

OVERVIEW

- Introduction to South African Law, including the validity of international treaties;
- Introduction to the Mutual Agreement Procedure ("**MAP**");
- Bilateral tax treaties in force between BRICS Member States;
- Problems with the OECD MTC MAP;
- OECD Action Plan on Base Erosion and Profit Shifting ("**BEPS Action Plan**");
- OECD BEPS Action 14: Peer review and monitoring process.



OVERVIEW (CONT.)

- Action 14: Minimum Standard for MAP;
- BEPS Action 14: Assessment Schedule for Peer Reviews;
- The 2011 Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the "**2011 MCMAATM**");
- The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the "**2017 MLI**");
- Why the need for a uniform BRICS MAP? and
- Specific MAP Recommendations for BRICS Member States.



INTRODUCTION TO SOUTH AFRICAN LAW

- The South African legal system comprises common law, customary law, and statutory law, all superceded by the **Constitution**, which is the supreme law in South Africa;
- Common law comprises a unique blend of **Roman-Dutch** and **English** legal principles. Recognition of foreign judgements is primarily determined under common law;
- Portions of South African common law are shared by neighbouring countries (Botswana, Lesotho, Namibia, Swaziland and Zimbabwe);
- South African law follows the **doctrine of legal precedent**.



INTRODUCTION TO SOUTH AFRICAN LAW (CONT.)

- The **Rule of Law** applies in South Africa, which means that the absolute exercise of power is restricted by subordinating it to well-defined and well-established laws;
- The Rule of Law applies both to domestic law and to international law (including tax treaty) situations;
- The South African democracy is hailed as a true Constitutional Democracy with strict adherence to the Rule of Law and the separation of powers of the three arms of government.



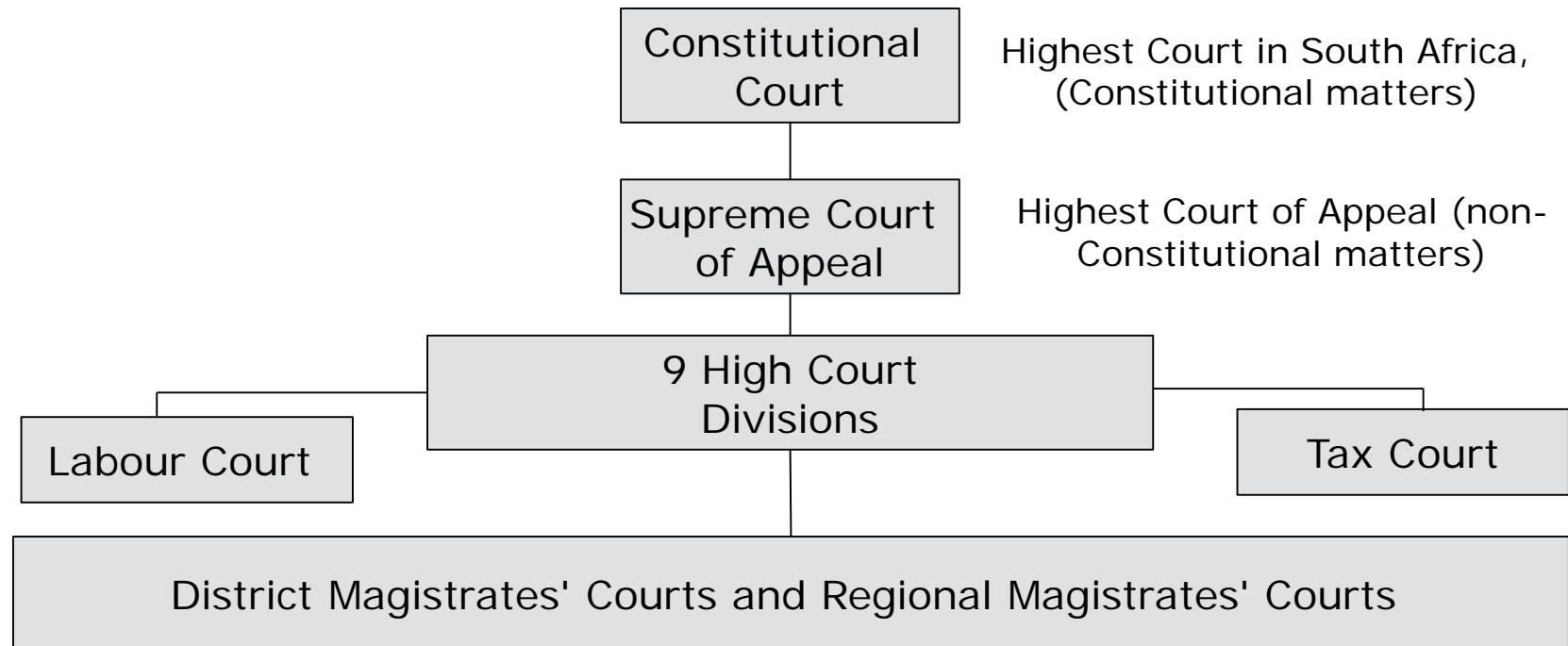
INTRODUCTION TO SOUTH AFRICAN LAW (CONT.)

- Under s231 of the Constitution, international agreements become part of the South African domestic law if the necessary procedures/formalities have been complied with;
- Domestic procedures/formalities for the tax treaties are set out in s108(2) of the Income Tax Act, No 58 of 1962. Once the s108(2) procedures have been complied with, a tax treaty has the same legal effect as any section of the Income Tax Act;
- However, if there is a conflict between a tax treaty and the Income Tax Act, the treaty must prevail.



INTRODUCTION TO SOUTH AFRICAN LAW (CONT.)

➤ South African **Court System**:



INTRODUCTION TO SOUTH AFRICAN LAW (CONT.)

- Prior to the enactment the Constitution in 1996, **customary international law** was treated as if it formed part of common law;
- Section 232 of the Constitution now provides:
"customary international law is law in the Republic unless it is inconsistent with the Constitution of an Act of Parliament";
- Section 233 of the Constitution provides:
"When interpreting any legislation, every court must prefer any reasonable interpretation of the Legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."



INTRODUCTION TO MAP

- Many instances of cross-border trade result in double taxation;
- Jurisdictions therefore attempt to eliminate double taxation both in their domestic tax law (by providing unilateral tax credits), and by way of **bilateral double taxation conventions** (also referred to as double tax agreements or tax treaties – DTCs or DTAs);
- The application of **bilateral tax treaties** is sometimes not uniform and could lead to disputes.



INTRODUCTION TO MAP (CONT.)

- Article 25 of the OECD MTC contains a Mutual Agreement Procedure (the "**OECD MTC MAP**") which is voluntarily used in order to solve tax treaty disputes between the contracting states and/or their taxpayers;
- The two main **multilateral taxation conventions**, namely the 2011 MCMAATM and the 2017 MLI, also contain their own MAPs, which are substantially similar to Art 25 of the OECD MTC.



BILATERAL TAX TREATIES IN FORCE BETWEEN BRICS MEMBER STATES

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



PROBLEMS WITH THE OECD MTC MAP

- It is a **voluntary** procedure;
- There is **no obligation** on a Competent Authority **to solve** the dispute;
- Art 25 generally contains **no time limits**;
- The **interaction** between the tax treaty MAP and domestic law is often **not clear**;
- It is a **time consuming** and administratively burdensome process;
- The **taxpayer is not always informed** about developments nor is part of the process.



OECD ACTION PLAN ON BASE EROSION AND PROFIT

- BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, was agreed for insertion into the OECD BEPS Final Report;
- BEPS Action 14 did not include a proposal to adopt mandatory binding arbitration;
- The result was the inclusion of a MAP as **Article 16** of the 2017 MLI which is substantially similar to that found in Article 25 of the OECD MTC, minus the arbitration provisions found in Art 25(5);
- Being substantially similar, Article 16 gives rise to the same problems and inefficacies. It also contains the same 3-year action limit.



OECD BEPS ACTION 14: PEER REVIEW AND MONITORING PROCESS

- This process is being conducted on an ongoing basis by the Steering Group of the Inclusive Framework on BEPS under the supervision of OECD Forum on Tax Administration ("**MAP Forum**").
- Members of the Steering Group include representatives from all BRICS Member States, with the exception of the Russian Federation, as follows:
 - Mr Flavio Antonio Araujo – **Brazil**;
 - Ms Pragya S Saksena – **India**;
 - Mr Jianfan Wang – **Peoples Republic of China** (Deputy Chair);
 - Ms Yanga Mputa – **South Africa**.



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. These MAP profiles have already been published on the OECD website.



BEPS ACTION 14: PEER REVIEW AND MONITORING – ASSESSMENT SCHEDULE FOR STAGE 1 PEER REVIEWS

1 st batch By December 2016	2 nd batch By April 2017	3 rd batch By August 2017	4 th batch By December 2017	5 th batch By April 2018
Belgium	Austria	Czech Republic	Australia	Estonia
Canada	France	Denmark	Ireland	Greece
Netherlands	Germany	Finland	Israel	Hungary
Switzerland	Italy	Korea	Japan	Iceland
United Kingdom	Liechtenstein	Norway	Malta	Romania
United States	Luxembourg	Poland	Mexico	Slovak Republic
	Sweden	Singapore	New Zealand	Slovenia
		Spain	Portugal	Turkey

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



BEPS ACTION 14: PEER REVIEW AND MONITORING – ASSESSMENT SCHEDULE FOR STAGE 1 PEER REVIEWS (CONT.)

6 th batch By August 2018	7 th batch By April 2017	8 th batch By August 2017	9 th batch By December 2017	10 th batch By April 2018
Argentina	Brazil	Brunei	Andorra	Barbados
Chile	Bulgaria	Curacao	Bermuda	Kazakhstan
Colombia	China	Guernsey	British Virgin Islands	Oman
Croatia	Hong Kong (China)	Isle of Man	Cayman Islands	Qatar
India	Indonesia	Jersey	Macau (India)	Saint Kitts and Nevis
Latvia	Papau New Guinea	Monaco	Turks and Caicos Islands	Thailand
Lithuania	Russia	San Marino	Bahamas	Trinidad and Tobago
South Africa	Saudi Arabia	Serbia	Anguilla	Bahrain
			Tunisia	United Arab Emirates

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

THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

- The 2011 MCMAATM is a Multilateral international convention which deals *inter alia* with the exchange of information, the assistance in recovery of tax debts, and the service documents;
- It contains an article setting out a mutual agreement procedure ("**The 2011 MCMAATM MAP**");
- As is the case with bilateral tax treaties, the competent authorities are not obliged to resolve the situation, they are only required to "endeavour to resolve" the situation (Art 24(2));
- In terms of Art 24(1), 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.



2017 MLI

- As indicated, Art 16 of the 2017 MLI contains its own MAP;
- All the BRICS Member States, with the exception of Brazil, have signed the 2017 MLI;
- **India, China and South Africa have reserved the right to exclude MAP;**
- Russia has not made any reservations with respect to MAP;
- Russia, India, China and South Africa have all issued various notifications in relation to the application of MAP for purposes of the 2017 MLI;
- There is no detailed Commentary, similar to the OECD MTC Commentary, which applies to the 2017 MLI MAP.



WHY THE NEED FOR A BRICS MAP?

- It is clear that MAP in a tax treaty context is 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.



WHY THE NEED FOR A BRICS MAP?

- If a uniform BRICS MAP is created, similar investment benefits are expected for other BRICS multinationals;
- Therefore, in accordance with the DTC MAP recommendations, and in accordance with OECD guidelines, and within the restraints of the relevant treaty obligations, a special, uniform BRICS MAP is proposed.



BRICS MAP RECOMMENDATIONS

- 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**");
- The dedicated BRICS MAP officials 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**.



BRICS MAP RECOMMENDATIONS (CONT.)

- The BRICS Member States should agree to a published 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;
- 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.



BRICS MAP RECOMMENDATIONS (CONT.)

- 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;
- A central (internet-based and secure) repository should be created to allow taxpayers' to provide information to both Competent Authorities at the same time;
- The agreed procedure should be reflected in a new BRICS MAP Convention, which is fully sanctioned as binding law under the domestic law of each BRICS Member State.



BRICS MAP RECOMMENDATIONS (CONT.)

- Each BRICS Member State should issue a BRICS MAP Manual giving guidance to BRICS applicants;
- In the case of South Africa, 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 MAP. This would be in conformance with the DTC recommendation on BEPS Action 14;
- In the case of the 2017 MLI, India, China and South Africa should be encouraged **not** to reserve the right to exclude MAP.



PRESENTER'S CONTACT DETAILS



Professor Michael Honiball

Werksmans Attorneys

Telephone number: +27 11 535 8136 (direct)

Mobile number: +27 83 252 1000

Email: mhoniball@werksmans.com



THANK YOU

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