

BRICS V LEGAL FORUM CONFERENCE 2018

Streamlining the Tax Treaty Mutual Agreement

Procedure (MAP) between BRICS

Member States

By Michael Honiball

Professor of Practice in Taxation

Faculty of Economic and Financial Sciences

University of Johannesburg

Director: Werksmans Attorneys

1 ABSTRACT

1.1 The BRICS Finance and Tax Expert Committee ("**BRICS FTEC**") of the BRICS Legal Forum has adopted the above topic for the BRICS Legal Forum Conference 2018, to be held in Cape Town on 23 and 24 August 2018. The topic is in conformance with the 2017 Russia Key Declaration Outcomes, in that it proposes the introduction of detailed uniform BRICS tax dispute resolution rules and mechanisms for the benefit of both taxpayers and the revenue authorities of the BRICS Member States. Such detailed uniform rules will directly and indirectly encourage investment, trade and other business between the BRICS Member States by assisting in the application of the existing bilateral double taxation conventions ("**DTCs**" or "**tax treaties**") on a more certain basis. Such rules will also assist in the application of the multilateral taxation conventions to which the BRICS Member States are a party. The ultimate goal of uniform MAP rules and mechanisms is the harmonisation of the tax systems of the Member States in order to eliminate double taxation, double non-taxation, and inconsistencies in the tax treatment of cross-border tax issues, thereby enhancing the certainty of treatment of cross-border investments. Such harmonisation will benefit the BRICS tax authorities as well as create more certainty of application of international tax law for taxpayers. Ultimately this increased certainty is expected to encourage further intra-BRICS trade. However, it is not intended that such harmonisation will negatively impact on the tax sovereignty of the separate BRICS Member States.

1.2 Unlike the position within the EU and elsewhere within the OECD, where compulsory arbitration is becoming the norm, developing countries like BRICS regard centralised arbitration as an encroachment or diminution of their tax sovereignty. Therefore, the proposal for the BRICS Legal Forum Conference 2018 is, instead of agreeing to or enhancing arbitration options, to rather propose and implement a pre-agreed efficient, voluntary, and transparent MAP process between the BRICS Member States. It is intended that this BRICS initiative should complement rather than replace the OECD BEPS Action 14 agreed initiatives.

1.3 The topic proposed by the BRICS FTEC for the BRICS Legal Forum Conference 2018 is therefore: "Streamlining the Tax Treaty Mutual Agreement Procedure ("**MAP**") between BRICS Member States". It is expected of each Member State's BRICS FTEC to propose practical, workable solutions for streamlining MAP, for bilateral tax treaty application purposes, for purposes of implementing and applying the 2011 Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("**the 2011 MCMAATM**"), and for purposes of implementing and applying the 2017 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**2017 MLI**"). These proposals will then be presented to the Ministers of Finance and the tax authorities of the BRICS Member States for further refinement and implementation.

2 **INTRODUCTION**

2.1 Consistent with other jurisdictions internationally, the BRICS Member States have concluded numerous bilateral International Tax Conventions with each other, as well as with non-Member States. The current list of bilateral tax treaties in force between BRICS Member States is set out in Annexure 1.

2.2 All of these bilateral tax treaties are substantially based on the OECD Model Tax Convention ("**OECD MTC**"). Art 25 of the OECD MTC provides for a MAP which applies when a taxpayer of one of the BRICS Member States considers that the actions of one or both of the Member States who have entered into the tax treaty, will result in taxation not in accordance with the provisions of the treaty. The MAP is available to such taxpayers in addition to any remedies

which may be available under domestic law. Art 25 of the OECD MTC is reproduced as Annexure 2, for ease of reference.

2.3 In terms of Art 25(2) of the OECD MTC, the Competent Authorities of the Contracting States must "endeavour" to resolve the case. However, they are not obliged to do so. Historically, the efficacy of the MAP has been undermined by the absence of an obligation on the part of the contracting parties to resolve the dispute. While Art 25(5) of the OECD MTC provides for compulsory arbitration when a dispute has not been resolved within two years by means of MAP, the incorporation of this sub-article when negotiating a bilateral tax treaty is discretionary. In practice, it is not commonly adopted due to the perception that by adopting it, fiscal sovereignty will be relinquished (Duffy and Bailey: *The Case for Mandatory Binding Arbitration in International Tax: 2016 Number 2 at 79*). Annexure 3 sets out those BRICS Member States which have adopted Art 25(5) of the OECD MTC or an equivalent provision. It is clear from Annexure 3 that none of the BRICS bilateral treaties have Art 25(5) or equivalent, and that in general, BRICS Member States are reluctant to incorporate it into their other bilateral tax treaties.

2.4 The 2011 MCMAATM, which is a multilateral international convention which deals *inter alia* with the exchange of information, the assistance in recovery of tax debts, and the service of documents, and under Art 6 of which the Common Reporting Standard ("**CRS**") was created, also contains an article setting out a MAP. The full text of Art 24, called "Implementation of the Convention", is attached as Annexure 4, for ease of reference. Art 24 contains a MAP which only applies for purposes of the application of the 2011 MCMAATM, it does not extend to other international conventions. Art 24(1) provides that the parties must communicate with each other regarding the implementation of the 2011 MCMAATM through their respective competent authorities, either directly or via authorised subordinate authorities. Unfortunately, as is the case with Art 25 of the OECD MTC, if there is any dispute about the application of the 2011 MCMAATM, the Competent Authorities are not obliged to resolve the situation, they are only required to "endeavour to resolve" the situation (Art 24(2)). It is further specifically provided that the Competent Authorities of two or more parties "may mutually agree on the mode of application of the Convention among themselves". Art 24(1) therefore envisages that "sub-groups" of Parties to the 2011 MCMAATM,

like BRICS, may mutually agree the mode of application of the 2011 MCMAATM.

