

# Tax Cooperation Between the European Union and China

**In this article, the author outlines the initiatives that are being taken to increase cooperation between China and the European Union, including the European Union-China Comprehensive Agreement on Investment and China's Belt and Road Initiative. In particular, the author focusses on tax cooperation as a starting point for furthering cooperation in other areas, an example of which is the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM).**

## 1. Introduction

The European Union and China have close business ties. In 2020-2021, China surpassed the United States to become the European Union's largest trading partner.<sup>1</sup> The two parties concluded negotiations on a European Union-China Comprehensive Agreement on Investment (CAI or Agreement) on 30 December 2020.<sup>2</sup> This Agreement aims to ensure that EU investors obtain better access to the fast growing 1.4 billion person consumer market in China and that they compete on a level playing field in China. Both the European Union and China have made commitments in the CAI. The Agreement is just the starting point; both parties hope to establish an institutional framework in two years to promote implementation. It signals both parties' willingness to further trade relations with each other.

Along with the CAI, China's Belt and Road Initiative (BRI) (2015)<sup>3</sup> is another project that is intended to facilitate trade and investment between the European Union and China. A main objective of the BRI is to connect China and the

East Asian economic circle with the European Union. The main business activities involved in the BRI are cooperation on infrastructure building, maritime and land connectivity, trade of goods and services and other economic cooperation. It is often considered to be the largest matrix of infrastructure projects in the decades to come, with total investment anticipated to be in the trillions of US dollars.<sup>4</sup> By 2022, 149 countries and 32 international organizations had joined the BRI.<sup>5</sup> 18 EU Member States have also participated in the BRI (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovak Republic, Slovenia and Romania). In general, the BRI is intended to facilitate the entry of Chinese investors into the EU market and the CAI can assist EU investors to further access the Chinese market.

The current political economy has created challenges for the European Union and China with regard to further business cooperation. Globalization has been overshadowed by the COVID-19 pandemic.<sup>6</sup> Free international trade under the World Trade Organization (WTO) system is also fragile.<sup>7</sup> China's economy has been boosted since its Reform and Open policy in 1978. After its accession to the World Trade Organization (WTO) in 2001, China became one of the largest trading parties in the world. Since 2010, China's GDP has ranked second in the world, just next to the United States.<sup>8</sup> It is predicted that China still has strong potential for economic growth.<sup>9</sup> As a beneficiary of the free world trade system, China is an advocate of multilateralism and globalization.<sup>10</sup> The parties have, however, reached an impasse due to a lack of understanding of each other's approach to the economy.<sup>11</sup> The feasibility

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1. In 2021, China was the European Union's largest trading partner, amounting to 16.2% of the European Union's total trade. China was the largest partner in terms of EU imports of goods and the third largest partner regarding EU export of goods. See Eurostat, *China-EU International Trade in Goods Statistics*, available at [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU\\_-\\_international\\_trade\\_in\\_goods\\_statistics#Recent\\_developments](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU_-_international_trade_in_goods_statistics#Recent_developments) China-EU - international trade in goods statistics - Statistics Explained (accessed 11 Oct. 2022).

2. *EU-China Comprehensive Agreement on Investment, The Agreement in Principle*, available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en) (accessed 11 Oct. 2022) [hereinafter CAI].

3. In 2015, the National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce jointly released Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road (28 Mar. 2015). See *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*, Xinhua News (28 Mar. 2015), available at [http://www.xinhuanet.com/world/2015-03/28/c\\_1114793986.htm](http://www.xinhuanet.com/world/2015-03/28/c_1114793986.htm) (accessed 11 Oct. 2022).

4. Id.

5. An Overview of Countries That Have Signed a Memorandum of Understanding with China (7 Feb. 2022), available at [www.yidaiyilu.gov.cn/xwzx/roll/77298.htm](http://www.yidaiyilu.gov.cn/xwzx/roll/77298.htm) (accessed 11 Oct. 2022).

6. E.G. Popkova & I.V. Andronova, *The COVID-19 Pandemic Experience for the World Economy and International Trade (Introduction)*, in *Current Problems of the World Economy and International Trade (Research in Economic Anthropology)*, vol. 42, pp. 1-4 (E. G. Popkova & I. V. Andronova eds., Emerald Publishing 2022).

7. For instance, the rise of protectionism has the potential to paralyze the WTO system. See G. Gari, *Narrow Down Utopia: Adjusting the WTO to a Changing Trade Environment*, in *A Post-WTO International Legal Order, Utopian, Dystopian and Other Scenarios* pp. 38-40 (M. K. Lewis, J. Nakagawa & R.J. Neuwirth eds., Springer 2020).

8. See data from World Bank, available at <https://data.worldbank.org> (accessed 12 Oct. 2022).

9. Id. In 2020, the first year of the COVID-19 pandemic, China was the only country in the world whose GDP reflected positive growth.

10. L. Zeng, *Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny*, 15 *Chin. J. Int. Law*, pp. 518-519 (2016).

11. For instance, during the CAI agreement negotiations, the European Union had concerns regarding China's progress on opening up the economy: a lack of transparency, industrial policies that favour Chinese

ity and means to further promote mutual business cooperation requires more research.

Tax cooperation can be an excellent starting point. Under the BRI, China has started initiatives on tax cooperation between the participating members. In April 2019, China established the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM), a non-profit official mechanism for tax administration cooperation amongst the jurisdictions that have joined the BRI. It is a multilateral platform for greater tax cooperation between BRI members, focusing on tax administration.<sup>12</sup> The BRITACOM has five main policy objectives: following the rule of law and increasing tax certainty, expediting tax dispute resolution, enhancing tax administration capacity, streamlining tax compliance, and digitalizing tax administration.<sup>13</sup> Only six EU Member States have become observer members of this new tax cooperation framework (Cyprus, Germany, Greece, Hungary, Italy and Spain).<sup>14</sup> It seems that the European Union has a conservative attitude towards China's initiative on tax cooperation. The CAI does not have separate tax cooperation proposals, but sets up a common platform for tax cooperation, namely a level playing field for EU investors and transparency rules for subsidies.<sup>15</sup> Nevertheless, the CAI is still pending signature, as the European Union has multiple concerns.<sup>16</sup> This article provides an extensive analysis of the feasibility of corporate tax cooperation between the European Union and China.

## 2. Common Tax Risks between the European Union and China

With the expansion of trade and investment between the European Union and China, both taxpayers and tax authorities are likely to face more tax risks, including tax avoidance, tax disputes and harmful tax competition, without a coherent corporate tax cooperation system between the two parties. For tax authorities, a common problem that both the European Union and China face is tax avoidance. Both the European Union and China are victims of revenue loss caused by active tax avoidance activities of multinational enterprises.<sup>17</sup> EU Member

domestic enterprises, the fact that state-owned enterprises enjoy preferential subsidies and financing, etc. See European Commission, *EU trade relations with China*, available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china_en) (accessed 14 Oct. 2022).

