the BRI for China and ASEAN countries.

The BRI is not merely as a regional cooperation project but a globalized business opportunity. Although it is initiated by China, it connects mainly Europe and Asia. The destination of both the SERB and the MSR is Europe. Therefore, it provides European countries more opportunities for economic cooperation. Moreover, it implicates the global influence of China as an emerging power. China's GDP ranks second in the world.<sup>12</sup> It is not only a top destination for foreign direct investment but also a main capital exporting country. In 2016, China's net outbound investment is US\$ 170.1 billion, while the inbound FDI is US\$ 126.0 billion.<sup>13</sup> The outbound investment has surpassed the inbound investment. Instead of being a norm taker, China is becoming a norm maker in the current global order. The establishment of the Centre indicates that China is making its own rules on dispute resolutions for investment activities along the BRI. Therefore, it is inspirational for the world to have a closer look at this project, especially the new tax dispute resolution mechanism proposed by China.

This article analyzes current means to solve tax disputes between China and ASEAN countries, and discusses the possibility and concerns of adopting mediation and arbitration as an alternative. It specifically analyzes the advantages and problems of the newly established Centre for dispute resolution. This article aims to provide thoughts on how to find the most appropriate and effective way to solve tax disputes, therefore ensuring a certain business environment for taxpayers.

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<sup>12</sup> See the World Bank Data GDP Ranking (2016), available at: <https://datacatalog.worldbank.org/dataset/gdp-ranking> [Accessed May 11, 2018].

<sup>13</sup> Actually, China has become a capital importing and capital exporting country since 2014. In 2014, the outbound direct investment was US\$123.1 billion, and the inbound foreign direct investment was 119.5 billion. In 2015, the outbound direct investment was US\$ 145.6 billion, and the inbound foreign direct investment was US\$ 126.2 billion. Statistics are from the Ministry of Commerce in China, available at: <http://data.mofcom.gov.cn/tzhz/fordirinvest.shtml>, <http://data.mofcom.gov.cn/lywz/inmr.shtml> [Accessed May 11, 2018].

## 2. Tax certainty and dispute resolution

### 2.1 Tax certainty

Tax certainty contains protective meaning for taxpayers and it is essential to ensure tax certainty by a tax system.<sup>14</sup> In general, tax certainty means the states of knowability, reliability, and calculability for taxpayers.<sup>15</sup> Knowability means taxpayers know the law through the system of legality and competence rules; reliability means taxpayers can rely on tax law through the law's stability, periods of validity, and procedure; calculability means there is no surprise for taxpayers, i.e. the anteriority rule.<sup>16</sup> In a state-taxpayer relationship, tax certainty protects taxpayers' expectation of their rights and obligations while restricts the state's arbitrary power of taxing.<sup>17</sup> Therefore, it is the fundamental character of a tax system to guarantee certainty for taxpayers.

In international trade and investment, tax certainty is a top factor for both tax authorities and taxpayers. According to the IMF/OECD Tax Certainty Report (2017), tax certainty has a critical impact on the growth of foreign direct investment (FDI).<sup>18</sup> In this era, several factors have heightened tax uncertainty, i.e. the increased internationalization of business activities, the emergence and spread of new business models, fragmented and unilateral policy decisions, and some rulings and court decisions, and the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project transition.<sup>19</sup> A lack of clear and timely dispute resolution mechanisms and processes could increase uncertainty. To be specific, dispute mechanism in these aspects affect tax certainty: ongoing and frequent differences between the legislators and associated guidance

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<sup>14</sup> H. Ávila, "The Concept of Tax-Law Certainty" in H. Ávila (eds), *Certainty in Law* (Cham: Springer International Publishing, 2016), 195-196.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1977), 124-125; H. Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands Fundamental Legal Principles as Checks on Legislative Power: A Case Study" (2013) 9 *Utrecht Law Review* 52.

<sup>18</sup> IMF/OECD, *Tax Certainty-IMF/OECD Report for the G20 Finance Ministers* (Paris: OECD Publishing, 2017), 25-26.