2.5 The OECD Action Plan on Base Erosion and Profit Shifting ("**BEPS Action Plan**") identified 15 actions to address base erosion and profit sharing ("**BEPS**") in a comprehensive manner. The BEPS Action Plan was the result of an initiative which commenced in September 2013, when the OECD and G20 leaders endorsed a comprehensive action plan to address weaknesses in the international tax framework, in order to ensure that profits are taxed where economic activities take place and value is created. The result of the initiative was the agreement to implement 15 specific actions to prevent BEPS, including the implementation of a multilateral tax convention (namely the 2017 MLI) which would override all the bilateral tax treaties which contained clauses which were regarded as being used to facilitate base erosion. Due to the historical difficulties with the practical application of the MAP, and due to the concerns raised by multinational enterprises ("**MNEs**") about the increased potential for double taxation arising from the implementation of the BEPS proposals, BEPS Action 14: Making Dispute Resolution Mechanisms More Effective ("**BEPS Action 14**"), was agreed for insertion into the OECD BEPS Final Report. BEPS Action 14, which calls for more effective dispute resolution mechanisms, is therefore aimed at ensuring more certainty and predictability for MNE taxpayers. However, BEPS Action 14 did not include a proposal to adopt mandatory binding arbitration. The result was the inclusion of a MAP as Art 16 of the 2017 MLI which is substantially similar to that found in Art 25 of the OECD MTC. Being substantially similar, Art 16 gives rise to the same problems and inefficiencies. It also contains the same 3-year application deadline limit. Annexure 5 sets out Art 16 of the 2017 MLI, which contains the MAP, for ease of reference.

2.6 This paper will analyse the main problems with MAP, including setting out a history of MAP and more details about the implementation of Action 14 of the BEPS Action Plan. It will also set out the use of MAP in South Africa, including the recommendations of the Davis Tax Committee and a discussion of the SARS MAP Guide. Lastly, it will set out some practical recommendations for improving the MAP, specifically among BRICS Member States.

3 ANALYSIS OF ART 25 OF THE OECD MTC

3.1 Art 25 of the OECD MTC may be summarised as follows: In terms of Art 25(1) of the OECD MTC, taxpayers have the right to appeal (within three years) to the tax authorities in the State of residence in circumstances where taxation is not in accordance with a treaty. In terms of Art 25(2), where the objection appears to be justified, the Competent Authority must endeavour to solve the dispute. The Competent Authority in the case of South Africa is the Commissioner for the South African Revenue Service ("**SARS**"), as discussed below. Agreements reached by the Competent Authorities will be implemented notwithstanding any time limits under domestic law. In terms of Art 25(3), Competent Authorities may consult one another to solve the problems of treaty interpretation and application, as well as to resolve any problems of double taxation, whether or not dealt with in any treaty. In terms of Art 25(4), consultation between competent authorities may take any form, including joint meetings between them or their representatives. In terms of Art 25(5), provision is made for a mandatory arbitration of issues unresolved within two years at the request of the taxpayer.

3.2 In terms of the revenue rule, each jurisdiction has the right to levy taxes only within its own borders. The result is that, other than within the EU, there is no international tax court which has jurisdiction over the tax laws of multiple jurisdictions. There is also no mandatory international arbitration body to arbitrate tax disputes. As no international tax court exists, problems arising under a tax treaty have to be adjudicated by one of the Contracting States. One of the avenues of adjudication is to make use of the MAP. Under the general definitions article, being Art 3 of the two main Model Tax Conventions, namely the OECD MTC, and the United Nations Model Tax Convention ("**UN MTC**"), it is provided that a State will indicate in the treaty who will act as the Competent Authority. In a South African context, the Competent Authority is the Commissioner for SARS or his duly authorised representative (see Art 3 of most of the tax treaties entered into by South Africa).

3.3 Art 25(1) and 25(2) of both the UN and the OECD MTCs provide that the competent authorities of the two Contracting States must endeavour to resolve disputes leading to inconsistent taxation under the convention. This may occur, for example, when the Contracting States classify income

differently and as a result attach different tax consequences to the same income. Although one of the important aims of a treaty is to eliminate double taxation, the existence of double taxation or the potential for double taxation is not a requirement for the use of the MAP (see in general Rohatgi *Basic International Tax* (2002) 121-123).

3.4 It is specifically provided that the MAP exists irrespective of any domestic remedies (Art 25(1)). The result is that a taxpayer who makes use of the MAP may still want to or need to object and appeal against an assessment in terms of domestic law. Unlike under domestic legislation where a taxpayer has to wait for a formal assessment to make use of the objection procedure, the MAP may be initiated by a taxpayer once he or she is certain that a Contracting State will apply the treaty in a specific manner, without a formal assessment having been received (Para 12 of the OECD Commentary on Art 25). Examples include practice notes, interpretation notes or published rulings containing views which the taxpayer argues are not in accordance with the tax treaty. Further, the use of the MAP is not subject to domestic remedies first being exhausted. Under both the OECD and UN MTCs, a taxpayer has three years from the date of the first notification of an action resulting in a liability to make use of the procedure (Art 25(1)). An analysis of tax treaties entered into by South Africa indicates that the period within which a taxpayer has to make use of the MAP is generally three years (see for example, the treaties with Greece, New Zealand, Sweden and the USA). Some South African treaties contain a 2-year limitation, for example, the treaty with Canada. Under some South African treaties no time period is specified (see for example the treaty with the UK and the Netherlands).

3.5 Where a taxpayer has changed his or her residence, the Competent Authority of the State of residence at the time when the dispute arose, must be approached. In the absence of formal requirements for the use of the MAP, the procedure applicable to domestic dispute resolution may be used (Para 13 of the OECD Commentary on Art 25).