12. N. Li, *The Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM): Where Is It Heading?*, 75 Bull. Intl. Taxn. 11/12, p. 740 (2021), Journal Articles & Opinion Pieces IBFD.
13. BRITACOM, available at <https://www.britacom.org/jzgj/britacom> (accessed 14 Oct. 2022).
14. The list of observing members of BRITACOM is available at <https://www.britacom.org/jzgj/council> (accessed 14 Oct. 2022).
15. European Commission Press Release IP/20/2542, *Key Elements of the EU-China Comprehensive Agreement on Investment* (30 Dec. 2020), available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2542](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2542) (accessed 3 Nov. 2022).
16. T. Fallon, *The Strategic Implications of the China-EU Investment Deal: The EU-China Comprehensive Agreement on Investment is a Win for China, and a Blow to Transatlantic Relations*, *The Diplomat* (4 Jan. 2021).
17. Statistics show that the European Union loses EUR 60 billion annually due to corporate profit shifting activities. See J. Sawulski, *Tax Unfairness in the European Union, Towards Greater Solidarity in Fighting Tax Evasion*, Polish Economic Institute (Jan. 2020), available at [https://pie.net.pl/wp-content/uploads/2018/07/PIE\\_Report\\_Tax\\_Havens\\_](https://pie.net.pl/wp-content/uploads/2018/07/PIE_Report_Tax_Havens_)

States and China have very different tax systems, a situation that gives enterprises the opportunity to manipulate the gaps and mismatches to avoid tax. The European Union has implemented, for instance, the EU Anti-Tax Avoidance Directive (2016/1164) (ATAD)<sup>18</sup> and the State aid law<sup>19</sup> to combat tax avoidance within Europe. With regard to tax avoidance activities relating to third countries, however, cooperation is needed with other countries, including common standards. With the expansion of business activities under the BRI and CAI, multinational enterprises will have more opportunities for tax avoidance if the common tax cooperation actions are not carried out. Meanwhile, China is also grappling with tax avoidance activities. China is now not only a capital importing country but also a capital exporting country.<sup>20</sup> As a capital importing country, the main tax avoidance activities are transfer pricing, treaty abuse and offshore indirect share transfers, etc. China has adopted anti-avoidance measures against the background of the BEPS Project to recover lost revenue and has achieved good results.<sup>21</sup> However, under BRI and CAI investments, China, as a capital exporting country, is encountering the problem of tax avoidance from its domestic enterprises going abroad. These enterprises may confront the European Union's anti-avoidance measures and China's domestic anti-avoidance measures. According to the OECD's 2021 tax dispute statistics regarding China, China had the most transfer pricing disputes with Switzerland and Italy, and other non-transfer pricing MAP cases mainly with Austria, Belgium, Germany, Finland and the Netherlands.<sup>22</sup> It is likely that more tax disputes will arise without common rules to combat tax avoidance between the European Union and China. Therefore, for corporate taxpayers, an effective tax dispute resolution mechanism that is recognized by both the European Union and China is indispensable. In addition, both the European Union and China suffer from harmful tax competition. The European Union is its own norm-maker within the internal market in terms of combatting harmful tax competition between Member States and increasing its competitiveness when competing with third countries. Similarly, China is transitioning from a norm-taker to a norm-maker against the background of harmful tax competition. Its active role in implementing the BEPS Project and the leading role it has taken in

EU.pdf. See also N. Li, *Impact on Tax Factors on Chinese FDI*, in *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, *International Economic Law Series* pp. 61-65 (J. Chaisse ed., Oxford University 2019).

18. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), Primary Sources IBFD [hereinafter ATAD].
19. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115, art. 107 (2008), Primary Sources IBFD [hereinafter TFEU].
20. China has been a capital importing and capital exporting country since 2014. Statistics can be obtained from the Ministry of Commerce in China, available at <http://data.mofcom.gov.cn/index.shtml> (accessed 10 Nov. 2022).
21. Li, *supra* n. 17, at p. 65.
22. OECD, *Mutual Agreement Procedure Statistics of Transfer Pricing Cases Per Jurisdiction for 2021*, available at <https://www.oecd.org/tax/dispute/2021-map-statistics-china.pdf>; and OECD, *Mutual Agreement Procedure Statistics of Other Cases Per Jurisdiction for 2021*, available at <https://www.oecd.org/tax/dispute/2021-map-statistics-china.pdf>.

initiating BRITACOM are good examples.<sup>23</sup> It is likely there will be friction when the two norm-makers expand their influences transnationally. The earlier the European Union and China take proper actions, the better they can manage these risks.

### 3. The Starting Points for Tax Cooperation between the European Union and China

#### 3.1. Implementation of the common international standards

Both the European Union and China have implemented the minimum standards of the BEPS Action Plans, including measures to improve transparency in relation to tax rulings, counter tax treaty abuse, transfer pricing documentation and country-by-country (CbC) reporting, as well as improving tax dispute resolution mechanisms.<sup>24</sup> They have both joined the OECD Multilateral Convention (MLI).<sup>25</sup> This has provided a common base for tax cooperation between the European Union and China, as they share common rules on fundamental tax issues.

All the EU Member States have implemented the minimum standards of the BEPS Actions to combat tax avoidance. In particular, the European Union has initiated the ATAD, which contains anti-abuse measures to address aggressive tax planning. The ATAD has specific rules for hybrid mismatches, controlled foreign companies (CFC), exit taxation, interest limitation and abuse. By implementing the ATAD, the EU Member States now have more stringent measures to combat tax avoidance.<sup>26</sup> With respect to the MLI, all the EU Member States have signed on to effectively implement the agreed changes in response to the BEPS measures on treaty issues and dispute resolution without bilateral renegotiation.<sup>27</sup>

China is also an active participant in the BEPS Inclusive Framework. It has implemented the minimum standards of the BEPS Actions under domestic law and some other measures.<sup>28</sup> It is swiftly implementing the minimum standards on treaty abuse and dispute resolution, which is contributing to its own reform on anti-tax avoidance measures domestically. With respect to transfer pricing issues, China has a specific focus and claim on profit allocation relating to location specific advantages that is still in line with the

23. J. Li, *China's Rising (and the United States' Declining) Influence in Global Tax Governance? Some Observations*, 75 Bull. Intl. Taxn. 11/12, pp. 737-739 (2021), Journal Articles & Opinion Pieces IBFD.

24. The minimum standards in respect of the BEPS Actions is available at <https://www.oecd.org/tax/beps/beps-actions> (accessed 15 Nov. 2022).

25. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD.

26. For the detailed implementation actions of each EU Member State, see *EU Member States - BEPS Country Monitor*, Tables IBFD (accessed 18 Feb. 2023).

27. For the detailed implementation actions of each EU Member States, see *EU Member States - MLI Country Monitor*, Tables IBFD (accessed 18 Feb. 2023).