<sup>19</sup> Ibid 9-10.



provided by tax administrations and the courts; lengthy judicial disputes resolution processes; the costliness of the procedures; and unpredictability of the costs of the dispute resolution process.<sup>20</sup> The Report also identifies top 10 tools for enhancing tax certainty, and seven of them relates to dispute prevention and dispute resolution.<sup>21</sup>

## 2.2 Tax dispute resolution mechanisms

Mutual Agreement Procedure (MAP) is the most recognized way to solve treaty-related tax disputes through the consult of competent authority of Contracting Parties. The main purpose of the MAP is to avoid double taxation. It is a key tool for taxpayers to minimize the risk when there is a dispute.<sup>22</sup> Article 25 of OECD's Model Tax Convention includes the MAP and the arbitration procedure as treaty-related tax disputes resolutions. The arbitration is considered as a supplementary to the MAP instead of a separate procedure.<sup>23</sup> The OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Plans has also integrated an effective dispute resolution as a minimum standard. Action 14 develops solutions to address treaty-related disputes under the MAP and includes arbitration as a complementary option. In order to facilitate the implementation of BEPS minimum standards, the OECD develops an inclusive framework, which allows interested countries and jurisdictions to work on BEPS. Currently, 113 countries and jurisdictions have joined the inclusive framework implying their willingness to implement Action 14. Additionally, the multilateral instrument (the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, MLI) also has provisions on the MAP and a default arbitration. Until 22 March 2018, 78 countries and jurisdictions have signed up for the MLI promising to improve dispute resolution.<sup>24</sup>

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<sup>20</sup> Ibid 22.

<sup>21</sup> Ibid 47-58.

<sup>22</sup> Ibid 55.

<sup>23</sup> M. de Ruyter, "Supplementary Dispute Resolution" (2008) 48 *European Taxation* 493.

<sup>24</sup> See signatories and parties to the MLI (status as of 22 March 2018), available at: <http://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf> [Accessed April 6, 2018].

Besides the MAP, arbitration is a strong complementary tool for countries to solve tax disputes. Arbitration is a common way to solve bilateral investment treaty (BIT) disputes, but it is rare in tax treaty cases in practice.<sup>25</sup> Nevertheless, it is becoming an increasingly recognized way to resolve tax disputes. With respect to the MLI, 26 signatories, especially developed countries, have opted in a mandatory binding arbitration procedure.<sup>26</sup> In 2017, the European Union (EU) has approved the EU Arbitration Directive<sup>27</sup> as a complement to the EU Arbitration Convention<sup>28</sup> in order to provide enforcement mechanisms to solve transfer pricing disputes for taxpayers. The United States (US) is always an active advocate on tax arbitration, particularly the “baseball arbitration”, i.e. the arbitrator can only choose between two options presented by the competent authorities.<sup>29</sup> The goal of including mandatory arbitration provisions in tax treaties is to let it act as a deterrent measures for treaty partners to resolve MAP cases in a fair and efficient way.<sup>30</sup>

### 3. Risks of tax disputes between China and ASEAN

#### 3.1 Treaty-related tax disputes

Treaty-related tax disputes are likely to emerge although China has signed double tax treaty (DTT) with all ASEAN countries (not including Myanmar).<sup>31</sup> Except China-Cambodia DTT (2016) and China-Indonesia DTT (2014), the rest DTTs are outdated, for instance, the DTTs

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<sup>25</sup> K. Perrou, “Tax Law Disputes before Investment Arbitration Panels: Practical Experience” 56 *European Taxation* 451.

<sup>26</sup> These countries include Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Japan, Liechtenstein, Luxembourg, Mauritius, Malta, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. Most signatories opted in the mandatory binding arbitration procedure with reservations. For more information, see OECD MLI Matching Database (beta), available at: <http://www.oecd.org/tax/treaties/mli-matching-database.htm> [Accessed April 6, 2018].

<sup>27</sup> Council Directive (EU) 2017/1852/EU of October 10, 2017 on Tax Dispute Resolution Mechanisms in the European Union.

<sup>28</sup> Convention 90/436/EEC [1990] OJ L225/10 Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises.

<sup>29</sup> D. Rosenbloom, “Mandatory Arbitration of Dispute Pursuant to Tax Treaties: The Experience of the United States” in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books, 2016).

<sup>30</sup> *Ibid.*

<sup>31</sup> For complete analysis on tax risks of China’s investment in the ASEAN under the BRI and details of treaty analysis, see D. Xu, “Regional Tax Coordination between China and ASEAN under the Belt and Road Initiative” (2018) *Asia-Pacific Law Review*, forthcoming.

with Malaysia and Thailand were enforced in 1987.<sup>32</sup> Though Chinese tax authorities are working on the updating of DTTs with BRI countries,<sup>33</sup> the identification of a taxpayer's resident status, the interpretation of a permanent establishment (PE), and the application of treaty provisions are probably to trigger treaty disputes.<sup>34</sup>

### 3.2 Competency of tax authorities in ASEAN countries

The insufficient competency of some tax authorities in ASEAN countries could lead to inefficient resolution of tax disputes even with the MAP. The competency of tax authorities relates to a country's economic development, budget, resources, and experiences, etc. Among ASEAN countries, the capability of tax authorities varies much, but the overall level is not high if compared to developed countries (except for Singapore).<sup>35</sup> Moreover, only a few countries have experiences of the MAP, including Singapore, Malaysia, and Indonesia.<sup>36</sup> For other countries, especially those major BRI infrastructure investment destinations, such as Thailand and Myanmar,<sup>37</sup> the insufficient MAP experience and low capability could impede the resolution of some tax disputes.