3.6 The OECD Commentary (Para 9) indicates that the most common cases for which the MAP is used are the following:

- 3.6.1 the attribution of profits and expenditure to a permanent establishment;
 - 3.6.2 adjustments between associated enterprises (in other words, transfer pricing adjustments);
 - 3.6.3 the treatment of interest as dividend expenditure under thin capitalisation rules; and
 - 3.6.4 the determination of residence due to a lack of information submitted by the taxpayer.
- 3.7 In addition, a Competent Authority itself, as opposed to a taxpayer, may also use the procedure for:
- 3.7.1 resolving inconsistent tax treatment arising from the interpretation or application of the provisions of a treaty (Art 25(23));
 - 3.7.2 determining the applicability of the treaty to taxes introduced after the treaty was entered into; and
 - 3.7.3 determining the circumstances under which interest will be regarded as dividends under the thin capitalisation rules.
- 3.8 It will be noted that apart from disputes regarding dual residency (Art 4(2)(d)), the MAP is not mandatory. In addition, Art 9(2) provides that where a Contracting State makes a transfer pricing adjustment, if necessary the Contracting States shall consult with each other. It is presumed, but is not always the case, that where a dispute arises during an adjustment by one of the Contracting States, such dispute will be resolved by mutual agreement.
- 3.9 According to the OECD Commentary, once the request for the MAP has been made by a taxpayer and the Competent Authority is of the view that the complaint is justified, the Competent Authority first needs to attempt to resolve the dispute on its own (Para 25(2)). Only if the dispute cannot be solved unilaterally, must the Competent Authority of the other Contracting State be approached (Para 25(4)). In such circumstances, the authorities may communicate with each other directly, without making use of diplomatic

channels. Communication may take place by letter, facsimile, telephone, direct meetings, joint commissions or any other convenient means, for example, e-mail (see Para 40 of OECD Commentary on Art 25).

3.10 The treaty does not place an obligation on the Competent Authority to solve the dispute, nor does it create a time limit within which the dispute has to be solved. An agreement reached under the MAP will be binding despite any time limits set under domestic legislation (Art 25(2)). It is thus clear that the MAP involves two stages, i.e. the first stage being the taxpayer – competent authority stage and the second stage being competent authority – competent authority stage.

3.11 The question arises as to the binding effect of decisions reached under the MAP. Both the OECD MTC (see Art 25(2): 'Any agreement reached shall be implemented') and the OECD Commentary make it clear that a mutual agreement is binding on the tax authorities (Para 35). However, in *IRC v Commerzbank AG* [1991] *IRC v Bancodo Bazil SA* [1990] STC 2854 at 302b it was held that a MAP had no authority in the English courts as the decisions of the Competent Authority merely express the views of the tax authorities of the two Contracting States and can be either right or wrong.

3.12 The binding authority of the MAP on tax authorities can be understood in light of the fact that as a treaty is an agreement between the two Contracting States (including the MAP), the States have agreed in advance to be bound by the outcome of the procedure. However, the same does not hold true for the taxpayer. The result is that a resident or national who is aggrieved by the decision, can still approach domestic courts to settle the issue. In such circumstances the court will not be bound by the decision reached under a MAP (See *Goris and Smit* (1997) 20). In a South African context this means that notwithstanding a decision favourable to SARS under the MAP, the taxpayer can still approach a Court, which will not be bound by the ruling.

3.13 Although a taxpayer may set the MAP in motion, he or she does not have an automatic right to appear before the authorities to state his or her case or to be represented. However, the OECD Commentary indicates that it is desirable that a taxpayer should have the right to make representation and to be assisted by counsel. In addition, although both competent authorities should

endeavour to find a solution, they are under no obligation to do so (see Para 26 of the OECD Commentary on Art 25). Although the MAP has several limitations and provides no guarantees that the dispute will be resolved, it may still be beneficial for taxpayers to use the procedure. If the procedure is successfully implemented, it could save a taxpayer time as well as significant legal costs. However, due to the uncertain nature of the MAP, taxpayers will, in all likelihood, be in a better position if they make use of domestic remedies simultaneously with the MAP.

3.14 The usefulness of the mutual agreement procure has been questioned:

"... It generally takes a long time and it is the tax authorities that control the procedure; the taxpayer enjoys no particular legal protection. The taxpayer has neither the right to demand a mutual agreement procedure nor to demand the elimination of taxation contravention principles. The taxpayer has no right to be heard or to otherwise be involved, and has not right to be informed of the decision itself or the grounds on which it was taken. Moreover, there is no obligation to disclose the agreement. The absence of mandatory problem resolution is the largest disadvantage of the procedure," (Runge 'Mutual Agreement Procedures and the Role of the Taxpayer' 2002 Internal Bureau of Fiscal Documentation 16 of 17)."

3.15 No doubt due to the potential unsatisfactory results of the MAP, alternative dispute mechanisms have been considered. One such mechanism is international arbitration. For a discussion of this topic, see Tilllinghast "The Choice of Issues to be Submitted to Arbitration under the Income Tax Conventions" in *Alpert and Van Raad 'Essays on International Taxation'* (1993) 349. On similar lines the treaty between Germany and Austria provides that if a tax dispute cannot be settled by the MAP within three years, it must, at the request of the taxpayers involved, be submitted to the European Court of Justice ("**ECJ**"). (For a discussion of the suitability of the ECJ to adjudicate a dispute arising from the application of tax treaties, see *Zuger Arbitration under Tax Treaties Improving Legal Protection in International Law* (2000) 101).

3.16 Historically, the Member States of the European Community had decided through their multilateral Arbitration Convention (signed on 23 July 1990) that certain cases of double taxation which cannot be solved through the MAP

should be submitted for international arbitration. (For a more in depth discussion of this convention, see Schwarz *Schwartz on Tax Treaties* (2009) Chapter 19). At the time, that approach was not unanimously accepted nor followed by the OECD

3.17 In 2003, the OECD's Committee on Fiscal Affairs formed a working group to examine ways of improving the effectiveness of the MAP, including the consideration of other dispute techniques which might be used to supplement the operation of the MAP. As an initial step, this working group compiled Profiles of the Mutual Agreement Procedures in both OECD and non-OECD countries. A Progress Report was published for public comment in 2004. In this report a different number of proposals for improving the MAP process were discussed. After reviewing comments received another Public Discussion Draft was published which formally recommended a number of specific proposals. In 2007 a final report, 'Improving the Resolution of Tax Treaty Disputes' was approved by the OECD's Committee on Fiscal Affairs. This final report includes the following four key recommendations:

3.17.1 A supplementary dispute resolution mechanism on the form of a mandatory binding arbitration in addition to the OECD's MAP to settle issues that remain unresolved after two years of MAP considerations;

3.17.2 Changes to the Commentary of the MAP provision aimed at clarifying and improving various operational and substantial aspects of the MAP process;

3.17.3 The issuing of the MEMAP as an on-line resource to explain the MAP process and to describe 'best practices' to effective MAP; and

3.17.4 Annual reporting by OECD Member countries of key statistics regarding their MAP case load.

3.18 Since 2008 the OECD MTC also provides for compulsory arbitration. According to Ault and Sasseville '2008 OECD Model: The New Arbitration Provision' May/June 2009 *Bulletin for International Taxation* 208, three factors lead to the inclusion of a compulsory arbitration provision in the OECD MTC in 2008. First, competent authorities were increasingly called upon to adjudicate

on transfer pricing issues. Due to the complexity of transfer pricing issues, the MAP often does not result in an agreement. Second, the entry into force on 1 January 1995 of the EU Arbitration Convention gave rise to the wide acceptance of arbitration. Third, the favourable change in attitude by the United States to arbitration in a tax treaty context.