28. For instance, China has proposed that profits be allocated according to location-specific advantages, which is still in line with the arm's length principle, but means that more profits can be allocated to jurisdictions that provide location savings, especially developing countries. For detailed implementation actions regarding BEPS in China, see *China (People's Rep.) - BEPS Country Monitor*, Tables IBFD (accessed 18 Feb. 2023) and *China (People's Republic of) - MLI Country Monitor*, Tables IBFD (accessed 18 Feb. 2023).

**Table 1. Implementation of the common international standards (BEPS and exchange of information) in the European Union and China**

	EU Member States	China
<b>BEPS</b>		
Inclusive Framework on BEPS membership	Yes	Yes
Existence of harmful tax regimes (Action 5)	Not harmful	Not harmful
Exchange of information on tax rulings (Action 5)	Yes	Yes
Preventing treaty abuse (Action 6)	Yes	Yes
CbC reporting (Action 13)	Yes	Yes
Effective dispute resolution (Action 14)	Yes	Yes
MLI	Yes	Yes
<b>Exchange of information</b>		
Mutual Administrative Assistance Convention	Yes	Yes
Global Forum membership	Yes	Yes
Commitment to AEOI (CRS)	Yes	Yes
CRS MCAA signed	Yes	Yes

OECD standards.<sup>29</sup> In addition, China has also approved the MLI, thus facilitating changes on treaty issues.<sup>30</sup>

To increase transparency, both the EU Member States and China have implemented the OECD standard on exchange of information. The EU Member States and China have both joined the Convention on Mutual Administrative Assistance in Tax Matters to exchange tax information.<sup>31</sup> With respect to automatic exchange of information (AEOI), the OECD developed the Common Reporting Standard (CRS) in 2014 to call on jurisdictions to obtain information from their financial institutions and automatically exchange such information with other jurisdictions.<sup>32</sup> The 2016 Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA) has also facilitated more AEOI.<sup>33</sup> All the EU Member States have committed to the CRS and signed the CRS MCAA. Meanwhile, China has made the same commitment.<sup>34</sup> With

29. D. Xu, *The Convergence and Divergence between China's Implementation and OECD/G20 BEPS Minimum Standards*, 10 World Tax J. 3, p. 488 (2018), Journal Articles & Opinion Pieces IBFD.

30. For detailed MLI articles that China has opted into, see *China (People's Rep.) - MLI Country Monitor*, *supra* n. 28.

31. 146 jurisdictions are participating in the Convention. See Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters (25 Jan. 1988) (amended by the 2010 Protocol), Treaties & Models IBFD.

32. OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2<sup>nd</sup> ed., OECD 2017).

33. Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information, OECD Automatic Exchange Portal, available at <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>.

34. See OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Country Monitoring, available at <https://www.oecd.org/tax/transparency/country-monitoring/>.

Table 2. Status of tax treaties between EU Member States and China			
EU Member State	Date of Signature	Effective date	Applicable date
Austria	10/04/1991	01/11/1992	01/01/1993
Belgium	18/04/1985 07/09/2009 (amended)	11/09/1987 29/12/2013	01/01/1988 01/01/2014
Bulgaria	06/11/1989	25/05/1990	01/01/1991
Croatia	09/01/1995	18/05/2001	01/01/2002
Cyprus	25/10/1990	05/10/1991	01/01/1992
Czech	28/08/2009	04/05/2011	01/01/2012
Denmark	26/03/1986 16/06/2012 (amended)	22/10/1986 27/12/2012	01/01/1987 01/01/2013
Estonia	12/05/1998	08/01/1999	01/01/2000
Finland	12/05/1986 25/05/2010 (amended)	23/12/1986 25/11/2010	01/01/1987 01/01/2011
France	30/05/1984 26/11/2013 (amended)	21/02/1985 28/12/2014	01/01/1986 01/01/2015
Germany	10/06/1985 28/03/2014 (amended)	14/05/1986 06/04/2016	01/01/1985 01/01/2017
Greece	03/06/2002	01/11/2005	01/01/2006
Hungary	17/06/1992	31/12/1994	01/01/1995
Ireland	19/04/2000	29/12/2000	01/01/2001
Italy	31/10/1986 23/03/2019 (amended)	14/11/1989 Not yet	01/01/1990 Not yet
Latvia	07/06/1996	27/01/1997	01/01/1998
Lithuania	03/06/1996	18/10/1996	01/01/1997
Luxembourg	12/03/1994	28/07/1995	01/01/1996
Malta	02/02/1993 18/10/2010 (amended)	20/03/1994 25/08/2011	01/01/1995 01/01/2012
Netherlands	13/05/1987 31/05/2013 (amended)	05/03/1988 31/08/2014	01/01/1989 01/01/2015
Poland	07/06/1988	07/01/1989	01/01/1990
Portugal	21/04/1998	07/06/2000	01/01/2001
Romania	16/01/1991 04/07/2016 (amended)	05/03/1992 17/06/2017	01/01/1993 01/01/2018
Slovak Republic	11/06/1987	23/12/1987	01/01/1988
Slovenia	12/02/1995	27/12/1995	01/01/1996
Spain	22/11/1990 28/11/2018 (amended)	20/05/1992	01/01/1993 02/05/2021
Sweden	16/05/1986	03/01/1987	01/01/1987

Source: IBFD Tax Research Platform

respect to exchange of information on request (EOIR), both the EU Member States and China have joined the Global Forum on Transparency and Exchange of Information for Tax Purposes and have been assessed by the

OECD.<sup>35</sup> Therefore, with regard to exchange of information, the European Union and China have a common legal base. See Table 1. for an overview of the implementation of the common international standards in the European Union and China.

### 3.2. Tax treaties

All 27 EU Member States have signed a tax treaty with China (see Table 2.). This contributes to the resolution of double taxation and tax disputes between the EU Member States and China. However, except a few renewed tax treaties (Belgium, France, Germany, the Netherlands, Romania, Italy and Spain), most tax treaties are old. Many new developments subsequent to the BEPS Action Plans are not embedded in the old tax treaties, which thus cannot adapt to the new challenges of tax avoidance. Thus, the current tax treaty network provides a solid base but needs to be updated to further cooperation between the parties.

## 4. The EU's Direction for Tax Cooperation

### 4.1. The EU Standard of Tax Good Governance

In 2020, the European Union launched a new tax package that aims to address economic recovery following the pandemic. This package also reveals the European Union's tax policy plan for the future.<sup>36</sup> In this package, the European Union emphasizes its objective to boost tax fairness by intensifying the fight against tax abuse, combating unfair tax competition and increasing tax transparency. Accordingly, it will reform its standard of tax good governance and seek its application to third countries.<sup>37</sup> The standard mainly includes transparency, fair tax competition, exchange of information and internationally agreed standards on BEPS.<sup>38</sup> The standard was initially introduced in 2008<sup>39</sup> to predetermine whether third countries can meet the European Union's criteria for tax cooperation and whether non-qualified countries should be included in the EU list of non-cooperative jurisdictions.<sup>40</sup> The European Union also aims to promote this standard internationally and gain support from developing country partners to enhance tax good governance.