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<sup>32</sup> Time of enforcement of DTT with China: China-Brunei DTT (2007), China-Cambodia DTT (2016), China-Indonesia (2014), China-Laos DTT (2000), China-Malaysia DTT (1987), China-Philippines DTT (2002), China-Singapore DTT (2008), China-Thailand DTT (1987), and China-Vietnam DTT (1997).

<sup>33</sup> L. Han and Y. Gao, "The Latest Development and Prospect of Tax Treaties under the international perspective--Interview with Yuying Meng, Vice Director of the Interantional Tax Deputy, the State Administration of Taxation" (2017) 6 *International Taxation in China* 8.

<sup>34</sup> Xu, above fn. 31.

<sup>35</sup> According to the statistics of the World Bank in 2017, the time to prepare and pay taxes in ASEAN countries is long and the number for taxpayers to make tax payments is high on average. Brunei: 64 hours, 15 times; Cambodia 173 hours, 40 times; Indonesia 208 hours, 43 times; Laos 362 hours, 35 times; Malaysia 188 hours, 8 times; Myanmar 282 hours, 31 times; Philippines 182 hours, 20 times; Singapore 64 hours, 5 times; Thailand 262 hours, 21 times; Vietnam 498 hours, 14 times.

<sup>36</sup> See OECD MAP profile, available at: <http://www.oecd.org/tax/dispute/country-map-profiles.htm> [Accessed April 4, 2018].

<sup>37</sup> For instance, China has officially announced the start of the infrastructure projects on the China-Myanmar Railway, China-Myanmar Oil & Gas Pipeline, and China-Thailand Railway. See *An Inventory of the Significant Projects under the "Belt and Road Initiative"*, February 4, 2017, available at: <https://www.yidaiyilu.gov.cn/qyfc/xmal/2475.htm> [Accessed April 4, 2018].

### 3.3 The political economy of the region

The political economy in this region could increase chances of tax disputes. ASEAN countries normally consider the BRI as an opportunity for foreign direct investment (FDI), which brings more tax revenue.<sup>38</sup> Since most investment is in the construction of infrastructure at this stage, tax disputes could concentrate on the issues of PE identification and transfer pricing, which are sensitive for the taxing right. Thus, investors could encounter situations of no or not sufficient treaty benefits enjoyed. In addition, ASEAN countries have different attitude towards BRI. Some of them welcome the investment due to their keen need. However, some countries still maintain not a so enthusiastic attitude for geo-political reasons.<sup>39</sup> These countries' policy issues could affect the implementation of DTTs and MAPs.

In summary, tax disputes will predictably increase in the region of ASEAN countries under the BRI. An effective and efficient dispute resolution system is a guarantee for tax certainty, which is a top factor by importance for investment.

## 4. The problems of the current dispute resolution mechanism under the MSR

### 4.1 The MAP is time-consuming and not final

The MAP is always time-consuming and there is no guarantee for a final dispute resolution. According to the OECD MAP statistics for 2016, the average time taken to close MAP cases is 17 months, but for transfer pricing cases, it takes 30 months. The MAP profiles of China, Indonesia, and Singapore indicate that the average time to close cases varies, but it is longer in general. For instance, transfer pricing cases takes 26.14 months to solve in China, 39.98 months in Indonesia, and 54.95 months in Singapore respectively. Other cases takes 16 months, 27.9

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<sup>38</sup> "China's BRI Seen Boosting Trade with ASEAN to US \$2.1 Trillion", *The Star Online*, May 20, 2017, available at: <https://www.thestar.com.my/business/business-news/2017/05/20/chinas-bri-seen-boosting-trade-with-asean-to-us21-trillion/> [Accessed April 5, 2018].

<sup>39</sup> For instance, companies in Thailand, Vietnam, and Brunei are concerned and resistant to Chinese companies because they worry the impact of competition would harm them. See Lu, above fn.7, 375.

months, and 36.05 months to resolve in China, Indonesia, and Singapore.<sup>40</sup> The three countries are relatively experienced in the MAP compared to other ASEAN countries. The tax authority's competency is considered higher as well.<sup>41</sup> It even takes these countries such long time to solve tax disputes, not to mention those countries in the region without much experience and resource. This is actually a common problem for both developing and developed countries. A main reason is that the MAP only requires contracting parties "endeavour" to resolve disputes instead of a binding resolution.<sup>42</sup> There is no strict timetable for competent authorities to resolve the dispute. Thus, it could not provide a guarantee for a final resolution. Although the statistics from China and Singapore shows an effective resolution via the MAP, i.e. over 80% cases resolved, the statistics in Indonesia displays a rather opposite result, namely over 80% cases are finally delivered to the tax court instead of resolving via the MAP.<sup>43</sup> Therefore, though the MAP can be an effective way to resolve tax disputes, it is not necessarily an efficient one.

#### 4.2 Taxpayers are outside the MAP

When a dispute enters the MAP, the competent authorities of the contracting parties are entities who actually work on the resolution. It is a government-to-government discussion. However, taxpayers who are direct interest parties are always excluded from the MAP.<sup>44</sup> Taxpayers are merely involved to make their request before the competent authority and deliver relevant facts or arguments. Nevertheless, neither there is guarantee of taxpayers' active participation in the MAP, nor a strict obligation on tax authorities.<sup>45</sup> Tax authorities are not

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<sup>40</sup> These statistics are for cases started before 1 January 2016. There are only MAP statistics of China, Indonesia, and Singapore from OECD's official website. See the MAP statistics, available at: <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2016-per-country-other.htm> [Accessed April 9, 2018].

<sup>41</sup> Xu, above fn. 31.

<sup>42</sup> P. Brown, "Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions" in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books, 2016).

<sup>43</sup> Ibid.

<sup>44</sup> K. Perrou, "Participation of the Taxpayer in MAP and Arbitration: Handicaps and Prospects" in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books, 2016).

<sup>45</sup> Ibid.

definitely the representative of taxpayers in the MAP, particularly when the tax authority have mastered all relevant information of the taxpayer. The MAP usually requires the taxpayer to submit all the materials related to the dispute, including the taxpayer's revenue and loss, and tax payment record, etc. When the taxpayer's own tax reporting has loopholes, the full submitting of materials exposes the taxpayer's problems. The tax authority could take the chance to adjust the taxpayer's behaviour or even make deals with the counterparty instead of completely satisfying the taxpayer's request in the dispute.<sup>46</sup> Moreover, the practice varies tremendously considering different tax authorities' own policies. Not every tax authority endeavours to reach a win-win result.<sup>47</sup> Therefore, the MAP cannot always ensure the taxpayer's requests are satisfied.

## 5. Arbitration as a complementary to the MAP

### 5.1 Advantages of tax arbitration

Taking into account the disadvantages of the current MAP mechanism, arbitration could be an efficient complementary. As introduced before, the main models of arbitration nowadays are the OECD model (OECD Model Tax Convention and MLI), the EU model (EU Arbitration Convention and the directive), and the US model. The reason to integrate arbitration as a complementary is that it could address the disadvantages of the MAP.

#### 5.1.1 Arbitration is more efficient

The arbitration can speed up the resolution of tax disputes. The arbitration usually has a stringent timeline and procedure rule for the resolution. For instance, the EU Arbitration Convention requires the advisory commission deliver its opinion within six months from the submission date and the decision be implemented within six months of its delivery.<sup>48</sup> This

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<sup>46</sup> S. Li and P. Qin, "International Tax Arbitration Mechanism and China's Taxation Rights", (2015) 5 *Taxation Research* 72 (in Chinese).

<sup>47</sup> Brown, above fn. 42.

<sup>48</sup> Article 11 and 12 of EU Arbitration Convention. The total duration of the proceedings is limited to three years.

setting eventually speed up the MAP settlement, which offers taxpayers more certainty on their expectation towards the resolution. Meanwhile, a final decision within a due period does not necessarily lead to a biased opinion. Reasoned opinions can be time and cost efficient as well.<sup>49</sup>

If the arbitration system is well designed, it could ensure an efficient decision.

### 5.1.2 Arbitration could provide a level playing field

For developing countries, arbitration could provide a level playing field for the dispute resolution thus avoiding the power play. Compared to most developed countries with much experience and resource in the MAP, developing countries are in a more disadvantaged position. The BRI is open to investors all over the world although China is the major investor at the initial stage. It is predictable that more multinational enterprises (MNEs) will join the business activities in this area, thereby probably triggering more tax disputes. Since most countries in this region are developing countries with limited MAP experiences, the level playing field is tilt for them to negotiate with tax authorities who have more experience and expertise. This problem continues if developing countries and developed countries go to the arbitration, especially under the current arbitration models. However, an independent, fair, and efficient arbitration system can contribute to establishing a level playing field for developing countries in this region to avoid a biased resolution merely due to an unbalanced political power play.<sup>50</sup>

### 5.2 Concerns for tax arbitration between countries along the MSR

Most countries in this region do not even have many experiences in the MAP, not to mention arbitration. Except that Singapore and Indonesia in very few cases have an arbitration clause in tax treaties, other ASEAN countries do not include an arbitration clause in tax treaties.<sup>51</sup>

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<sup>49</sup> S. Govind and L. Turcan, "Cross-Border Tax Dispute Resolution in the 21st Century: A Comparative Study of Existing Bilateral and Multilateral Remedies" (2017) 19 *Derivatives & Financial Instruments* 8.

<sup>50</sup> M. Lennard, "International Tax Arbitration and Developing Countries" in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books, 2016).

<sup>51</sup> Singapore has included an arbitration clause in the Singapore-Mexico DTT (1994); Indonesia has also included an arbitration clause in the Indonesia-Mexico DTT (2002).

Within the MLI, China, Indonesia, Malaysia, and Singapore are all signatories, but only Singapore has opted for a mandatory binding arbitration.<sup>52</sup> In fact, besides the four countries, Brunei and Vietnam have also joined the BEPS inclusive framework, but there seems no further action from the two countries to include arbitration as a means for dispute resolution.<sup>53</sup> These countries do have concerns for tax arbitration.

### 5.2.1 Tax sovereignty

Tax sovereignty could be a premier concern for countries not favouring arbitration. ASEAN countries care more about the FDI that could contribute to the country's economic growth and infrastructure construction. Every country hopes to keep the revenue in its jurisdiction. Submitting tax disputes to an arbitration causes concerns on harming the sovereignty. The existing models do not always fit in the need of countries in this region because they are all oriented by developed countries, and they aim to solve complicated commercial disputes. The design of the rules could naturally lead to "bias" towards less developed countries with limited experience and resource in arbitration.<sup>54</sup> Moreover, most arbitration centres are located in common law jurisdictions, such as London, Hong Kong, and Singapore, which adopt the principles of common law as the fundamental rules.<sup>55</sup> This is not completely suitable for countries along the MSR. They always concern they are not parties in the existing clubs. For countries in this region, the tribunal might not give a satisfying decision due to the lack of knowledge in this region, especially when dealing cases between developed and developing countries.<sup>56</sup> Therefore, the selection of arbitrators from countries in this region would be helpful to increase the credibility of the decision. It is necessary to have a refined system that

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<sup>52</sup> Above fn. 35.

<sup>53</sup> OECD, *Members of the Inclusive Framework on BEPS* (March 2018), available at: <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> [Accessed April 10, 2018].

<sup>54</sup> *Ibid.*

<sup>55</sup> For instance, the London Court of International Arbitration, Singapore International Mediation Centre, and Hong Kong Mediation and Arbitration Centre.

<sup>56</sup> Lennard, above fn. 50.



can protect the sovereignty of these countries thereby comforting them to accept the arbitration as an effective complementary to the MAP.

### 5.2.2 High costs

The high cost of arbitration is also the main concern for countries in the region. Arbitration is a common way used to resolve investment disputes, particularly disputes derived from bilateral investment treaty (BIT).<sup>57</sup> A frequent complain about commercial investment arbitration is its high costs. The average cost for an ICSID (International Centre for Settlement of Investment Disputes) case is around USD 8 million per party.<sup>58</sup> The high cost always intimates developing countries who can hardly afford the expenses. However, this is normally the case between developed countries in the existing arbitration models. If the arbitration system could take into account the financial capability of developing countries and lower the costs, it will not become such an obstacle.

### 5.2.3 Transparency

Transparency is another concern. The decision-making process in an arbitration is always confidential. It is good to have secrecy on tax disputes since information involved in tax disputes can be very sensitive. However, the tribunal's decision-making is not transparent, which means that there is no assurance on a fair and neutral determination. This could be a concern for ASEAN countries since they may not know how the decision is made. The problem is that the lack of a common standard on the application of law can lead to unpersuasive decisions. Thus, the lack of transparency could strengthen these countries' concern on a fair and neutral result from the arbitration.