3.19 Art 25(5) provides for mandatory arbitration of all issues unresolved under the MAP after two years. The purpose of Art 25(5) is not to replace the MAP with an evaluation of the case by a body of arbitrators, but to supplement the procedure in cases where the competent authorities are unable to agree on the appropriate interpretation and application of a treaty. Once the outstanding issues have been settled by arbitration, the competent authorities will be held in a position to settle the case.

3.20 As with the MAP, under the compulsory arbitration procedure the taxpayer is not involved. It remains the relevant States who set out both their views and those of the taxpayer to the arbitrators. As taxpayers are not directly involved, no need exists to make provision for procedural rights for taxpayers similar to those that apply to private arbitrations. Consequently, unlike private arbitrations, the outcome of the arbitration is not binding on the taxpayer, only on the competent authorities.

4 **The OECD Manual on MAP**

4.1 In order to assist both taxpayers and tax administrators with the MAP, the Centre for Tax Policy and Administration ("**CTPA**") of the OECD issued the Manual on Effective Mutual Agreement Procedures ("**OECD MEMAP**"). The February 2007 version is the latest version. The OECD MEMAP provides basic information about how the MAP process is intended to function, including providing best practices for efficient MAP. However, it does not impose a set of binding rules. According to the OECD MEMAP itself, its status is as follows:

4.1.1 It is not intended to modify, restrict or expand any rights or obligations agreed to in any tax treaty;

4.1.2 It is intended to complement and not to supersede the OECD MTC Commentary and the OECD Transfer Pricing Guidelines. To the extent that there is any conflict, the latter must prevail;

4.1.3 The "best practices" identified in the OECD MEMAP are merely guidelines and may not always be appropriate.

4.2 The OECD MEMAP sets out, *inter alia*, how to best make a MAP request, including what the general format of such request should look like, the role of taxpayers and their interaction with the competent authorities, the interaction between the two relevant competent authorities, the non-precedent value and non-binding status of agreements between competent authorities, recommended timelines, and internal guidelines for Competent Authority MAP operations.

4.3 The OECD MEMAP was issued many years prior to the 2011 MCMAATM and the 2017 MLI and as such, does not deal with the MAP processes in the context of the 2011 MCMAATM nor of the 2017 MLI. Nevertheless, the OECD MEMAP is regarded as an important practical guide as to how to conduct the MAP and should therefore apply to both the 2011 MCMAATM and the 2017 MLI.

5 ACTION 14 OF THE BEPS ACTION PLAN

5.1 In October 2016, the OECD commenced its MAP peer review and monitoring process under Action 14 of the BEPS Action Plan. This process is being conducted on an ongoing basis by the Steering Group of the Inclusive Framework on BEPS ("**the Steering Group**") under the supervision of OECD Forum on Tax Administration ("**MAP Forum**"). As of November 2017, the Steering Group included representatives from all BRICS Member States, with the exception of the Russian Federation, as follows:

5.1.1 Mr Flavio Antonio Araujo – Brazil;

5.1.2 Ms Pragya S. Saksena – India;

5.1.3 Mr Jianfan Wang – Peoples Republic of China (Deputy Chair);

5.1.4 Ms Yanga Mputa – South Africa.

5.2 The Action 14 Minimum Standard requires OECD Members and other participating jurisdictions to provide reporting of anonymised MAP statistics based on a uniform MAP statistics reporting framework. The Members of the Inclusive Framework of BEPS have committed to implement the Action 14 Minimum Standard, to ensure the effective implementation of the Minimum Standard, and to have their compliance with the Minimum Standard reviewed and monitored by their peers. They are also required to publish their MAP profiles in accordance with an agreed template. The MAP profiles have been published on the OECD website, and the following MAP Peer Reviews, which are taking place in groups of participating jurisdictions in accordance with their readiness, have already taken place:

5.2.1 First batch: September 2017

- Belgium;
- Canada;
- The Netherlands;
- Switzerland;
- The United Kingdom;
- The United States.

5.2.2 Second batch: December 2017

- Austria;
- France;
- Germany;
- Italy;
- Liechtenstein;
- Luxembourg;
- Sweden.

5.2.3 Third batch: March 2018

- Czech Republic;
- Denmark;

- Finland;
- Korea;
- Norway;
- Poland;
- Singapore;
- Spain.

5.3 The peer review process is conducted in two stages: Stage 1 entails the evaluation of the implementation by the relevant jurisdiction of the Action 14 minimum standard set out in a peer review report. This involves taxpayer participation in the form of a taxpayer input questionnaire. Stage 2 entails the monitoring of the implementation of the recommendations arising from the Stage 1 report.

5.4 In November 2017, the OECD announced that they were gathering input for the Fourth Batch peer review of Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal, by utilising the taxpayer input questionnaire.

5.5 The first of the BRICS Member States to participate in the BEPS Action 14 Peer Review and Monitoring Programme will be India and South Africa, scheduled to fall within the Sixth Batch of, August 2018. Brazil, China and Russia fall within the Seventh Batch, scheduled to commence by December 2018. The full peer review schedule is attached as Annexure 6.

6 **ART 16 OF THE 2017 MLI**

6.1 As stated above, in September 2013, the G20 Leaders endorsed the comprehensive BEPS Action Plan on BEPS to address weaknesses in the international tax framework, which culminated in the BEPS Action Plan. The 15 action points focus on addressing BEPS in a comprehensive manner through global tax coordination to ensure international tax rules are fit for an increasingly globalised, digitized business world. Recognising that there would be a need to consider innovative ways to implement the measures resulting from the BEPS project, Action 15 entailed a multilateral tax treaty to deal with BEPS, called A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS.

