

# TEI Tax Summit 2016

Asia Pacific

Hong Kong  
31 August 2016



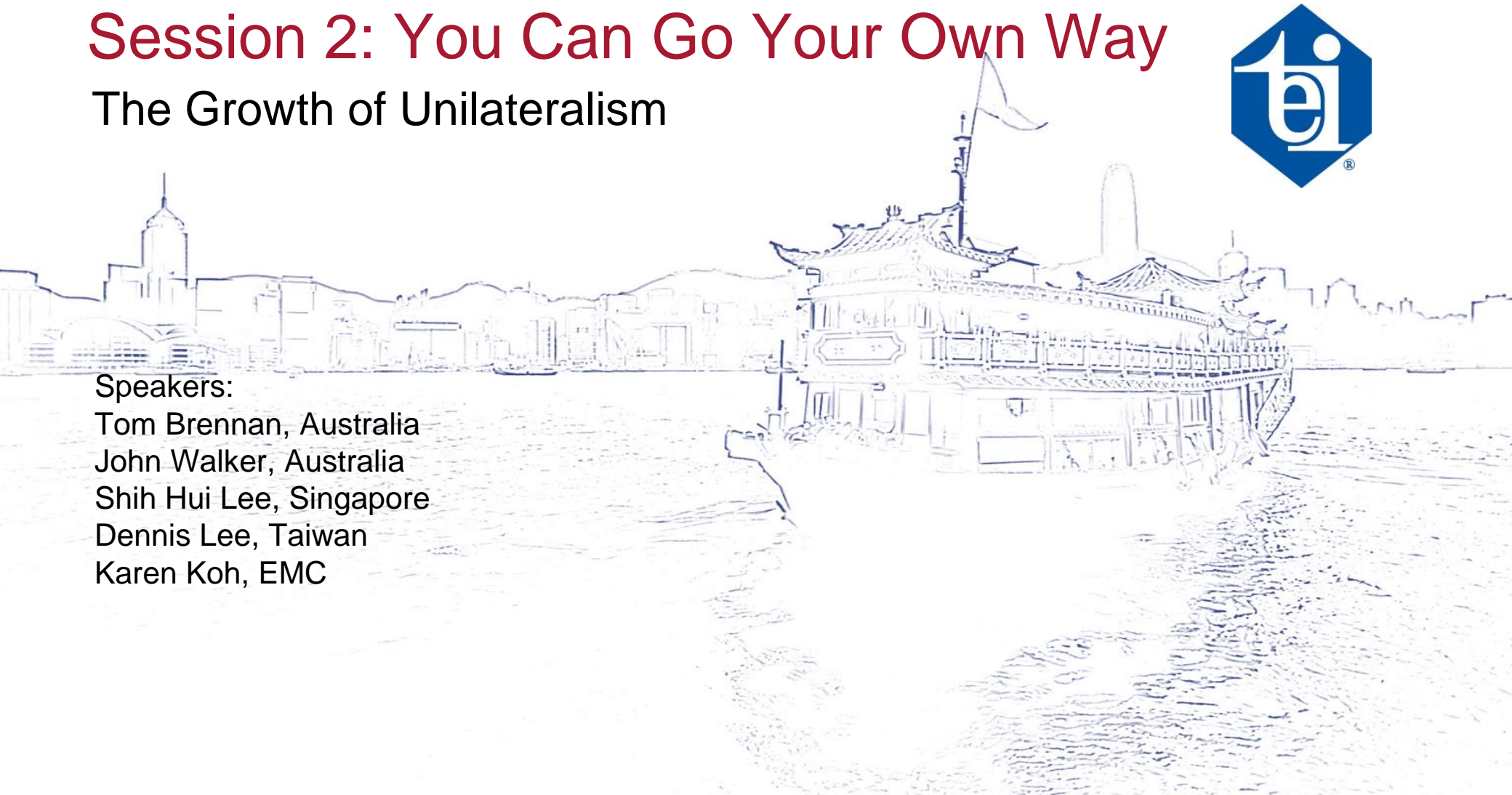
# Session 2: You Can Go Your Own Way

## The Growth of Unilateralism

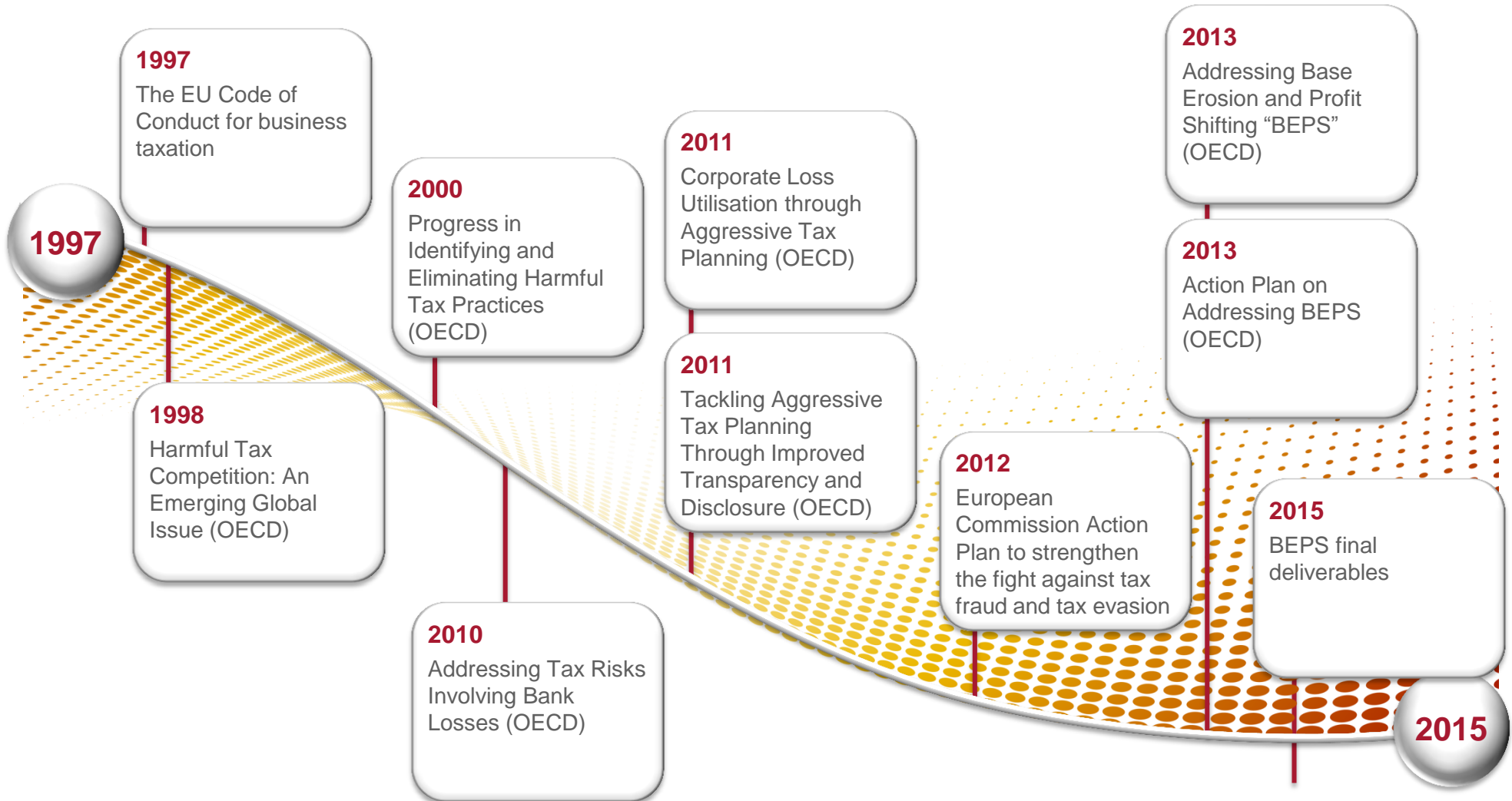


### Speakers:

Tom Brennan, Australia  
John Walker, Australia  
Shih Hui Lee, Singapore  
Dennis Lee, Taiwan  
Karen Koh, EMC



# Evolution of Global Coordinated Tax Policy



## Finally, a solution to the BEPS Problem

*“This [BEPS] Action Plan, which we will roll out over the coming two years, marks a turning point in the history of **international tax co-operation**. It will allow countries to draw up the **co-ordinated, comprehensive** and **transparent** standards they need to prevent BEPS,”*

OECD Secretary-General Angel Gurría, July 2013

# Unilateral Action vs BEPS

- Some jurisdictions are “jumping the gun”
- Using the pretence of BEPS to impose potentially punitive and inconsistent unilateral measures
- Domestic political pressures forcing the agenda
- Compounding current market uncertainty
- Precedent for unilateral action by others – where will it end?

# Unilateral action emerging in many forms

- Targeted domestic anti-avoidance measures e.g. DPT
- Unilateral indirect tax measures – e.g. specific GST regulations for ecommerce
- Transfer Pricing – e.g. conflicting rules and focus in different jurisdictions
- Bespoke or selective implementation of BEPS recommendations – e.g. Action Item 13 CbC reporting

## Case Study - Australia

- Introducing a series of unilateral measures, targeting tax arrangements which erode the Australian tax base:

New Measure	Designed to Counter
Multinational Anti-Avoidance Law (“MAAL”)	Artificial avoidance of Australian permanent establishment
Diverted Profits Tax (“DPT”)	Transactions involving low-taxed entities lacking economic substance

- Both measures draw heavily on the DPT rules introduced by the UK in early 2015

# Australian MAAL - Overview





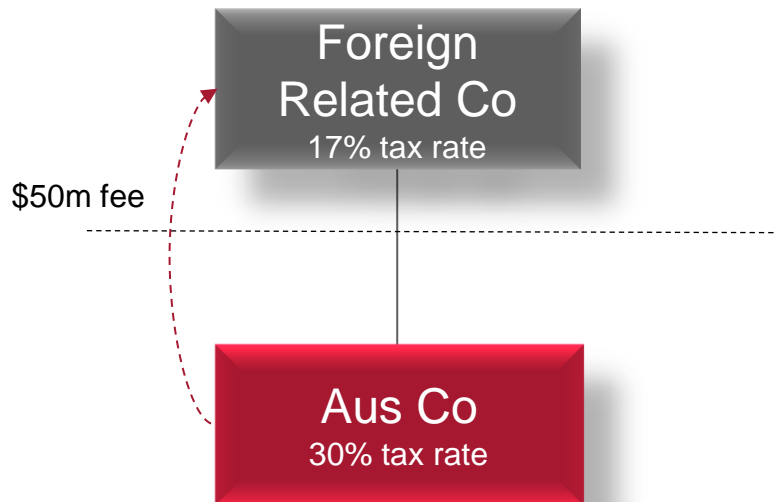
# Australian DPT - Overview



# Australian DPT

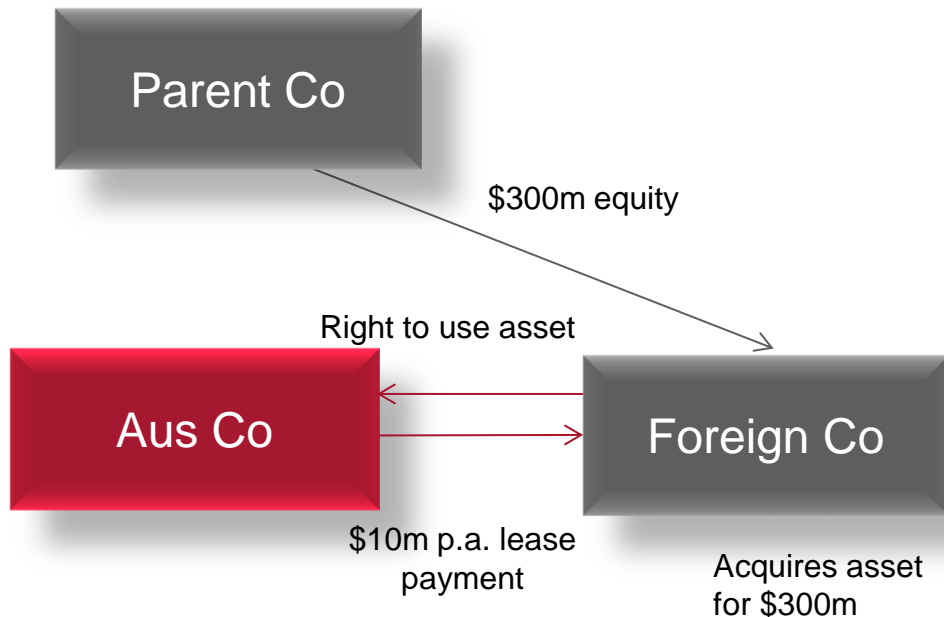
- DPT is charged at a rate of 40% on “diverted profits”
- DPT allows re-characterization of the supply chain
- Targets “taxed nowhere” income, but goes much further
- Not a self assessed tax. The ATO will issue a DPT assessment
- Tax becomes payable within 110 days of initial assessment.
  - “Pay to play” – pay tax up-front, then make your case to the ATO

# Australian DPT – Basic Example



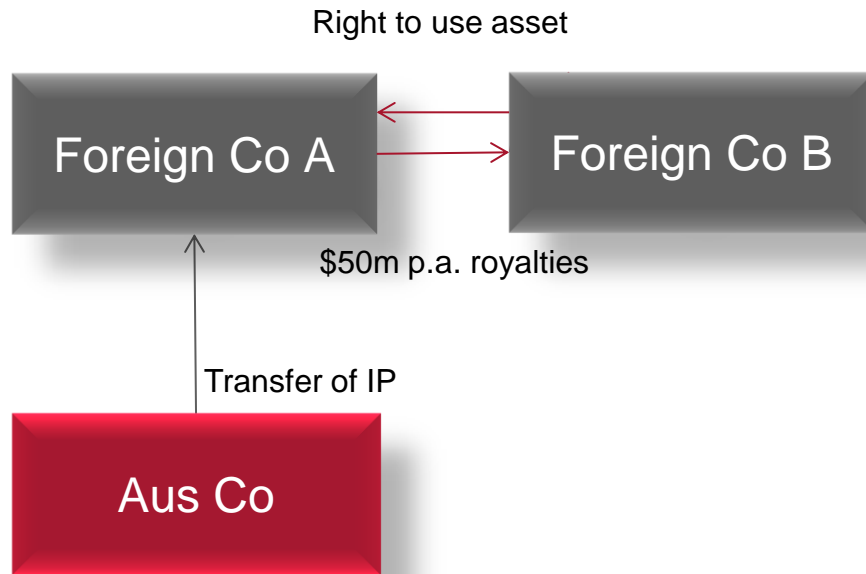
- Foreign Co provides marketing and administrative services to Australia Co and charges a fee of \$50 million
- Aus Co does not provide any further information to support the pricing of the fee
- The ATO considers that the fee is inflated compared to an arm's length amount
- There is an effective tax mismatch given that 17% is less than 80 per cent of Australia's 30% corporate tax rate
- In the absence of further information, it is reasonable to conclude that the transaction was designed to secure the tax reduction. The non-tax financial benefits do not exceed the financial benefit of the tax reduction
- Therefore, a DPT assessment will be issued

# Australian DPT – Reconstruction Example



- Parent Co injects \$300 million equity funding into Foreign Co.
- Foreign Co uses the funds to purchase an asset, which it leases to Aus Co
- Foreign Co has no other activities
- Strong possibility that the arrangement could be seen as artificial and contrived
- A relevant alternative scenario would be for Parent Co to provide equity funds directly to Aus Co to purchase the asset for its own use

# Australian DPT – Reconstruction Example



- Aus Co contractually transfers an IP asset it has developed to Foreign Co A for a nominal amount
- Aus Co continues to develop and maintain the IP
- Foreign Co A only pays a small amount for this service and does not contribute in any other meaningful way to the further development or maintenance
- Foreign Co has no other activities
- Strong possibility that the arrangement could be seen to lack economic substance
- A relevant alternative scenario would be for Aus Co to remain owner of the asset, and receive the entirety of the royalty flow

# DPT – Recipe for Uncertainty

Uncertainty = Disputes

- Reconstruction and recharacterization powers go far beyond OECD Guidelines
- “Reasonable to Conclude”
  - Highly subjective, facts and circumstances based test:
    - Commercial / legal context
    - Location of functions / Significant People Functions
    - Evidence / motive
  - What parallel universe does your tax inspector live in?

# DPT – Recipe for Uncertainty

- Attribution of ownership for intangible and mobile assets
- Relative value of Marketing IP vs. Technology IP
- Changing dynamics in TP disputes - aggressive approach to resolving transfer pricing issues

# Australian DPT and Double Tax Treaties

- DPT overrides Australia's bilateral treaty obligations:
  - Is the DPT an anti-avoidance rule consistent with the intent of the treaties?
- Taxpayers will have no standing to rely on treaties to override the DPT
- Interest and royalty payments in reconstructed scenarios – do treaty rates apply?
- Foreign income tax credit/offset unlikely to be available for DPT liabilities



# What can multinationals do to prepare?

- Proactive Approach:
  - Have enough resources to keep up to date on what countries are doing, and their proposed measures
  - Be linked into networks (e.g. government affairs teams, industry bodies, advisor groups, TEI) to share intelligence
  - Consider active engagement with policy makers. Should your organization provide input to influence the design of measures?

# What can multinationals do to prepare? (cont'd)

- Is it feasible to proactively engage tax authorities in regular dialogues e.g. explaining your business and any changes that it is going through, so that the tax authorities can better apply the law to your facts?
  - Enhanced Taxpayer Relationship Programme in Singapore
  - Pharmaceuticals cluster facilitated by the ATO

# What can multinationals do to prepare?

- Take a decision on how best to respond:
  - Assess potential exposure
  - Determine your strategy
  - Consider GAP analysis / restructuring?
  - Move IP/SPFs to better align and harden substance?
  - Whether and how to engage with tax authority(ies)?
  - Advance pricing or other advance clearances?
  - Provision for and/or pay the tax?

# Final Thought: How will the success of the BEPS project be judged?

*“There are many ways to define the success (or otherwise).*

*The first is whether **consensus** has been reached on the different measures...*

*The second is whether the measures are **actually implemented** and applied according to the consensus...*

*The third is whether **instances of BEPS still exist** after implementation.*

*The BEPS Project will also be a success if businesses do not have to comply with hundreds of **different disclosure requirements or anti-avoidance measures** and can therefore benefit from lower compliance costs.” \*\**

## On these metrics, has the BEPS project been a success?

\*\* <http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm>

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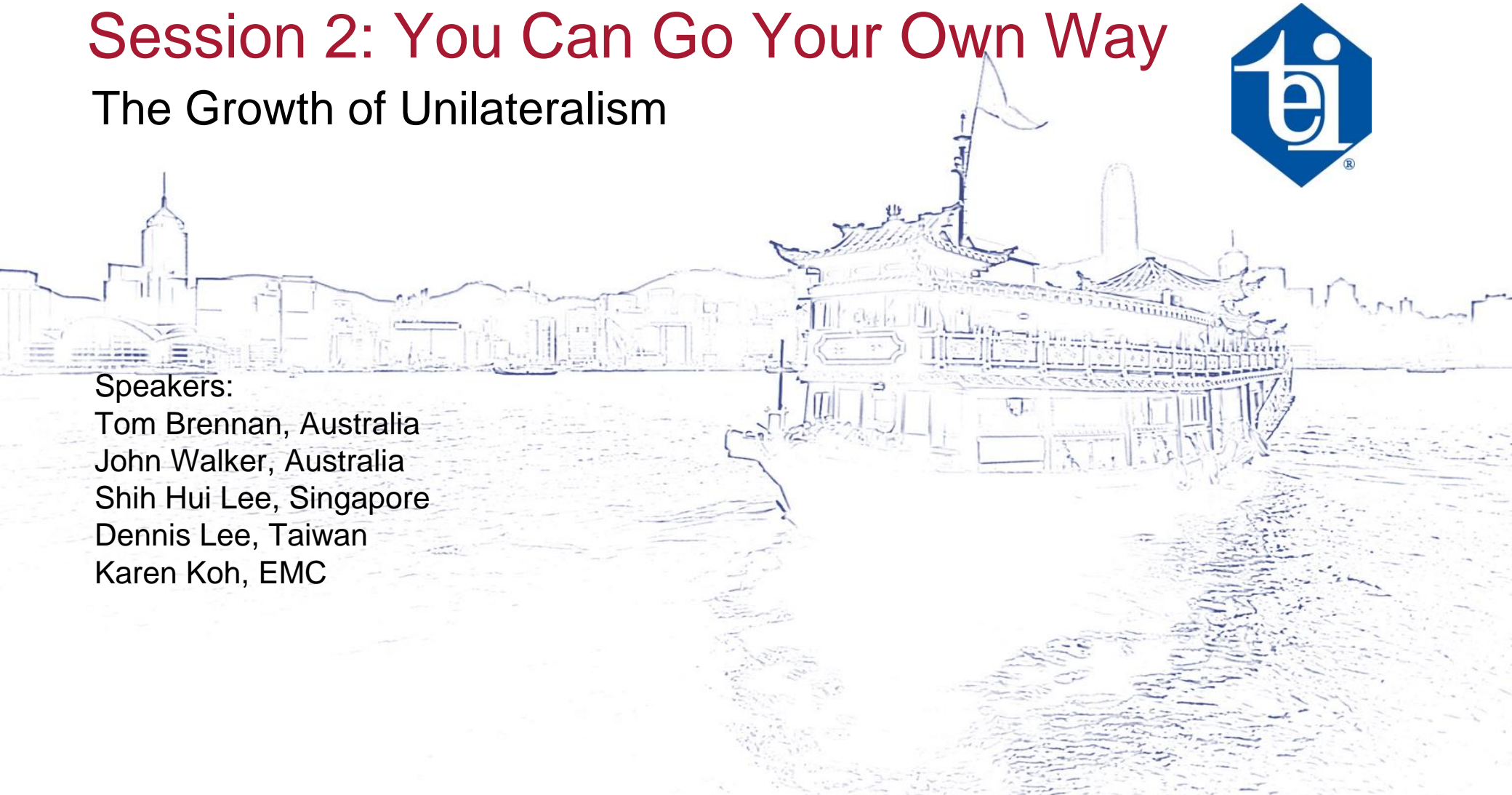
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