In summary, the concerns on tax arbitration are reasonable for countries along the MSR. It is necessary to have better alternatives that can address these concerns if resolving tax disputes

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<sup>57</sup> Perrou, above fn. 25, 451-457.

<sup>58</sup> Lennard, above fn. 50.

effectively is the ultimate goal. Therefore, an arbitration system fits in this region would be beneficial for ASEAN countries to resolve tax disputes between them and with China.

## 6. Is China's new BRI Court-connected and Mediation Centre a step forward?

### 6.1 Overview of China's BRI Court-connected and Mediation Centre

On 7 January 2018, China has established the first BRI International Commercial Court-connected and Mediation Centre (the Centre) in Shenzhen Qianhai district.<sup>59</sup> As an international non-governmental organization, this centre serves for the resolution of international commercial disputes through mediation and arbitration, especially targeted at the area of the MSR.<sup>60</sup> A characteristic of this Centre is voluntary preliminary mediation for disputes, which is facilitative to the resolution of disputes.<sup>61</sup> Although there are existing alternatives, such as the Singapore International Mediation Centre and the China Chamber of International Commerce Mediation Centre, this Centre could become a new opportunity for ASEAN countries to solve commercial disputes. In fact, this Centre combines mediation, arbitration, and an appeal procedure together. This Centre is independent from the court, but if disputes cannot be solved by mediations, disputed parties could choose litigation or arbitration. Currently, there are merely rough rules with respect to how the Centre works. There is also an appeal procedure if parties do not agree with the decision.<sup>62</sup> Nevertheless, there is no clear guidance on whether tax disputes could be accepted by this centre.

The Centre has a location advantage. Shenzhen Qianhai area is a free trade zone close to Hong Kong, which has more experiences and expertise in commercial arbitration. It also covers

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<sup>59</sup> R. Tang, "The Establishment of the Belt and Road International Commercial Arbitration Centre in Shenzhen Qianhai", *Legal Daily*, 1 July 2018.

<sup>60</sup> "Myanmar (Burma): Experts Divided over Ramifications of Belt and Road Courts on Myanmar", *Asia News Monitor*, 5 February 2018.

<sup>61</sup> Work Rules of the Belt and Road International Commercial Court-connected and Mediation Centre, available at: <http://www.ydyflggfwpt.gov.cn/web/content/108-?lmdm=1070> [Accessed April 10, 2018].

<sup>62</sup> *Ibid.* If the case goes to the court, disputing parties can appeal to a higher court in China. This follows China's domestic procedure law.

the region of the MSR. As the pioneer of China's Reform and Opening Policy, Shenzhen has more liberal and legalized environment for dispute resolutions under the MSR.<sup>63</sup> Therefore, it combines the advantages of both Shenzhen and Hong Kong with the purpose of protecting the rights of business parties and creating a fair and transparent legal environment.<sup>64</sup> If this centre could serve for tax disputes settlement, it can be a powerful complementary for the MAP between ASEAN countries.

## 6.2 Characteristic of the Centre: Mediation

Mediation differs from arbitration. Mediation is always considered as an Eastern value and tradition, which is commonly adopted by Chinese courts.<sup>65</sup> It is a facilitation without adjudication because the mediator intervenes between disputing parties on equal footing. In arbitration, the arbitrator makes decision for the parties with more power distance.<sup>66</sup>

### 6.2.1 Facilitative process on self-determination

Mediation can alleviate the concern on tax sovereignty in arbitration since it is a facilitative process by mediators. Most importantly, disputing parties always maintain the right of self-determination. In the process, the mediator can help to restore the relationship between disputing parties. If the mediator can be impartial and independent, and the process is confidential, this would be a good alternative compared to direct arbitration. It means that disputing parties can make their own choices and reach an agreement according to their willingness.<sup>67</sup> This provides flexibility to disputing parties who cannot resolve the dispute in

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<sup>63</sup> R. Chen, "Shenzhen Takes the Lead to Establish a Belt and Road International Commercial Dispute Resolution Platform", *21st Century Business Herald*, 8 February 2018. In the first month of the establishment of the international commercial arbitration centre in Shenzhen, it has accepted 274 cases, and 32 has been settled by arbitration.

<sup>64</sup> "The Central Deep Restructuring Committee Reviewed and Approved the Opinions on Establishing a Belt and Road Dispute Settlement Mechanism and Institutions", *Xinhua News Agency*, 24 January 2018, available at: <https://www.yidaiyilu.gov.cn/xwzx/roll/45584.htm> [Accessed April 10, 2018].