6.2 The main objective of Action 15 was to create a multilateral instrument ("**MLI**") which would modify existing bilateral tax treaties in a synchronised and efficient manner to implement the tax treaty measures developed during the BEPS Project, without the need to expend resources individually renegotiating each treaty bilaterally. The result was the 2017 MLI, Art 16 of which contains the mutual agreement procedure for the Covered Tax Agreements impacted by the 2017 MLI, and for the 2017 MLI itself. The Covered Tax Agreements are those bilateral tax treaties which are impacted by the MLI.

6.3 Consistent with most international Conventions, participating jurisdictions are entitled to make reservations about the adoption of most of the provisions of the 2017 MLI. Art 16 is no exception and South Africa has made various reservations and notifications. Pursuant to Art 16(5)(a) of the 2017 MLI, South Africa reserves the right for the first sentence of Art 16(1) of the 2017 MLI not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package. It intends to meet this minimum standard by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the Competent Authority of either Contracting State), where a person considers that the actions of one or both of the Contracting Jurisdictions will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting State, that person may present the case to the Competent Authority of the Contracting State of which the person is a resident. If the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, then the aggrieved person may present the case to the Competent Authority of the Contracting State of which that person is a national. The Competent Authority of that Contracting State will then implement a bilateral notification or consultation process with the Competent Authority of the other Contracting State for cases in which the Competent Authority to which the MAP case was presented does not consider the taxpayer's objection to be justified.

6.4 Pursuant to Art 16(6)(b)(i) of the 2017 MLI, South Africa considers that certain agreements contain a provision that provides that a case referred to in

the first sentence of Art 16(1) must be presented within a specific time period that is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The only relevant tax treaty which South Africa has signed with BRICS Member States to which this notification applies, is the tax treaty with Brazil.

6.5 Pursuant to Art 16(6)(b)(i) of the 2017 MLI, South Africa considers that certain agreements contain a provision that provides that a case referred to in the first sentence of Art 16(1) must be presented within a specific time period that is at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The only relevant tax treaties which South Africa has signed with BRICS Member States to which this notification applies, are the tax treaties with the Peoples Republic of China, India and the Russian Federation.

6.6 Pursuant to Art 16(6)(c)(i) of the 2017 MLI, South Africa does not consider that any of the agreements with any other BRICS Member States contain the provision described in Art 16(4)(b)(i).

6.7 Pursuant to Art 16(6)(c)(ii) of the 2017 MLI, South Africa considers that the agreement with Brazil does not contain a provision described in Art 16(4)(b)(ii).

6.8 Pursuant to Art 16(6)(d)(ii) of the 2017 MLI, South Africa considers that none of the agreements with any other BRICS Member States, do not contain a provision described in Art 16(4)(c)(ii).

7 **DTC RECOMMENDATIONS ON MAP FOR SOUTH AFRICA**

7.1 In the February 2013 Annual Budget Speech, the South African Minister of Finance stated that government will initiate a tax review "to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability". It was decided at the inaugural meeting of the Committee on 25 July 2013 that the Committee will be known as The Davis Tax Committee ("**DTC**") as it was chaired by Judge

Dennis Davis. The DTC's term ended on 27 March 2018, and it issued numerous reports, including reports on each of the BEPS Action Points.

7.2 The DTC was tasked with inquiring into the role of the tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability, by taking into account recent domestic and international developments and, particularly, the long term objectives of the National Development Plan.

7.3 The DTC was not a creature of statute. It was formed and appointed by the Minister of Finance and, as such, advised and reported to the Minister directly. Accordingly, all of its reports were submitted to the Minister of Finance for consideration in the determination of tax policy, which is usually articulated in the annual national budget speech. The DTC only published its reports on its website after obtaining the necessary approval of the Minister of Finance.

7.4 The DTC operated on the basis of various sub-committees dealing with specific items in the Terms of Reference. Based on wide consultation and submissions received, each sub-committee prepared an interim report for the approval of the DTC as a whole and subsequent submission to the Minister of Finance. Not all of its recommendations were accepted by the Minister of Finance, and many are still under consideration by National Treasury.

7.5 As stated above, the DTC issued Reports on numerous topics, including on all the OECD BEPS Action Points. The Report on BEPS Action Point 14 was very comprehensive, and excellent recommendations were made, as set out more fully below. To date, the only action which has resulted from this Report, is the issuing by SARS of a MAP Guide.

7.6 The DTC, in its Final Report on BEPS Action 14 issued in September 2016, has made the following recommendations about MAP:

7.6.1 South Africa should adopt the OECD minimum standards as set out in BEPS Action 14 with respect to MAP;

7.6.2 SARS needs to be more active in supporting South African taxpayers during MAP processes;

- 7.6.3 To ensure the effectiveness of MAP, it is important that the performance measures against which officials working on MAP are measured should not be based on factors such as revenue obtained and the matter must be referred to an independent and separate unit within SARS that deals with MAP. For example, if the matter is a transfer pricing matter, it should not be referred to the SARS Transfer Pricing Unit;
- 7.6.4 Attention must be given to intensive recruitment and robust training of personnel by SARS, to set up and equip a specialised unit to deal with MAP issues;
- 7.6.5 It is important for South Africa to include Art 9(2) of the OECD MTC in those tax treaties where this sub-article has not yet been included. This is to ensure that the position in the South African tax treaties is in accordance with the OECD Commentary on Art 25;
- 7.6.6 SARS should not influence taxpayers to waive their rights to MAP, nor should taxpayers be prohibited as part of settlement negotiations, from escalating the portion of tax suffered to the Competent Authority for relief from double taxation;
- 7.6.7 In a transfer pricing context, the lack of an Advance Pricing Agreement ("**APA**") programme in South Africa is an inhibitor to foreign direct investment as it removes the opportunity to seek certainty on transactional pricing. An APA programme should therefore be introduced;
- 7.6.8 Although South Africa has detailed legislation, guidelines and regulations on domestic dispute resolution and litigation, there is no published guidance on how to resolve disputes through the tax treaties. Such guidance should be created and published. In this regard, clear guidance on when SARS will entertain MAP needs to be given together with an appropriate process guide for taxpayers similar to the guide issued for domestic resolution. The DTC further recommended that the MAP guidance should contain details about when MAP will be applied, applicable time limits in which a taxpayer can approach the Competent Authority, who the Competent Authority is, what documents are required to be submitted with any application, interaction of MAP with domestic

tax law, estimated timelines and the obligations of the Competent Authority.