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35. Id.
  36. European Commission, Press Release IP/20/1334, *Fair and Simple Taxation: Commission Proposes New Package of Measures to Contribute to Europe's Recovery and Growth* (15 July 2020), available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1334](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1334) (accessed 22 Mar. 2023).
  37. European Commission, Communication from the Commission to the European Parliament and the Council on Tax Good Governance in the EU and beyond, COM(2020) 313 final (15 July 2020), available at [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2020\\_tax\\_package\\_tax\\_good\\_governance\\_communication\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_tax_good_governance_communication_en.pdf).
  38. I.J.M. Valderrama, *The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries*, 47 *Intertax* 5, pp. 454-467 (2019).
  39. Council of the European Union, Press Release, 2866th Council Meeting, Economic and Financial Affairs, 14 May 2008.
  40. The list, in 2022, was composed of American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu. See European Council, EU list of non-cooperative jurisdictions for tax purposes, available at <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> (accessed 19 Nov. 2022). See also Council of European Union, Council Conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, 14166/16, FISC 187 ECOFIN 1014 (8 Nov. 2016).

#### 4.1.1. Fair tax competition

By issuing different regulations and documents to maintain fair tax competition, the European Union aims to create a level playing field for tax competition between EU Member States and with third countries. The creation of a level playing field is the requirement for free trade and investment within the internal market.<sup>41</sup> Thus, the understanding of fair tax competition in the European Union is grounded in the idea of fair trade from a business perspective.<sup>42</sup> Although there could be a different interpretation of fair tax competition from a political, philosophical or social perspective, the European Union gives priority to the economic approach to interpreting fair tax competition.<sup>43</sup> This justifies the Member State governments' intervention in the market to combat harmful tax measures that distort fair tax competition. A typical example is the widespread application of State aid law to tax rulings in EU Member States. Since 2015, the European Commission has started investigating the tax rulings of different Member States. Large multinational companies like Apple, Starbucks, Google and Amazon have all been involved in State aid cases initiated by the European Commission.<sup>44</sup> In general, the Commission has claimed that the tax rulings of Member States grant specific tax advantages to these companies that result in a lower tax burden and this is not fair for other undertakings in the internal market.<sup>45</sup> Therefore, as a part of competition policy, State aid law is a powerful tool adopted by the European Union to combat harmful tax competition.

#### 4.1.2. Transparency

The European Union has a stringent requirement on tax transparency for corporations. In 2021, the European Union officially published the Public CbCR Directive (2021/2101).<sup>46</sup> It requires qualified companies to publish their tax information publicly within the European Union. This means that, besides tax authorities, civil society can have access to large multinational companies' tax information as well. The aim is to increase tax transparency and strengthen public scrutiny. Multinational companies must pay attention to paying their fair share of taxes, as they bear the reputational risk vis-à-vis the public.<sup>47</sup> Compared to the OECD's standard of CbC reporting, the Euro-

pean Union goes one step further, i.e. making the report public. This reveals the European Union's strong stance towards multinational companies in terms of tax transparency. In addition, besides following the OECD's standard on exchange of information, the European Union also has higher requirements on the exchange of information of tax rulings, cross-border tax planning arrangements and intermediaries via the Directive on Administrative Cooperation (2011/16) (DAC).<sup>48</sup>

Therefore, tax transparency is strengthened by including administrative cooperation regarding the exchange of information within the European Union.

#### 4.1.3. Promotion of the EU tax good governance standards with third countries

It is the European Union's objective to help developing countries build robust tax systems and to strengthen the European Union's international position with third countries.<sup>49</sup> To implement the standards on tax good governance, the European Union needs the cooperation of third countries and to export this norm.<sup>50</sup> For instance, the European Union relies on certain standards to determine the list of non-cooperative jurisdictions. This means that if jurisdictions aim to be removed from the list, they have to check the European Union's standards and amend their domestic tax rules and measures accordingly.<sup>51</sup> Another example is that the European Union has signed bilateral trade and investment cooperation agreements with different countries, including China. These agreements contain the European Union's tax good governance standards. By signing these agreements with the European Union, the third countries demonstrate that they will adopt these standards.<sup>52</sup> This process not only exports norms to third countries, but also is evidence of the transformation of the European Union's soft law into hard law globally. In summary, the European Union is becoming a norm-maker not only for EU Member States, but also for third countries, especially developing countries with business activities with the European Union.

## 4.2. Dispute resolution

With regard to the resolution of tax disputes, the European Union has the Arbitration Convention (90/436)<sup>53</sup> and the Tax Dispute Resolution Mechanisms Directive

41. Art. 26 TFEU.

42. A. Pirlot, *The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'*, 48 *Intertax* 4, pp. 410-412 (2020).

43. I.J.J. Burgers & I.J.M. Valderrama, *Fairness: A Dire International Tax Standard with No Meaning?*, 45 *Intertax* 12, pp. 780-781 (2017).

44. For an overview of all State aid case decisions, see [https://competition-policy.ec.europa.eu/state-aid/tax-rulings\\_en#guidance](https://competition-policy.ec.europa.eu/state-aid/tax-rulings_en#guidance) (accessed 15 Nov. 2022).

45. DG Competition Working Paper on State Aid and Tax Rulings, Background to the High Level Forum on State Aid of 3 June 2016, available at [https://competition-policy.ec.europa.eu/system/files/2021-04/specific\\_aid\\_instruments\\_working\\_paper\\_tax\\_rulings.pdf](https://competition-policy.ec.europa.eu/system/files/2021-04/specific_aid_instruments_working_paper_tax_rulings.pdf).

46. Directive EU 2021/2101 of the European Parliament and of the Council of 21 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, OJ L 429/1 (1 Dec. 2021), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2101&from=EN> (accessed 22 Mar. 2023).

47. W. Netjes & D. Freyer, *Tax Transparency Is Here to Stay: An Analysis of the Public CbCR Directive*, 50 *Intertax* 8/9, p. 612 (2022).

48. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD. Thus far, there are eight Directives on Administrative Cooperation (DAC), each requiring different information to be exchanged. See European Commission, *Administrative Cooperation in (Direct) Taxation in the EU*, [https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/general-overview/enhanced-administrative-cooperation-field-direct-taxation\\_en](https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/general-overview/enhanced-administrative-cooperation-field-direct-taxation_en) (accessed 20 Nov. 2022).

49. COM(2020) 313 final, *supra* n. 37.

50. Valderrama, *supra* n. 38, at pp. 458-459.

51. A. Koutsouva, *The European Union's List of Non-Cooperative Jurisdictions for Tax Purposes*, 29 *EC Tax Rev.* 4, pp. 194-195 (2020).

52. Valderrama, *supra* n. 38, at pp. 461-462.

53. Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ L 225 (23 July 1990), Primary Sources IBFD [hereinafter Arbitration Convention (90/436)].