<sup>65</sup> G. Wang, "The Belt and Road Initiative in Quest for A Dispute Resolution Mechanism", (2017) *25 Asia Pacific Law Review* 1.

<sup>66</sup> D. van Hout, "Is Mediation the Panacea to the Profusion of Tax Disputes?", (2018) *10 World Tax Journal* 43.

<sup>67</sup> *Ibid.*

the MAP. During a mediation, disputing parties do not have to worry much about the sovereignty issue since the mediator is not an adjunct but a party on an equal footing who facilitates the process. If the mediator has much knowledge about the BRI, especially the culture and tradition in ASEAN countries, it will be beneficial for disputing tax authorities to negotiate in an open and flexible atmosphere. This is an advantage of the Centre because selected mediators will have more knowledge in this area. Moreover, once there are cases involving international parties, the Centre will select mediators from related region or with knowledge of the region.<sup>68</sup>

#### 6.2.2 Efficient and inexpensive

The Centre tries to resolve disputes in an efficient and inexpensive way. According to the rules, an ordinary mediation period is 30 days, and it can be prolonged to 60 days.<sup>69</sup> Additionally, the Centre encourages the use of internet-based means for mediation, i.e. online mediation, including video and phone meetings. The aim is to reduce the costs of physical meetings.<sup>70</sup> Compared to the high costs of the existing arbitration models, the cost of mediation would be much lower.

#### 6.2.3 Flexible with arbitration

Another flexibility of mediation is that if disputing parties are cannot resolve the dispute, they still have the right to go for an arbitration. A concern for China's launch of the Centre is that it is "forcing" ASEAN countries to submit disputes to it, which is considered as jeopardizing the sovereignty of ASEAN countries.<sup>71</sup> Most investors along the MSR are Chinese enterprises, especially state-owned enterprises. These countries concern that if disputes between China and other ASEAN countries have to go to the court, the decision can

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<sup>68</sup> Above fn. 61.

<sup>69</sup> Ibid. If disputing parties agree to prolong the mediation period, the limitation of 60 days does not apply.

<sup>70</sup> Ibid.

<sup>71</sup> D. R. Chaudhury, "China's 'Own Courts' for BRI Rows Raise Eyebrows", *The Economic Times*, 15 February 2018.

hardly maintain neutral and fair.<sup>72</sup> This is particularly sensitive for tax disputes. However, ASEAN countries still keep the last resort. Their local courts could refuse to enforce the arbitration decision once they find that it does not comply with local laws.

### 6.3 Concerns

Although the establishment of the Centre provides an alternative for tax disputes resolution, it is never perfect. At the current stage, taxation is not the focus of the Centre since its primary business is investment disputes, such as those derived from BITs. When tax authorities cannot reach an agreement with the MAP, they can consider submitting the dispute to the Centre with respect to its speciality in the BRI. The question is how to ensure that the system is fair, independent, and transparent that meets the need of countries in this region. Most importantly, though China takes the initiative to establish such a centre, it is necessary to embrace ASEAN countries to participate in the rule making. Its success relies heavily on the acceptance by these countries. Moreover, in this region, there are already renowned mediation or arbitration centres in Hong Kong and Singapore.<sup>73</sup> Another question raises as how can this newly established centre compete with its peers. Mediation and arbitration are definitely not panacea for tax disputes in this region, but it offers a new alternative that could be refined as a means that caters more to the needs of countries in this region. This Centre is just an example that implicates a new possibility for resolving tax disputes along the MSR.

### 7. Suggestions on improving the current mechanism

The current mechanism for resolving tax disputes between China and ASEAN countries is the MAP, which has its limitations. Tax arbitration becomes an effective complementary alternative regardless the concern over the sovereignty issue, costs, transparency etc. To better

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<sup>72</sup> Ibid.

<sup>73</sup> In Hong Kong, there are Hong Kong Mediation Centre and Hong Kong International Arbitration Centre. In Singapore, there are Singapore Mediation Centre and Singapore International Arbitration Centre.

serving the benefits of countries along the MSR, China's new initiative of the Centre provides a new model since it integrates mediation as a preliminary process for disputing parties before arbitration. It is predictable that a majority of disputes will happen between China and ASEAN countries since China is the main investor at this stage. The problem is how to make the current mechanism serve for tax disputes best. This relies on the improvement of the institution and related rules. To relieve the concern on tax sovereignty from ASEAN countries, it is necessary to maintain impartiality of the institution and its decision-making procedure.<sup>74</sup>

### 7.1 Selection of mediators and arbitrators

Taking the Centre for instance, it should ensure that selected mediators for tax disputes must have found knowledge of international taxation. Moreover, disputing parties can choose mediators themselves. It is necessary to have mediators from ASEAN countries, who are familiar with the culture, the law, and even the language. The current rules mainly mention the participation of mediators from Hong Kong, but if more disputes with ASEAN countries occur, the Centre should have a broader range of tax experts from this region. It is also important to have mediators from third countries. With the expansion of the BRI investment, dispute resolution should not only rely on mediators from Asia, but also from other countries. The core principle for selecting mediators is to avoid interest conflicts, which is essential to ensure impartiality. On the other hand, if disputes have to resort to arbitration, it has to separate the mediators from arbitrators for the same dispute to maintain objectivity.

### 7.2 The right to appeal

Impartiality also embodies as the disputing party's right to appeal.<sup>75</sup> It is often the case that disputants are not satisfied with the arbitration decision, especially when they have concerns over the impartiality of the procedure. Therefore, an appeal process is indispensable. The

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<sup>74</sup> J. Fleming, *Getting to the Rule of Law* (New York: NYU Press, 2011), 12-14.

<sup>75</sup> Wang, above fn. 65, 15-16.

mechanism should allow disputants submit arbitration decisions to an appeal. The existing arbitration models do not provide *de facto* appeal mechanism for disputants.<sup>76</sup> This could be a novel attempt for this Centre. The right to appeal assures the party's right to express their dissatisfaction, which is important for ASEAN countries.

### 7.3 Transparency

Impartiality relies on transparency of the mechanism. Mediation and arbitration traditionally follow strict privacy rules. There is no publication requirement for mediation agreement or arbitration decision under the existing arbitration models.<sup>77</sup> Nevertheless, transparency could contribute to supervision of the process, which guarantees the impartiality as well.<sup>78</sup> If disputing parties does not reject, the arbitration decision could be published following the rules on transparency.

In general, the Centre has to become international and professional in order to achieve its goal.<sup>79</sup> The Centre does not aim specifically to resolve tax disputes, but is provides another option for countries along the MSR. If it can address the concerns of countries for arbitration and even provides efficient way to resolve tax disputes, such as mediation, it can play a more and more important role in tax disputes resolution along the MSR.

## 8. Conclusion

Tax certainty is an essential factor for the expansion of the investment in the region of the MSR. Southeast Asia is a top destination of BRI investment, and it is predictable that tax disputes in this region will increase considering the outdated treaty network, insufficient competency of tax authorities, and the political economy of the region. Thus, it is necessary to

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<sup>76</sup> A. Rust, "How Final Are Arbitration Decisions?" in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books 2016).

<sup>77</sup> J. Avery Jones, "Arbitration and Publication of Decision" in M. Lang (eds), *International Arbitration in Tax Matters* (IBFD Online Books 2016).

<sup>78</sup> Lennard, above fn. 50.

<sup>79</sup> Wang, above fn. 65, 16.

establish an effective and efficient dispute resolution mechanism to guarantee tax certainty for both tax authorities and taxpayers. The MAP is the primary means for tax dispute resolution. Nevertheless, the MAP has its drawbacks including its time-consuming process but no assurance on a final resolution, and its exclusion of taxpayers in the process. Tax arbitration could be a complementary to the MAP since it could be more efficient and could provide a level playing field for countries in the region. However, ASEAN countries do not prefer arbitration for the concerns on their tax sovereignty, high costs of arbitration under the current arbitration models, and the lack of transparency that could lead to unfairness.

China has established a new BRI Court-connect and Mediation Centre that seems like a new alternative for dispute resolution in this region. It is inspiring for tax dispute resolution. To address the concerns on arbitration, this Centre integrates mediation as a voluntary preliminary process. Compared to arbitration, mediation has its advantages since it is a facilitative process based on disputing parties' self-determination. It could be more efficient and less expensive compared with arbitration. In addition, if disputing parties cannot reach an agreement by mediation, they can still go for an arbitration. Nevertheless, concerns raise on the impartiality, independence, and transparency of the Centre.

To improve impartiality of the mechanism, it is suggested to select mediators and arbitrators with the knowledge of ASEAN countries or from these countries. Disputing parties should also have the right to appeal. Moreover, if disputing parties do not reject, arbitration decision should be published to increase transparency. Mediation and arbitration are not panacea for resolving tax disputes but are alternatives for efficient and effective dispute resolutions for tax disputes between China and ASEAN countries.



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