7.6.9 Since most disputes concern transfer pricing, it is important that SARS' Interpretation Note on Transfer Pricing be finalised;

7.6.10 The current audit procedure in South Africa places the taxpayer in a position of uncertainty as to whether the matter is under audit or not;

7.6.11 The timing for applying for MAP needs to be clarified;

7.6.12 In relation to the "pay now, argue later" principle currently applied by SARS, the DTC recommended that if a MAP matter take years before being resolved, SARS should be cognisant of the fact that not permitting the suspension of payment pending the outcome of MAP can be extremely detrimental to the taxpayer;

7.6.13 Many developing countries do not consider themselves yet ready for mandatory binding arbitration in the international taxation context. For example, India and Brazil made it clear in the BEPS discussions on this topic that they would not be involved in binding mandatory arbitration. (UN Committee of Experts on International Cooperation in Tax Matters *"Secretariat Paper on Alternative Dispute Resolution in Taxation"* (8 October 2015 Para 21);

7.6.14 South Africa should call for MAP results and agreements reached (including the "anonymised" versions) to be published annually, in a redacted form and by removing matters that could breach confidentiality;

7.6.15 Exchange of existing best practices between SARS and other revenue authorities should be strongly encouraged. The DTC recommended that South Africa should in particular adopt the OECD recommendation regarding Best Practice 1 (inclusion of Art 9(2) in its tax treaties); Best Practice 2 (adopt appropriate procedures to publish MAP agreements reached); Best Practice 5 (implement procedures that permit, after an initial tax assessment, taxpayer requests for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where

the relevant facts and circumstances are the same); Best Practice 6 (take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending); Best Practice 7 (implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes); Best Practice 8 (publish MAP guidance explaining the relationship between the MAP and domestic law administrative and judicial remedies); Best Practice 9 (publish MAP Guidance which provides that taxpayers will be allowed access to the MAP where double taxation arises in the case of bona fide taxpayer-initiated foreign adjustments permitted under the domestic laws of a treaty partner); Best Practice 10 (publish guidance on the consideration of interest and penalties in the MAP).

7.7 Regarding arbitration, the DTC recommended that South Africa should call for measures to be in place to make the arbitration process more transparent and it should only commit to the process if the rules are clear and transparent. Until the MAP arbitration process is made more transparent, South Africa should also be cautious about committing to an arbitration provision in the 2017 MLI. When South Africa becomes a party to the MLI, it should register a reservation not to commit to mandatory arbitration until the concerns regarding this process are rectified. Further, since mandatory arbitration is viewed by the OECD and taxpayers as a means of speedily resolving MAP, South Africa should call for international measures to be put in place to ensure transparency in the arbitration procedures. Lastly, at regional level, the DTC recommended that South Africa should recommend that a pool of arbitrators be formed with the necessary skills and qualifications.

7.8 From the above, it is clear that setting up a BRICS MAP Committee as suggested below, would be in conformance with many of the DTC recommendations on BEPS Action 14.

8 **SARS DRAFT MAP GUIDE**

8.1 In accordance with the recommendations made by the DTC, SARS issued its Guide on MAPs in July 2018 ("**MAP Guide**"). The SARS MAP Guide states that it is not to be used as a legal reference and it is not an "official publication" and accordingly does not create a "practice generally prevailing and defined in

the Tax Administration Act, No 28 of 2011". It is also not a binding general ruling. Accordingly, a taxpayer cannot rely unreservedly on the contents of the SARS MAP Guide.

8.2 In conformance with the DTC recommendations, the SARS MAP Guide sets out in what instances the MAP would apply, the circumstances in which a MAP request may be accepted or denied, how to go about submitting a MAP request and how the MAP interacts with domestic law. The SARS MAP Guide also confirms who the Competent Authority for South Africa is, as recommended by the DTC.

8.3 However, the SARS MAP Guide is not in conformance with the DTC MAP Guidelines in the following respects:

8.3.1 It confirms that the Competent Authorities are not compelled to reach an agreement and therefore it provides no additional assistance to taxpayers wishing to initiate a MAP, other than to set out the minimum information that must be included in a MAP request and where such request should be submitted;

8.3.2 The SARS MAP Guide does not contain any time limitations nor does it contain response times or response obligations by SARS towards applicants;

8.3.3 The SARS MAP Guide does not state the procedure for obtaining a tax residency certificate from SARS; and

8.3.4 The SARS MAP Guide simply recommends the approach which SARS will take in dealing with the interaction between South African domestic law objection and appeal processes, and the MAP Process, for example, whether the objection and appeal process is suspended pending the outcome of the MAP. The SARS MAP Guide should instead be prescriptive about this. In addition, South African domestic law should be correspondingly amended to cater for this, otherwise the general uncertainty of the MAP process will remain.

8.4 While the SARS MAP Guide has been issued in final, it remains open for public comments and suggestions for improvements.

9 BRICS MAP RECOMMENDATIONS

9.1 It is clear from the above that MAP in a tax treaty context is an uncertain, cumbersome and potentially time-consuming process. For South African taxpayers, a special arrangement among BRICS Member States which facilitates and enhances the MAP will increase certainty in trade between BRICS countries. This in turn will encourage and promote investment by South African multinationals into other BRICS Member States. Therefore, in accordance with the DTC MAP recommendations, and in accordance with OECD guidelines, and within the restraints of the relevant treaty obligations, the following is proposed:

9.1.1 Each BRICS Member State should create a special MAP Department within their Tax Authorities, if one does not already exist. Within such MAP Department, at least one official should be dedicated to BRICS MAP issues ("**the BRICS MAP Official**");

9.1.2 The dedicated BRICS MAP Official should receive joint training, should meet regularly, and should communicate with their BRICS counterparts frequently about inter-BRICS international tax issues, including to exchange best practices. Each BRICS MAP Official should form part of a standing BRICS MAP Committee;