(2017/1852) for Member States.<sup>54</sup> The EU Arbitration Convention was signed in 1990 and only applies to transfer pricing cases. When a tax dispute cannot be resolved through a mutual agreement procedure (MAP) within two years, taxpayers can request arbitration. The Convention sets out detailed procedural rules to establish an advisory commission to proceed to arbitration and ensures that the dispute is resolved within six months.<sup>55</sup> To address the limitation of the EU Arbitration Convention, the European Union adopted the EU Dispute Resolution Directive as a complementary agreement. It aims to enhance tax certainty by establishing an effective and efficient binding mechanism for tax dispute resolution between EU Member States. The Directive not only solves problems of double taxation, which are usually covered by tax treaties, but also applies to disputes regarding the interpretation and application of tax treaties.<sup>56</sup> It has a similar procedure to the EU Arbitration Convention, which includes the complaint stage, the MAP stage and the arbitration stage.<sup>57</sup> An improvement is that it has strict procedural timelines and detailed rules regarding the selection of the Advisory Commission, and requires the publication of arbitration decisions to increase transparency. Following implementation of the EU Dispute Resolution Directive, the European Union now has a systematic mechanism that combines a MAP and mandatory arbitration to solve cross-border tax disputes for Member States.

## 5. China's Direction in Terms of Tax Cooperation

### 5.1. BRI: Tax good governance

China initiated the BRI tax cooperation mechanism BRITACOM in 2019. Although it is still at the beginning stages, it evidences China's aim to strengthen tax cooperation with members of the BRI. The BRITACOM has five policy objectives, namely: following the rule of law and increasing tax certainty, expediting tax dispute resolution, enhancing tax administration capacity, streamlining tax compliance and digitalizing tax administration.<sup>58</sup> As the mechanism is still at the initial stages, there are no concrete implementation actions regarding these policy objectives. The main activities are holding meetings and workshops for members online to exchange opinions and experiences.<sup>59</sup> However, between 2019 and 2021, the BRITACOM conducted surveys on tax administrations and enterprises among BRI members to first discover specific problems relating to these five aspects, which culminated in the publication of reports. This will allow it to provide further suggestions on how to achieve its goals.<sup>60</sup>

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54. Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265/1 (14 Oct. 2017), Primary Sources IBFD [hereinafter Tax Dispute Resolution Mechanisms Directive (2017/1852)].
  55. Arts. 8-12 Arbitration Convention (90/436).
  56. Preambles 6 and 7 Tax Dispute Resolution Mechanisms Directive (2017/1852).
  57. *Id.*, at arts. 4-6.
  58. *See supra* n. 13.
  59. *See Li, supra* n. 12, at p. 744.
  60. The BRITACOM released five final reports for the five policy goals in 2021, available at <https://www.britacom.org/gkzljxz/Documents> (accessed 28 Nov. 2022).

This demonstrates that China does not promote its own ideas on how to formulate tax cooperation unilaterally but adopts multilateral means to reflect major concerns from different parties. These task forces concentrate more on the capacity building of tax administrations, such as improving the capacity of tax collection and regulating discretionary behaviour in terms of tax enforcement by local governments. With regard to the rule of law and tax certainty, the report presents suggestions including improving the tax system through sound tax policy design and simplified tax legislation, as well as optimizing mechanisms to prevent tax disputes, etc.<sup>61</sup> Moreover, the surveys show that enterprises have concerns regarding the lack of transparency of tax laws and regulations. Thus, it is also important to increase the transparency of tax rules to increase tax certainty. All of these efforts rely on following the rule of law, especially clear guidance on procedural law. The report refers to the international understanding of the rule of law, which can embody basic legal principles of accountability, just laws, open government, accessibility, impartial dispute resolution and fair treatment.<sup>62</sup> The interpretation here may not represent China's complete interpretation of the rule of law with respect to tax measures, but it sends a signal that China aims to integrate the international standard on the rule of law under the tax cooperation framework. A further focus is on procedural and institutional elements. In summary, China is moving towards its own outlook of tax good governance in the context of tax cooperation under the BRI.

### 5.2. CAI: The creation of a level playing field

The European Union and China concluded the CAI in 2020, which is considered the European Union's most ambitious agreement ever concluded with a third country.<sup>63</sup> The CAI benefits the European Union mainly in three respects: better market access for EU companies to China, a level playing field for EU investors by disciplining state-owned enterprises (SOEs) and increasing transparency for subsidies, and sustainable development including corporate social responsibility, labour and environmental norms.<sup>64</sup> Signature of the CAI is still pending by both the European Union and China, especially ratification by the European Parliament.<sup>65</sup> There are, however, strong economic and legal drivers behind the European Union-China negotiations for the CAI. For instance, the CAI can further promote liberalized trade and investment for both parties. Additionally, the CAI will replace the 25 bilateral investment treaties between EU Member States and China. It will thus advance multilateralism in terms of international norms.<sup>66</sup> The CAI does not cover

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61. Following Rule of Law and Raising Tax Certainty, Wuzhen Action Plan (2019-2021) Final Report (Sept. 2021), available at <https://www.britacom.org/gkzljxz/Documents> (accessed 30 Nov. 2022).
  62. *Id.*, at p. 3.
  63. European Commission, *supra* n. 15.
  64. *Id.*
  65. J. Chaisse & M. Burnay, *Introduction-CAI's Contribution to International Investment Law: European, Chinese, and Global Perspectives*, 23 J. World Invest. Trade 4, pp. 507-509 (2022).
  66. F. Marisi & Q. Wang, *Drivers and Issues of China-EU Negotiations for a Comprehensive Agreement on Investment*, in *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*,

taxation measures specifically but ensures elements that are substantive in respect of tax cooperation. The CAI addresses the premise for further tax cooperation between the European Union and China, namely a level playing field and transparency of subsidies in service sectors.

### 5.2.1. Chinese state-owned enterprises

A major concern for foreign investors with regard to fair tax competition in Chinese markets is Chinese SOEs, namely whether Chinese SOEs benefit from a more favourable tax treatment and are thus causing unfair tax competition. To further tax cooperation with China, it is necessary to understand the position of SOEs in China and the current reforms. Under China's socialist market economy system, the state-owned economy is the leading force in the national economy, with other forms of ownership coexisting.<sup>67</sup> SOEs play an important role in strategic industries and pillar industries where the state has substantial control.<sup>68</sup> SOEs have, however, undergone reforms under several phases since China's opening. The trend is to reduce the number of SOEs and to introduce more private and mixed ownership, thus letting the market play a more decisive role.<sup>69</sup> The current SOE reform commenced in 2013 and focuses on developing mixed ownership, with the aim being to classify SOEs and introduce more private and mixed ownership into industries that were previously only open to state ownership.<sup>70</sup> Currently, SOEs are classified as commercial SOEs and public-interest SOEs. Commercial SOEs include commercial strategic SOEs and commercial non-strategic SOEs. Commercial strategic SOEs relate to industries concerning national security and the lifeline of the national economy. In this scenario, the state still is a majority owner, but is open to private and mixed ownership. Commercial non-strategic SOEs should be fully open to mixed ownership and compete directly in the market. Public-interest SOEs perform the function of providing public goods and services and may decide themselves whether to introduce diversified ownership.<sup>71</sup> Until 2021, the number of mixed ownership enterprises that were central SOEs was over 70%. The percentage is 54% for local SOEs with mixed ownership. The number of SOEs has decreased from 117 to 98.<sup>72</sup> Accordingly, with the increase in mixed ownership SOEs, the level

of fair competition should also improve. Foreign investors can have greater access to China's domestic market by purchasing shares in SOEs and investing in fields that used to be merely open to SOEs. The reform has further opened market access to private and foreign investors in China and has contributed to the efficiency and governance of SOEs.<sup>73</sup> Before the reform, Chinese SOEs enjoyed tax incentives and favourable tax treatment, due to being state-supported industries, especially strategic and pillar industries. They also had greater bargaining power.<sup>74</sup> Additionally, large SOEs are more involved in tax avoidance activities than small private enterprises.<sup>75</sup> However, under the increasing reforms, SOEs, especially commercial SOEs, are being required to compete with other enterprises in the market and accept the results in terms of competition. Under the CAI, SOEs should act according to commercial considerations and behave as any private business would.<sup>76</sup> No tax incentives will be allowed to be granted specifically to certain commercial SOEs. The direction of the reform is to let all enterprises compete fairly in the domestic market without the involvement of a different tax treatment. Moreover, the reform has tremendously increased mixed ownership of SOEs, including private and foreign ownership. As a result, private and foreign shareholders can enjoy tax benefits equivalent to those granted to SOEs. Empirical studies also show that the reform regarding mixed ownership should curb the tax avoidance behaviour of firms. An SOE with a high level of mixed ownership should engage in less tax avoidance.<sup>77</sup>

### 5.2.2. Transparency of subsidies

According to the CAI, the transparency of subsidies will be improved. This also applies to subsidies in the form of tax incentives. China has an obligation to increase the transparency of tax incentives in respect of industrial goods and the services sectors, including those for SOEs. China joined the WTO in 2001 and has consistently faced compatibility challenges relating to tax subsidies.<sup>78</sup> Although China has reformed tremendously with regard to its tax incentives, due to inadequate notification in the WTO, the transparency of subsidies to Chinese SOEs is still considered insufficient from the WTO's perspective.<sup>79</sup>

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*International Economic Law Series*, pp. 164-176 (J. Chaisse ed., Oxford University 2019).

67. CN: Constitution of China (as amended through 2018), art. 6. See also C. Pei, C. Yang & X. Yang, *The Basic Economic System of China*, pp. 183-186 (Springer 2019).
68. Strategic industries include defense, electricity generation and distribution, petroleum and petrochemicals, telecommunications, coal, civil aviation and waterway transport. Pillar industries include machinery, automobiles, information technology, construction, steel, base metals and chemicals.
69. Q. Huang, *How 'New SOEs' Come of Age: Four Decades of China's SOEs Reform*, 13 *China Economist*, pp. 58-72 (2018).
70. The current reform began with the 18<sup>th</sup> Party Congress in 2013. See Guiding Opinions of the Chinese Communist Party Central Committee and the State Council on Deepening the Reform of State Owned Enterprises (24 Aug. 2015) (Guiding Opinions).
71. Id., at art. 2.
72. China Youth Daily, *At Present, the Number of Mixed Ownership Enterprises of Central Enterprises Exceeds 70%* (17 June 2022), available at <https://baijiahao.baidu.com/s?id=1735860771812508359&wfr=spider&for=pc> (accessed 25 Nov. 2022).

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73. J. Wang & T. Cheng-Han, *Mixed Ownership Reform and Corporate Governance in China's State-Owned Enterprises*, 53 *Vand. J. Transnat'l L.*, pp. 1100-1105 (2020).
74. W. Cui, *Taxation of State-Owned Enterprises A Review of Empirical Evidence from China*, in *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism* pp. 118-119 (B.L. Liebman & C.J. Milhaupt eds., Oxford 2015).
75. T. Chow et al., *Government Ownership and Corporate Tax Evasion: Evidence from China* (13 Mar. 2022), available at <https://ssrn.com/abstract=3160421> (accessed 22 Mar. 2023).
76. European Commission, Q&A: *EU-China Comprehensive Agreement on Investment (CAI)* (30 Dec. 2020), available at [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2543](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2543) (accessed 3 Dec. 2022).
77. W. Wang, H. Wang & J. Wu, *Mixed Ownership Reform and Corporate Tax Avoidance: Evidence of Chinese Listed Firms*, 69 *Pac. Basin Finance J.*, pp. 1016-1048 (2021).
78. D. Xu, *Prospects on the Relationship between Chinese Direct Tax Incentives and Subsidy Rules of the World Trade Organization*, 44 *Intertax* 6/7, pp. 539-540 (2016).
79. W. Zhou, H. Gao & X. Bai, *China's SOE Reform: Using WTO Rules to Build a Market Economy*, 68 *Int. Compar. Law Q.* 4, p. 1002 (2019).

Under the CAI, China must provide more information on tax subsidies for domestic enterprises on the basis of a specific consultation mechanism. Therefore, the CAI can compensate for the WTO's subsidy rules to increase the transparency of tax subsidies. To guarantee enforcement, the CAI also provides a dispute resolution mechanism. If it fails to do so, the European Union will retain its right to adopt autonomous measures to address any distortions in the European Union's market.<sup>80</sup> If the CAI can be implemented, there will be a comprehensive set of transparency rules for regulatory and administrative measures to enhance legal certainty.<sup>81</sup> To summarize, the CAI points out the fundamental issues of tax cooperation between the European Union and China and builds a common platform for negotiation.

### 5.3. Fair tax competition: A nationwide unified market

Together with China's outbound investment policy through the BRI and CAI, China aims to further open its domestic market and establish a nationwide unified market with a high-standard market system. On 10 April 2022, the State Council released Opinions of the CPC Central Committee and the State Council on Accelerating the Construction of a Unified Domestic Market.<sup>82</sup> The goals of the guidelines are to deepen China's market-oriented reforms and build up an efficient, rule-based, open market system. Specifically, the goals are to remove local protectionism, market segmentation and impediments restricting economic circulation, thus facilitating the smooth flow of products and resources on a larger scale. To achieve these goals, the primary tasks are to remove unfair competition behaviour and create a level playing field.<sup>83</sup> As stated in the guideline, the government will take steps to implement a unified negative list for market access in all regions, strengthen the anti-monopoly drive, punish enterprises engaging in unfair competition in accordance with the law, and eliminate local protectionism and barriers between regional markets.<sup>84</sup> This guideline signals the government's determination to further open up its domestic market to the outside world.

The creation of a level playing field demands that the government regulate harmful tax competition in the domestic market and remove unfair tax incentives. Tax incentives in China have evolved together with China's economic development and reform. At the beginning of the reform and the period of opening in the 1980s and 1990s, China adopted different tax incentives to attract foreign investment. However, with China's further inte-

gration into the world economy, especially accession to the WTO, China has also abolished previous tax incentives that are considered unfair tax competition measures, but regulates tax incentives uniformly through legislation.<sup>85</sup> With the promulgation of the Enterprise Income Tax Law (EITL) in 2007,<sup>86</sup> China has been working consistently on legally granting tax incentives and maintaining fair tax competition. Legally, only the central government has the authority to grant tax incentives and should follow legal procedures. According to the law, tax incentives are only allowed in state-supported industries, such as technological development, environmental protection, energy conservation, and state-supported regions, such as the less-developed Western region, autonomous regions living with minority people, and free trade zones.<sup>87</sup> Therefore, local governments should not have the authority to grant tax incentives. In reality, however, local governments are still using tax measures to strengthen the competitiveness of their region, which has created unfair tax competition. In some regions, in contrast, local governments grant tax incentives to local enterprises so that local enterprises have more advantages when competing with other enterprises, thus forming local protectionism.<sup>88</sup> The guidelines signal that the government has realized that these problems exist and is determined to resolve them and curtail local government's intervention in the market. The direction of the reform is now to maintain a level playing field for tax competition. From the perspective of outbound investment, the removal of local protectionism can stimulate Chinese enterprises to become stronger based on their own capacities and not on the basis of tax incentives. Thus, strengthening domestic enterprises, helping them to stand out and encouraging them to go abroad, are efforts that are aligned with both the market and China's policy goal.

### 5.4. Dispute resolution

China has implemented BEPS Action Plan 14 on the resolution of international tax disputes. The MAP is the main mechanism adopted by China to resolve tax treaty related disputes.<sup>89</sup> Moreover, the ratification of the OECD's MLI in 2022 has stimulated China to speed up amendment of its treaty network to meet the minimum standards regarding the MAP, and this process is almost finished.<sup>90</sup> However, China still has not adopted mandatory arbitration as a means to resolve tax disputes.<sup>91</sup>

China did not implement a new tax dispute resolution mechanism under the BRI. Although China's ambition is to promote tax cooperation under BRITACOM, it has

80. See *supra* n. 2, at sec. V.

81. *EU-China Comprehensive Agreement on Investment – The Agreement in Principle – Factsheet* (30 Dec. 2020), available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/6b4e0ec7-5ff0-4872-a4cf-54717b881d90/details> (accessed 25 Nov. 2022).

82. Xinhua News, *China Issues Guidelines on Establishing Unified Domestic Market* (11 Apr. 2022), available at [http://english.www.gov.cn/policies/latestreleases/202204/11/content\\_WS625360f2c6d02e533532900f.html](http://english.www.gov.cn/policies/latestreleases/202204/11/content_WS625360f2c6d02e533532900f.html) (accessed 20 Nov. 2022).

83. O. Shijia, *China Strives to Establish Unified Domestic Market*, *China Daily* (12 Apr. 2022), available at [http://english.www.gov.cn/policies/policywatch/202204/12/content\\_WS6254b729c6d02e5335329134.html](http://english.www.gov.cn/policies/policywatch/202204/12/content_WS6254b729c6d02e5335329134.html) (accessed 20 Nov. 2022).

84. *Id.*

85. Xu, *supra* n. 78, at pp. 539-540.

86. CN: Enterprise Income Tax Law of the People's Republic of China (as amended in 2018) [hereinafter EITL].

87. Ch. 4 EITL.

88. Y. Sun, *On the Building of a Unified National Market from the Perspective of Taxation*, 8 *Shuiwuyuanjiu* (Taxation Research), pp. 24-25 (2022).

89. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, People's Republic of China (Stage 2)* (OECD 2021).

90. D. Qiu, *Assessing the Impact of the OECD's Multilateral Instrument on China's Tax Treaties (2017-2022)*, 76 *Bull. Intl. Taxn.* 9, p. 425 (2022), *Journal Articles & Opinion Pieces* IBFD.

91. See *China (People's Republic of) - MLI Country Monitor*, *supra* n. 28. China did not opt into the mandatory binding arbitration measures of the MLI.



not yet established an innovative mechanism to resolve tax disputes.<sup>92</sup> China still has to rely on the MAP to solve treaty-related tax disputes. Academics, however, have discussed the feasibility of devising a new tax dispute resolution mechanism under the BRI, which would include dispute prevention elements, a mediation stage, a complementary arbitration stage and a publication stage, etc.<sup>93</sup>

The CAI has included a dispute settlement mechanism to resolve trade disputes between the European Union and China. Though not aimed specifically at tax disputes, this mechanism sheds light on tax dispute resolution between the European Union and China. This mechanism provides three ways to solve trade and investment disputes: the MAP, mediation and arbitration.<sup>94</sup> Arbitration is a common way to resolve international investment disputes and is available under the CAI when the MAP and mediation do not lead to a resolution. To guarantee impartiality, the arbitration panel is to consist of three panellists, one from the sub-list based on the proposal of the European Union, one from the sub-list based on China's proposal and one from a sub-list of individuals that are not nationals of either party. This individual becomes the chairperson.<sup>95</sup> A tax dispute resolution could be mirrored after these arbitration rules and the search for alternatives in respect of investment dispute resolution in general.<sup>96</sup>

## 6. Common Base for Tax Cooperation

### 6.1. Common objectives

The previous analysis shows that the European Union and China share common objectives for further tax cooperation, which are mainly in the fields of fair tax competition, tax transparency and tax dispute resolution. A major concern of the European Union is that it does not have a sufficient understanding of China's policy and it assumes China is a different market player. However, the analysis in this article, on new developments in terms of China's domestic and international tax mechanisms, demonstrates that there are no substantive conflicts or huge differences regarding tax cooperation between the two parties. In contrast, the European Union and China currently share more in common in terms of how to realize tax good governance and promote sustainable development. Both the European Union and China aim to create a

level playing field. The understanding of this level playing field is the same, namely ensuring fair tax competition by combating harmful tax measures. The European Union relies on State aid law, the ATAD, and other codes of conduct to achieve this goal, while China has made great progress on SOE reforms, the establishment of a national unified market and is strictly controlling the granting of tax incentives, etc. To increase transparency, the European Union is stricter regarding public CbC reporting, while China specifically aims to increase the transparency of tax incentives for SOEs. To resolve tax disputes, the European Union has more experience on MAPs and arbitration, while China has also proposed flexible measures including mediation, a dispute prevention mechanism and compensatory arbitration to solve tax disputes. Although there are numerous options available to realize the objectives of the parties, the two can start to become common norm-makers to establish a tax cooperation framework.

### 6.2. Multilateralism

The fundamental basis for cooperation is that both the European Union and China are supporters of multilateralism. In the area of international tax coordination, multilateralism is gaining ground. In order for tax coordination to be considered the governments of three or more countries must participate.<sup>97</sup> Against the background of the BEPS Project and the subsequent series of actions initiated by the OECD/G20, countries are relying more on multilateral actions to solve common tax challenges. Multilateralism is considered a requirement of international tax justice.<sup>98</sup> In substance, the different parties need to reach consensus on universal and binding rules to overcome the insufficiencies of bilateral measures.<sup>99</sup>

The European Union is good at practicing tax multilateralism. It has actively implemented the international tax standards under the BEPS Project. Moreover, the European Union, itself, is a multilateral union that contributes to the progress of multilateralism within the internal market. The EU standard of tax good governance is a typical example of the European Union's aim to improve the tax environment internally through multilateral means, but its intention is also to expand multilateralism to third countries.<sup>100</sup>

China is an advocate of multilateralism as well. Although not an OECD member, China has actively participated in the BEPS Project and is relying on multilateral processes to become a norm-shaker.<sup>101</sup> It believes it is prac-

92. X. Cui & J. Chen, *Building a Belt and Road International Tax Dispute Prevention and Resolution Mechanism*, 76 Bull. Intl. Taxn. 4, p. 173 (2022), Journal Articles & Opinion Pieces IBFD.

93. Id. See also D. Xu, *Improved Tax Dispute Resolution between China and the ASEAN Countries under the Belt and Road Initiative*, 72 Bull. Intl. Taxn. 12, pp. 741-742 (2018), Journal Articles & Opinion Pieces IBFD; Y. Liao & X. Feng, *Reform and Innovation of International Tax Dispute Resolution Mechanism under the Background of "One Belt One Road"*, 5 Xiamen Daxue Xuebao (Zhaxue Shehui Kexueban) (J. Xiamen U. (Arts & Soc. Sci)), pp. 24-29 (2022); F. Zhang, *On the Improvement of the International Tax Dispute Settlement Mechanism by the Belt and Road under the Strategy of Economic Winning the Country*, 8 Faxueazhi (Law Science Magazine), pp. 10-12 (2018).

94. Section V Dispute Settlement of the CAI, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b18952ea-bebe-4e4e-95ec-08081f2d2c07/details> (accessed 2 Dec. 2022).

95. Id., at arts. 7-8.

96. X. Cui & Y. Sun, *International Investment Arbitration: A New Way to Solve International Tax Disputes*, 4 Huaqiao Daxue Xuebao (Zhaxue Shehui Kexueban) (J. Huaqiao U. (Phil. & Soc. Sci)), p. 91 (2022).

97. R. García Antón, *Substantive Multilateralism in the Context of the MLI*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* p. 15 (A. Dourado ed., IBFD 2020), Books IBFD.

98. A. Dourado, *International Tax Multilateralism or Reinforced Unilateralism?*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* p. 3 (A. Dourado ed., IBFD 2020), Books IBFD.

99. García Antón, *supra* n. 97, at p. 16.

100. R. Lyal, *The European Union and Tax Good Governance in a Multilateral Environment*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* pp. 53-66 (A. Dourado ed., IBFD 2020), Books IBFD.

101. For instance, China has made proposals on allocating profits according to location specific advantages, which means fairer tax allocation for developing countries. See Xu, *supra* n. 29, at pp. 474-479.

ting true multilateralism.<sup>102</sup> The BRITACOM is also a multilateral mechanism promoted by China to achieve better tax cooperation. If the CAI becomes effective, it can advance both China and the European Union's practice on regional multilateralism. Although the BRITACOM and CAI are at the beginning stages, both certainty and stability could be encouraged if China were to initiate multilateral conventions and encourage more parties to participate.

### 6.3. Concerns

The European Union's response to further tax cooperation with China under the BRI and the CAI is impacted by the need to preserve the political autonomy of the individual Member States. Individual Member States have different interests regarding tax cooperation with China. This is the main reason why the Member States are divided in terms of their acceptance of the BRI and the CAI. More information on China's objectives and progress, with regard to the tax cooperation framework, may lead to a better understanding between the parties. Nevertheless, it is unsure how long it will take for the European Union, as a whole, to fully embrace tax cooperation with China.

Meanwhile, implementation of all of the tax measures in these two framework agreements may also trigger concerns in China. Although China has undergone a dramatic reform on many aspects of taxation, whether it can guarantee implementation of all the measures in a consistent and stable way remains uncertain. In the past, China had a state-oriented attitude towards taxation, always viewing taxation as an instrument to achieve governmental goals.<sup>103</sup> At present, it is now relying more on the rule of law to safeguard the enforcement of its actions, while retaining its own features and means to achieve the rule of law.<sup>104</sup> Moreover, China is, in general, fiscally centralized at the central government level. Most tax policies are designed at the central government level but are implemented at the local government level. There is a distri-

102. Li, *supra* n. 23, at p. 738.

103. D. Xu, *Why does China Have a State-oriented Attitude towards Tax Incentives?*, 33 *Aus. Tax Forum*, pp. 805-809 (2018).

104. China does not have the typical Western liberal democratic rule of law, which is based on free market capitalism, multiparty democracy, and a liberal interpretation of human rights. China has socialist rule of law with its own characteristics, which is closer to the thin rule of law. See R. Peerenboom, *China's Long March toward Rule of Law* pp. 103-109 (Cambridge U. Press 2002) and W. Cui, *Pivoting Away from the Rule of Law*, in *The Administrative Foundations of the Chinese Fiscal State* pp. 254-268, Cambridge Tax Law Series (Cambridge U. Press 2022).

bution of spending powers, however, between the central and local governments, which is characteristic of decentralization.<sup>105</sup> Due to imbalanced economic development between the regions and the impact of the pandemic, local governments may have an incentive to deviate from the central government's decisions to prioritize local needs, although this is prohibited. In addition, although China has announced that it would like to increase transparency of tax information, the means to realize this raises more concerns. Turning policy goals into actions is a key step. The potential success will depend on how determined China is to embrace reform and integrate international standards.

### 7. Conclusion

The European Union and China can become common norm-makers within the corporate tax cooperation framework. To realize this, both parties should work on the establishment of a conceptual framework by consistently expanding their common understanding of fairness, legal certainty and the rule of law, which will provide a foundation of values for further tax cooperation.

For the European Union, the cooperation framework is providing an opportunity to rethink its approach to China. Starting from a common base, the European Union will have more opportunities to further tax cooperation with China, such as updating its tax treaties with China by adopting the MLI, increasing participation in the BRI and BRITACOM, and further discussing and approving the CAI, etc. The European Union, however, can also take this opportunity to improve its internal decision-making process among Member States to increase the legitimacy of its rules when expanding to third countries.

For China, considering the concerns mentioned before, it should introduce more legal certainty to guarantee implementation of all the tax measures agreed to. This will depend also on the practice of the rule of law in China, especially for tax administrations. China can start with the establishment of a multilateral tax dispute resolution mechanism under the BRI modelled after the European Union's experience. To achieve true multilateralism, the next step is to promote a transition from soft law to hard law through a multilateral convention.

105. W. Cui, *The Forgotten Reform*, in *The Administrative Foundations of the Chinese Fiscal State* pp. 26-58, Cambridge Tax Law Series (Cambridge U. Press 2022).