9.1.3 The BRICS Member States should agree to a uniform MAP as regards time limits, regular feedback to taxpayers and taxpayer rights. The rule of law and the principle of *audi alteram partem* should be a cornerstone of such uniform MAP. In this regard it is suggested that Revenue Authority response times must be limited to 60 business days and that taxpayers must have the right to approach the Competent Authority of the other BRICS Member State directly on an appeal basis in pre-defined, time-limited circumstances. Taxpayers should also have the right to be represented in the MAP by their advisers or legal representatives as long as they are members of a registered profession;

- 9.1.4 A central (internet-based and secure) repository should be created to allow taxpayers' to provide information to both Competent Authorities at the same time;
- 9.1.5 The agreed procedure as per 0 and 0 above should be reflected in a new BRICS MAP Convention, which is sanctioned under the domestic law of each BRICS Member State;
- 9.1.6 Each BRICS Member State should issue a BRICS MAP Manual giving guidance to BRICS applicants; and
- 9.1.7 South African domestic law should be amended to expressly deal with the interaction between the objection and appeal process as found in the Tax Administration Act, and the MAP. This should be of general application, not just for BRICS MAP. For example, the domestic objection and appeal process should be suspended pending the outcome of the MAP. This would be in conformance with the DTC recommendation on BEPS Action 14.

10 **CONCLUSION**

- 10.1 Based on the analysis as set out above, it would clearly be in the interests of the BRICS Member States for their taxpayers and their advisors to have access to an efficient, voluntary and transparent MAP in order to resolve international tax issues.
- 10.2 The BRICS Member States are clearly not yet amenable to, nor equipped for, mandatory arbitration. Mandatory arbitration in international tax matters should therefore be replaced by an efficient, transparent MAP.
- 10.3 The OECD Action 14 MAP process, in which all of the BRICS Member States are participating, does not prevent "subgroups" of participating jurisdictions, like BRICS, from implementing their own detailed MAP rules. In fact, this is encouraged.
- 10.4 Art 24(1) of the 2011 MCMAATM expressly allows for "subgroups" of Parties to the Convention, like BRICS, to mutually agree modes of application of the Convention.

10.5 The new SARS MAP Guide issued by SARS contains no details about timelines and processes which will be of general application to South Africa's bilateral tax treaties. This must be corrected generally, for the benefit of all treaty partners, and especially for BRICS Member States.

10.6 It will be in the interests of mutual investment certainty, for BRICS to implement its own streamlined MAP processes, as follows:

10.6.1 Each BRICS Member State should create a special MAP Department within their Tax Authorities. Within such MAP Department, at least one official should be dedicated to BRICS MAP issues;

10.6.2 The dedicated BRICS MAP Official should form part of a BRICS MAP Committee, which should be a standing committee which receives joint training, meets regularly, communicates frequently about inter-BRICS international tax issues and which also exchanges best practices. This will conform *inter alia* to the DTC recommendation on BEPS;

10.6.3 The BRICS Member States must agree to a uniform MAP ("the **BRICS Uniform MAP**") as regards time limits, as well as regards regular feedback to taxpayers (with deadlines) and taxpayer rights. In this regard it is suggested that Revenue Authority response times must be limited to 60 business days and that taxpayers must have the right to approach the Competent Authority of the other BRICS Member State directly on an appeal basis in pre-defined, time-limited circumstances;

10.6.4 A central BRICS-only repository should be created to allow taxpayers to provide information to Competent Authorities simultaneously;

10.6.5 Each BRICS Member State should issue a BRICS MAP Manual giving guidance to applicants, containing details as set out above;

10.6.6 The uniform MAP as per 0, 0 and 0 above should be reflected in a BRICS MAP Convention, which is sanctioned under the domestic law of each BRICS Member State; and

10.6.7 South African domestic law should be amended to expressly deal with MAP, in conformance with the DTC recommendations as well as with the BRICS Uniform MAP, if required.

10.7 From an implementation point of view, the proposed BRICS Uniform MAP should first be discussed among the lawyers, accountants and tax advisors within the BRICS Member States on a specific Members State basis. If found to be workable in respect of each Member State, they should be adapted to be suitable for all Member States, after which the finalised proposals should be presented to the Ministers of Finance of the BRICS Member States for adoption, preferably by means of a new, separate multilateral taxation convention, but if necessary, also by means of amendment of domestic law.

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12 ABOUT THE AUTHOR

- 12.1 Michael Honiball is a Solicitor of England and Wales, an Attorney of the High Court of South Africa, and a Registered Tax Practitioner. He is also a member of the following professional bodies:
- 12.1.1 The South African Institute of Tax Practitioners (SAIT);
- 12.1.2 The Society of Trust and Estate Practitioners (STEP);
- 12.1.3 The International Academy of Estate and Tax Law (TIAETL);
- 12.1.4 The Law Society of England and Wales;
- 12.1.5 The Law Society of the Northern Provinces; and
- 12.1.6 The Cape Law Society.

12.2 Michael is a SAIT Master Tax Practitioner (SA) and a Professor of Practice in Taxation at the University of Johannesburg. He is also a member of the Executive Committee of the International Fiscal Association (IFA), South Africa branch.

ANNEXURE 1

BRICS Bi-lateral Tax Treaties in Force as at July 31, 2018

- SA-Brazil;
- SA-Russia;
- SA-India;
- SA-China;
- Brazil-Russia;
- Brazil-India;
- Brazil-China;
- Russia-China;
- Russia-India; and
- China-India

Copies of Art 25 (or equivalent) of each of the above tax treaties are attached to this Annexure for ease of reference, as Annexures 1A to 1J.

ANNEXURE 1A

Article 25
South Africa – Brazil Tax Convention
24 July 2006

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Convention, that person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the Contracting State of which the person is a resident, the case must be presented within the time limits provided for in the domestic law of the Contracting State.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the convention.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 1B

Article 24
South Africa - Russia Tax Convention
26 June 2000

"Mutual Agreement Procedure

- 1 *Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.*

- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*

- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*

- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 1C

Article 24 South Africa – India Tax Convention 28 November 1997

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident of, if his case comes under paragraph 1 of Art 23, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the Agreement.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement they may also consult together for the elimination of double taxation in cases not provided for in the Agreement.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a joint commission consisting of representatives of the competent authorities of the Contracting States."*

ANNEXURE 1D

Article 25
South Africa - China Tax Convention
7 January 2001

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 25, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3. When it seems advisable for reaching agreement, representatives of the competent authorities of the Contracting States may meet together for an oral exchange of opinions."*

ANNEXURE 1E

Article 25
Brazil - Russia Tax Convention
16 June 2017

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident.*

- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention.*

- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention.*

- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 1F

Article 25 Brazil - India Tax Convention 11 March 1992

"Mutual Agreement Procedure

- 1 *Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. This case must be presented within five years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.*

- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to avoidance of taxation not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.*

- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.*

- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States."*

ANNEXURE 1G

Article 25
Brazil - China Tax Convention
5 February 1993

"Mutual Agreement Procedure

- 1 *Where a resident considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident. The case must be presented within 3 years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of the Agreement.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3."*

Article 24
China - Russia Tax Convention
10 April 1997

"Mutual Agreement Procedure

- 1 Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident and also, if his case comes under paragraph 1 of Art 23, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.*
- 2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Agreement. Any agreement reached shall be implemented notwithstanding any time limits, provided for by the domestic law of the Contracting States.*
- 3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement."*

ANNEXURE 1I

Article 25 China - India Tax Convention 21 November 1994

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of paragraphs 2 and 3. When it seems advisable for reaching agreement, representatives of the competent authorities of the Contracting States may meet together for an oral exchange of opinion."*

Article 25
India-Russia Tax Convention
10 January 2001

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provision of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.*

- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits provided for in the domestic laws of the Contracting States.*

- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult with each other for the elimination of double taxation in cases not provided for in this Agreement.*

- 4 *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs."*

ANNEXURE 2

Article 25 OECD Model Tax Convention

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Art 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive as a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*
- 3 *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the limitation of double taxation in cases not provided for in the Convention.*
- 4 *The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.*
- 5 *Where,*
 - a) *Under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for the person on taxation not in accordance with the provisions of this Convention, and*
 - b) *The competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,*

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States, the competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

ANNEXURE 3

BRICS Member States which have Adopted Article 25(5) of the OECD MTC (or equivalent)

- 1 South Africa has only adopted Art 25(5) or equivalent in its tax treaties with Canada, the Netherlands and Switzerland.
- 2 South Africa has not adopted Art 25(5) it in respect of any BRICS Member State.
- 3 No BRICS Member States have adopted Art 25(5) in relation to any other BRICS Member State.

ANNEXURE 4

Article 24 of the 2011 MCMAATM

"Implementation of the Convention

- 1 *The Parties shall communicate with each other for the implementation of this Convention through their respective competent authorities. The competent authorities may communicate directly for this purpose and may authorise subordinate authorities to act on their behalf. The competent authorities of two or more Parties may mutually agree on the mode of application of the Convention among themselves.*

- 2 *Where the requested State considers that the application of this Convention in a particular case would have serious and undesirable consequences, the competent authorities of the requested and of the applicant State shall consult each other and endeavour to resolve the situation by mutual agreement.*

- 3 *A co-ordinating body composed of representatives of the competent authorities of the Parties shall monitor the implementation and development of this Convention, under the aegis of the OECD. To that end, the co-ordinating body shall recommend any action likely to further the general aims of the Convention. In particular, it shall act as a forum for the study of new methods and procedures to increase international co-operation in tax matters and, where appropriate, it may recommend revisions or amendments to the Convention. States which have signed but not yet ratified, accepted or approved the Convention are entitled to be represented at the meetings of the co-ordinating body as observers.*

- 4 *A Party may ask the co-ordinating body to furnish opinions on the interpretation of the provisions of the Convention.*

- 5 *Where difficulties or doubts arise between two or more Parties regarding the implementation or interpretation of the Convention, the competent authorities of those Parties shall endeavour to resolve the matter by mutual agreement. The agreement shall be communicated to the co-ordinating body.*

- 6 *The Secretary General of OECD shall inform the Parties, and the Signatory States which have not yet ratified, accepted or approved the Convention, of opinions furnished by the co-ordinating body according to the provisions of paragraph 4 above and of mutual agreements reached under paragraph 5 above".*

ANNEXURE 5

Article 16 of the 2017 MLI

"Mutual Agreement Procedure

- 1 *Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.*
- 2 *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.*
- 3 *The competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement".*

Annexure 6

**BEPS Action 14
Peer Review and Monitoring
Assessment Schedule for Stage 1 Peer Reviews***

| 1st batch By December 2016 | 2nd batch By April 2017 | 3rd batch By August 2017 | 4th batch By December 2017 | 5th batch By April 2018 | 6th batch By August 2018 | 7th batch By December 2018 | 8th batch By April 2019 | 9th batch By August 2019 | 10th batch By December 2019 |
|--|---|--|--|---|--|--|---|--|---|
| Belgium | Austria | Czech Republic | Australia | Estonia | Argentina | Brazil | Brunei | Andorra | Barbados |
| Canada | France | Denmark | Ireland | Greece | Chile | Bulgaria | Curacao | Bermuda | Kazakhstan |
| Netherlands | Germany | Finland | Israel | Hungary | Colombia | China | Guernsey | British Virgin Islands | Oman |
| Switzerland | Italy | Korea | Japan | Iceland | Croatia | Hong Kong (China) | Isle of Man | Cayman Islands | Qatar |
| United Kingdom | Liechtenstein | Norway | Malta | Romania | India | Indonesia | Jersey | Macau (China) | Saint Kitts and Nevis |
| United States | Luxembourg | Poland | Mexico | Slovak Republic | Latvia | Papau New Guinea | Monaco | Turks and Caicos Islands | Thailand |
| | Sweden | Singapore | New Zealand | Slovenia | Lithuania | Russia | San Marino | Bahamas | Trinidad and Tobago |
| | | Spain | Portugal | Turkey | South Africa | Saudi Arabia | Serbia | Anguilla | Bahrain |
| | | | | | | | | Tunisia | United Arab Emirates |

*www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm