

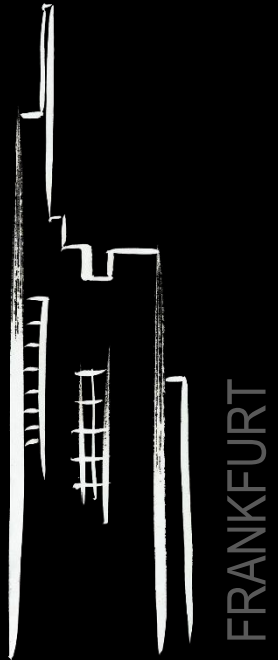


THE EVOLVING TAX LANDSCAPE IN SUB- SAHARAN AFRICA

- Our Diversity as a Region
- South Africa – Investor Tax Landscape
- Mauritius – Investor Tax Landscape
- Tax Challenges in Sub-Saharan Africa
- Questions

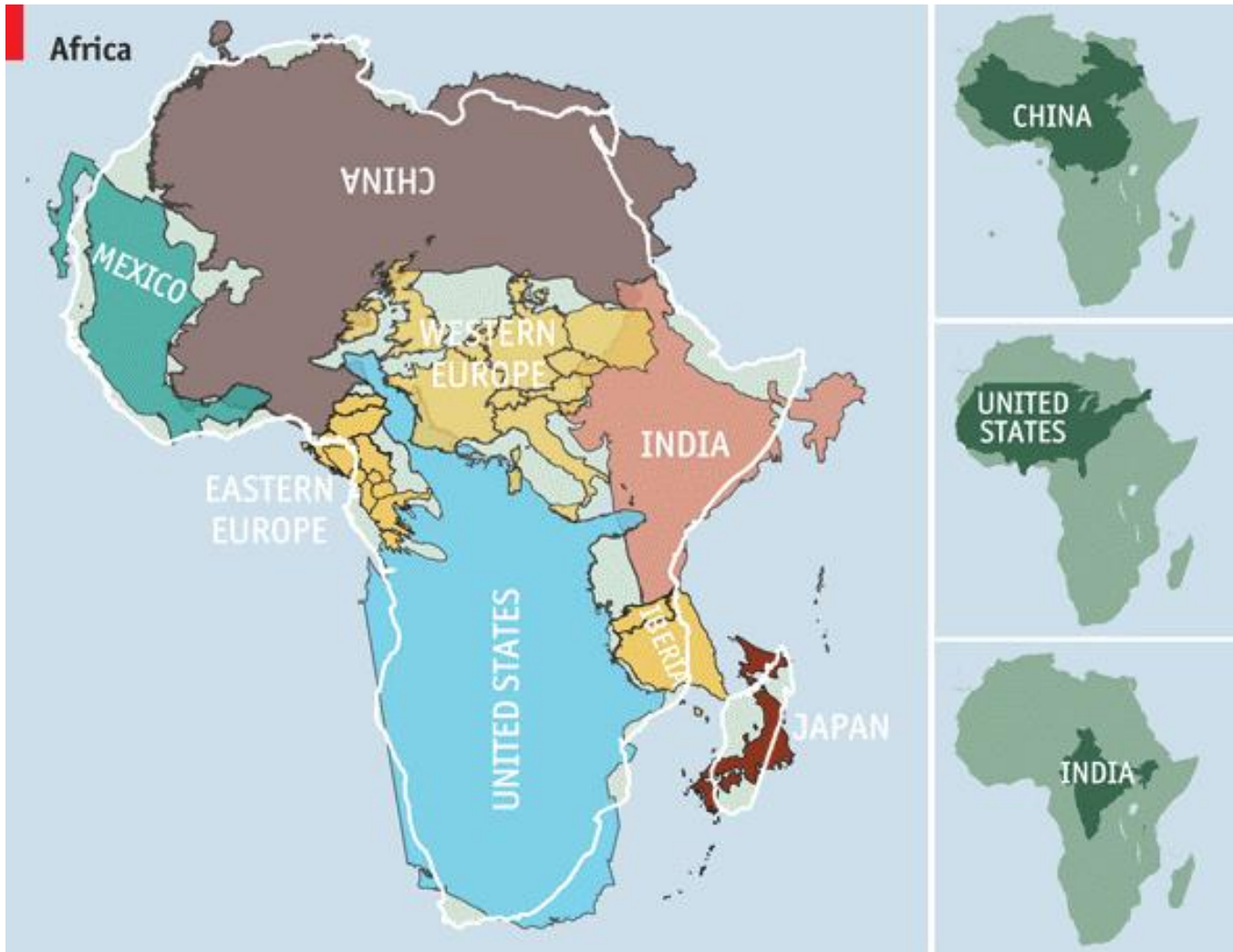
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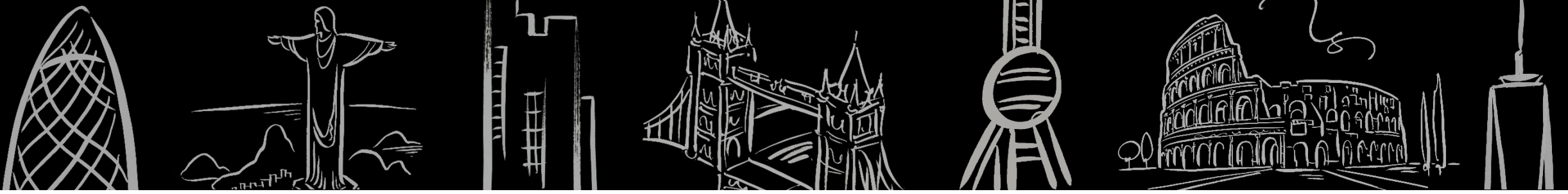
OUR DIVERSITY AS A REGION



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FIRST, SOME PERSPECTIVE...





IN NUMBERS...

- 52 countries
- 1500 languages spoken
- Multiple religions
- 1,2 billion inhabitants, likely to reach 4,2 billion inhabitants by 2100
- Unanimously ranked as the highest growth potential continent
- By 2035 Africa will have the world's largest workforce
- African average growth since 2000: 5%

THE OECD & AFRICA



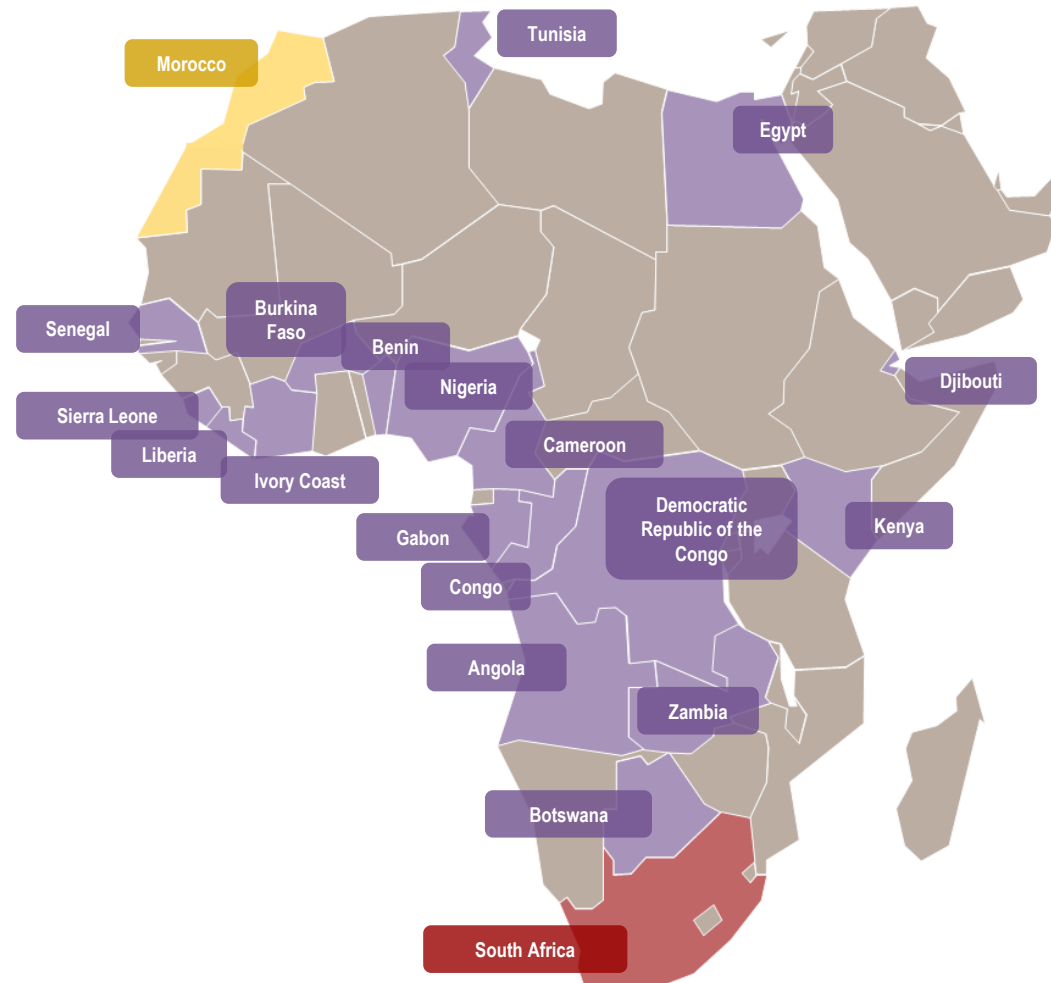
“ The African continent holds great potential. This is based notably on its population – the youngest in the world, its rapidly growing cities and markets, a rising and increasingly educated urban middle class, its abundant natural resources, and, in some countries, economies which are diversifying. The continent is increasingly attracting attention from international partners while also strengthening its influence as it takes a proactive stance on the global stage. ”

Angel Gurría
OECD Secretary-General

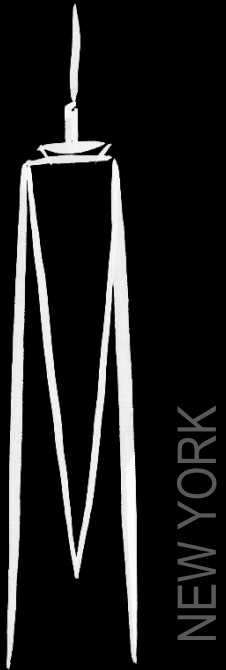
- One of the 5 Key Partners of the OECD
- Member of the inclusive Framework on BEPS

The other members of the Inclusive Framework on BEPS

Ongoing discussion regarding the Inclusive Framework on BEPS



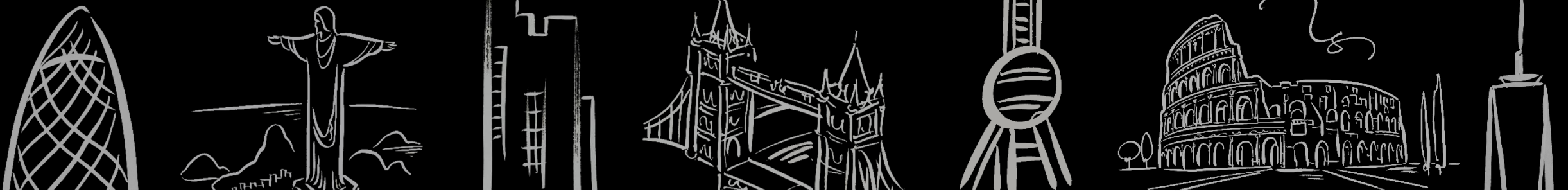
SOUTH AFRICA – INVESTOR TAX LANDSCAPE



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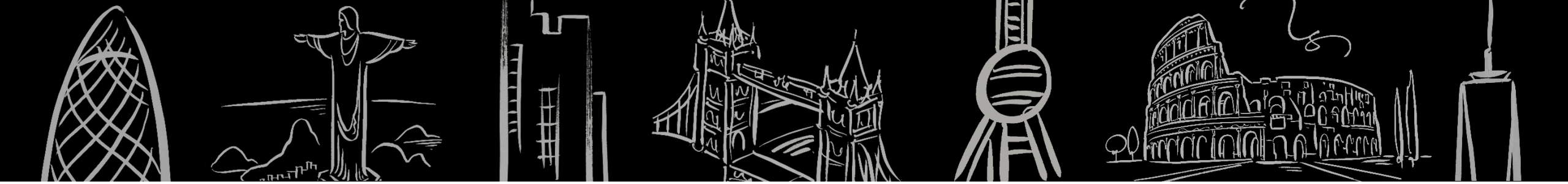
SOUTH AFRICA – INVESTOR TAX LANDSCAPE

- Tax rates
- DTA network
- Participation exemption
- Headquarter company regime
- Domestic treasury management company
- Davis Tax Committee
 - Transfer pricing and CBCR
 - Interest limitations
 - Digital economy



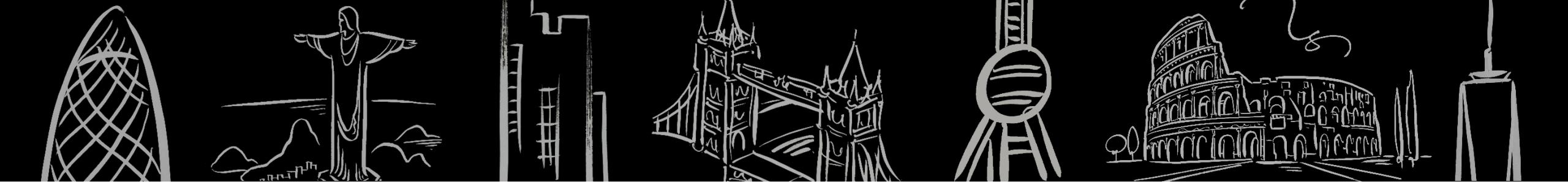
TAX RATES

- Corporate tax rate of 28%, compared to other BRICS rates of Brazil (34%), Russia (20%), India (35%) and China (25%)
- VAT rate of 15% (increased from 14% in 2018) – low by African standards and global standards
- DWT rate of 20% (unless reduced by a DTA)
- IWT and RWT rates of 15% (unless reduced by a DTA)
- Services WHT abolished – but Reportable Arrangements regime amplified



DTA NETWORK

- 79 DTAs worldwide
 - 23 DTAs with African countries (Cameroon new 2017, Zimbabwe revised 2016, Kenya new 2015, Mauritius revised 2015)
 - 56 DTAs with the rest of the world
- MLI – South Africa has signed up to it
 - Relatively few Covered Tax Agreements at this stage (e.g. UK, NZ)
 - Article 7 includes two alternative rules
 - General anti abuse rule – Principle Purpose Test (PPT)
 - Specific anti abuse rule – Limitation of Benefits in certain conditions
- SA has opted for the PPT
 - “...obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit...”
- Potential conflict with domestic general anti-avoidance rule “GAAR” – sole or main purpose test

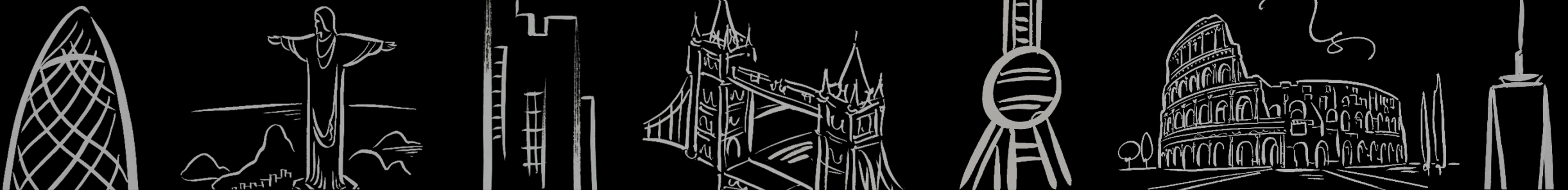


DTA NETWORK (CONT'D)

■ Example:

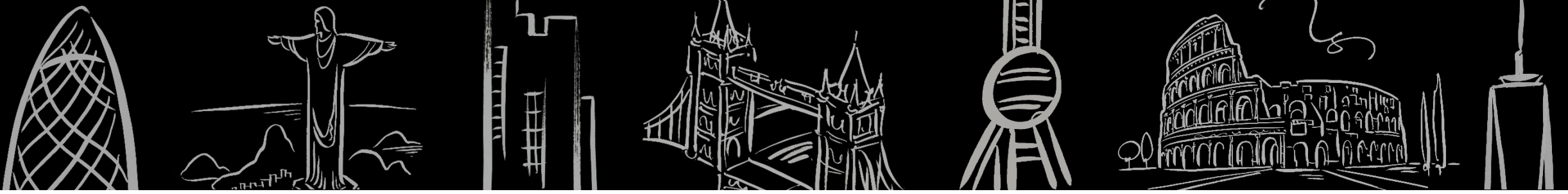
- UK Co looking to acquire 100% in an SA Opco to increase supply chain efficiency.
- Investment to be held via County A or Country B.
- Country A has 0% dividend WHT under DTA with SA; Country B has 10% dividend WHT under DTA with SA
- Country A is chosen
- PPT: tax benefit likely to be seen as *a principle purpose*
- Domestic SA 'GAAR': tax benefit not the *sole or main purpose*

- PPT allows SARS to make enquiries of non residents regarding purpose
- Very similar challenges in other countries, e.g. India, which have a similar GAAR provisions



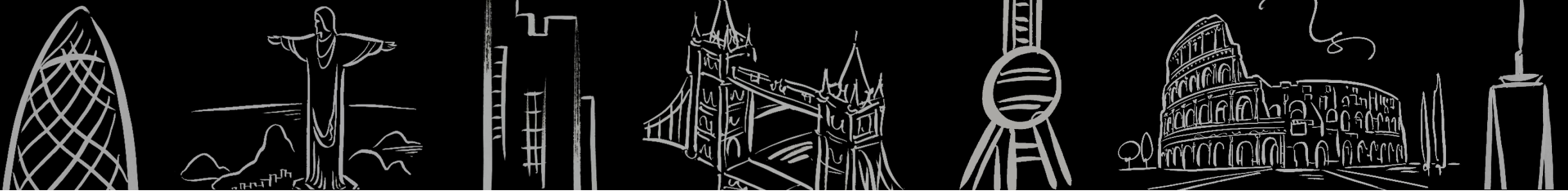
PARTICIPATION EXEMPTION

- Minimum 10% equity interest in a foreign company
- Tax free return to SA of foreign dividends
- No capital gains tax on disposal of foreign shares (assuming sale to a foreign third party)



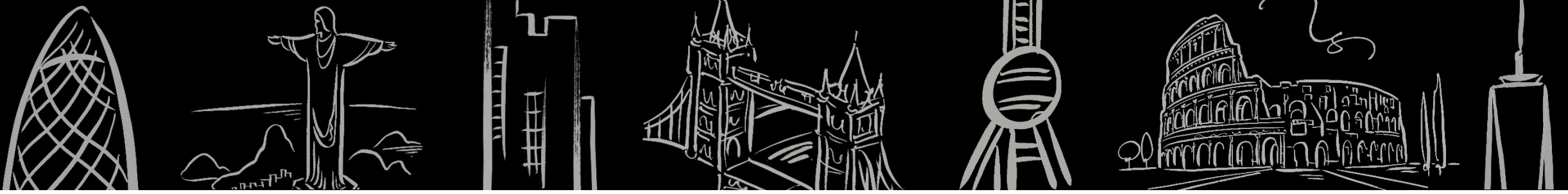
HEADQUARTER COMPANY REGIME

- Regime became effective from 2011
- “Gateway to Africa” for offshore investors
- Significant tax advantages:
 - No transfer pricing rules apply
 - No tax on foreign dividends received
 - No CGT on exit
 - No CFC rules apply
 - No WHT on return to shareholders of dividends, interest, royalties to shareholders
- No exchange control restrictions
- Qualifying criteria:
 - Minimum 10% interest in the HQ company by each shareholder
 - 80% of HQ company assets must be invested in foreign shares (10% minimum holding), loans or IP
 - 50% of all income must be in form of dividends, interest or royalties



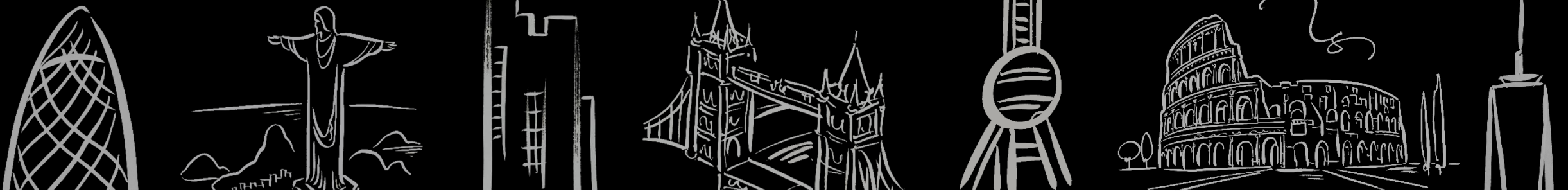
DOMESTIC TREASURY MANAGEMENT COMPANY

- Regime introduced in 2013
- Also intended to make SA a more friendly “gateway to Africa”
- Only applies to JSE- listed groups
- DTMC may be established to hold offshore investments, subject to requirements (e.g. registration with SARB)
- DTMC may be incorporated outside SA w.e.f. 2017
- Tax advantage - may use its “functional” currency to record transactions i.e. no ZAR forex gains/losses
- Exchange control relaxations
 - Listed co may move R3bn to DTMC annually
- Reporting requirements



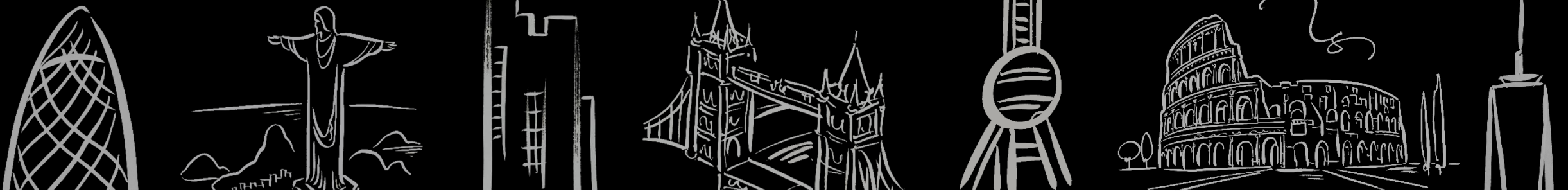
DAVIS TAX COMMITTEE

- Formed in 2013, mandate fulfilled in 2018
- Headed by Judge Dennis Davis
- Objective: to assess South Africa's tax policy framework in light of globalisation, a slowing economy, socio-political challenges
- BEPS at its core
- Benchmarking done to assess South Africa's compliance with OECD BEPS Action Plan recommendations
 - Many items found to be addressed (interest deductions, hybrid instruments, TP etc)
- Various specific DTC recommendations actioned into law:
 - Repeal of certain artificial WHT reliefs in Africa
 - Repeal of employment income exemption where individual out of South Africa for > 183 days



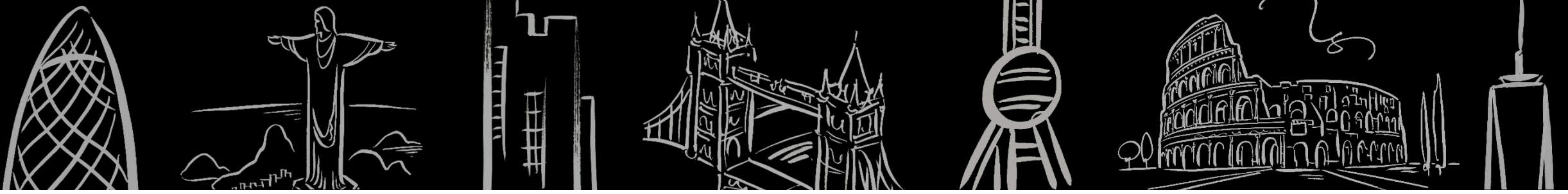
TRANSFER PRICING & CBCR

- Introduction of mandatory TP documentation filing requirements (Action 13):
 - Master file (aggregate x-border related party transactions exceed R100m), effective 2016
 - Local file (as for master file)
 - CBCR (consolidated turnover of R10bn or more), effective 2016
- Corporate tax return detailed disclosures on TP
- Onerous additional record keeping requirements where
 - aggregate x-border related party transactions exceed R100m
- SARS currently very active around TP
- First ever TP case decided earlier this year in the High Court (*Crookes Bros Ltd vs Commissioner for SARS, 2018*) – related to ‘debt vs equity’ nature of funding provided by SA co to Moz sub.
- No thin cap safe harbour rules



INTEREST LIMITATIONS

- Myriad of domestic interest deductibility limitation rules introduced in SA:
 - Limitation of interest deduction where recipient not taxable in SA (based on a profitability formula)
 - Hybrid debt rules
 - Hybrid interest rules (interest linked to profits)
- General TP rules (which include thin capitalisation and interest rates)



DIGITAL ECONOMY

- SARS becoming increasingly automated
- VAT on e-services
- Cryptocurrencies – treated as a financial service (exempt) for VAT

MAURITIUS – INVESTOR TAX LANDSCAPE

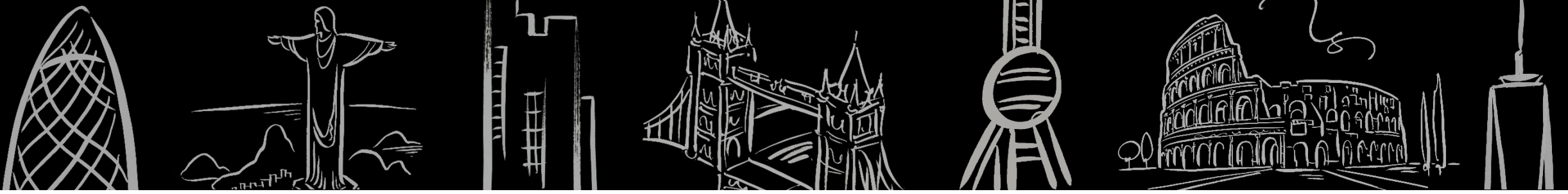


SHANGHAI

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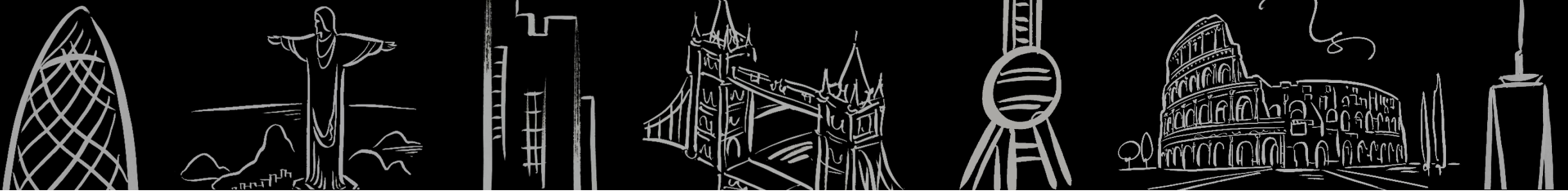
MAURITIUS – INVESTOR TAX LANDSCAPE

- DTA network
- No capital gains tax
- No withholding taxes on the way out for certain global businesses
- 3% effective corporate tax rate (until 31 December 2018)
- Major tax reforms looming in light of BEPS Action Plan:
 - New tax regime for corporate businesses
 - Freeport trade zones terminated
 - Taxation of income from global trading



DTA NETWORK

- 46 DTAs worldwide
 - 17 DTAs signed with other African countries
- 7 DTAs awaiting ratification:
 - Gabon, Ghana, Jersey, Kenya, Morocco, Nigeria and Russia
- 4 DTAs awaiting signature:
 - Cote D'Ivoire, Gibraltar, Malawi and The Gambia
- 21 further DTAs being negotiated
- Mauritius has signed up to the MLI
- 23 DTAs designated as Covered Tax Agreements
 - Only South Africa, Madagascar and Swaziland from Sub-Saharan Africa are included as CTAs.
 - The likes of Botswana, Mozambique, Namibia, Rwanda, Senegal, Uganda, Zimbabwe and Zambia not included.
- PPT adopted as an interim measure only
 - Will ultimately adopt detailed LOB provisions (bilateral negotiations)



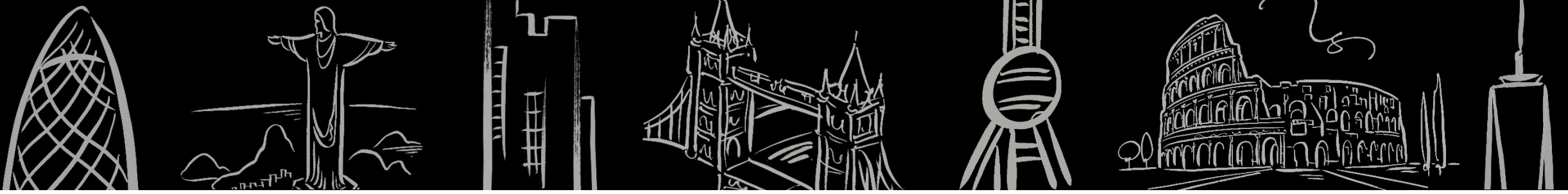
DTA NETWORK (CONT'D)

■ Interplay between Mauritius and South Africa DTA

- New DTA in force – key change is residence tiebreaker now via MAP
- Both are designated as CTAs
- Mauritius and South Africa have both adopted PPT, but....
- Mauritius has elected for Art 7(4) to apply while South Africa has not
- Allows a competent authority to allow tax benefits

even where PPT is failed

- Critical to understand commercial rationale for any structures involving South Africa and Mauritius going forward



NEW TAX REGIME FOR CORPORATE BUSINESSES

- OECD identified the automatic ‘deemed 80% foreign tax credit (FTC)’ as a harmful tax practice:
 - Repeal of deemed FTC from 31 December 2018
 - Introduction of a new “partial exemption” system
- Amendments to Global Business Licenses
- Companies treated as non-resident in Mauritius:
 - New section 73A (1 October 2018) – “*A company incorporated in Mauritius shall be treated as non resident if its place of effective management is situated outside Mauritius....*”

INTRODUCTION OF PARTIAL EXEMPTION SYSTEM

- 80% exemption introduced on specific income streams (subject to conditions):
 - Foreign dividends derived by a company
 - Interest earned by a company (other than a bank)
 - Income derived by a company from leasing of ships or aircraft
 - Income attributable to foreign PEs
 - Income from approved collective investment schemes, fund managers, administrators, advisors, asset managers
- Partial exemption regime applies to domestic companies and Global Business Companies (GBCs)

INTRODUCTION OF PARTIAL EXEMPTION SYSTEM

- Conditions all relate to **substance**:
 - Core income generating activities should be in or from Mauritius
 - Employ directly or indirectly a reasonable number of qualified persons to carry out the core activities
 - Minimum level of expenditure proportionate to its level of activities
 - Must be managed and controlled from Mauritius
 - Must be administered by a management company

AMENDMENTS TO GLOBAL BUSINESS LICENSES

- Currently 2 license categories available to businesses
 - Global Business License 1 (GBL1)
 - Must have non-Mauritian shareholders
 - Mauritian tax resident – recognized for DTA purposes
 - Substance requirements from 1 January 2015
 - Tax advantages (e.g. FTC, no WHT)
 - Global Business License 2 (GBL2)
 - Tax exempt
 - Not considered Mauritian tax resident – not recognized for DTA purposes
- GBL2 licenses to be abolished from 31 December 2018
 - Grandfathering provisions to apply

TAX CHALLENGES IN SUB-SAHARAN AFRICA



LONDON

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TAX ENVIRONMENT IN SUB-SAHARAN AFRICA

- Aggressive tax authorities – pay now, argue later
- Regular tax audits
- Penalties that often far outweigh the crime
- Lack of resources and a shortage of deep expertise, though ATAF has resulted in some up-skilling in key markets
- Varying levels of technological sophistication (manual versus automated tax filings, payments)
- No clear version of the tax “truth” (e.g. statements of account can take years to reconcile)
- Diversity of official languages (English, French, Portuguese)
- The law often differs from the guidance which differs from the practice on the ground
- Reliance on basic principles for otherwise complex areas of tax (e.g. share schemes, insurance)
- Concept of group taxation does not generally exist

SPECIFIC TAX CHALLENGES IN SUB-SAHARAN AFRICA

- Transfer pricing
- Withholding taxes
- Local limitation of benefits provisions
- Other considerations

TRANSFER PRICING

The absence of local comparable data



- The implementation of the Arm's Length principle can be challenging in Africa, due to the lack of local comparables.
- Existing Databases for TP analysis focus on data from developed countries. The identification of local comparables is time consuming and sometimes impossible.
- The existence of fewer organized companies in any given sector in Africa than in developed countries.

Lack of Knowledge & resources



- The tax authorities of many African nations lack auditors, economists, resources experienced in Transfer Pricing, financial databases.
- Lack of sufficient staff to process TP compliance and disputes.

Remuneration of IP



- The remuneration of IP generates in most cases more taxable income to developed countries at the expense of African countries, given that the latter lacks valuable IP.
- In the context of the natural-resource-rich countries (mining, oil and gas sectors), the appropriate share of revenues between MNEs and governments should be framed, so the tax authorities ensure the collection of tax revenues based on the nation's natural resources.

Absence of TP jurisprudence

- Case laws are not accessible in Africa.



Tax treaties



- Most African countries lack extensive tax treaty network within Africa, which places the continent in a disadvantaged place compared to other countries, when it comes to investments and business transactions.
- The development of tax treaties is crucial in order to ease business between African countries through the avoidance of double taxation and information exchange.

WITHHOLDING TAXES

Case Study

- SA Co provides management services to Kenya Co from South Africa
- From a domestic South African tax perspective, source of the services is South Africa
- From a domestic Kenya tax perspective, source of the services is Kenya
- WHT is applied to the payments flowing out of Kenya
- SARS taxes the management fees in full in SA and provides no credit for the WHT suffered as it was not legally withheld
- Double taxation ensues....

WITHHOLDING TAX

Case Study (continued)

- DTA Analysis
 - No management fee article in South Africa/Kenya DTA
- SARS perspective
 - Article 7 applies as management fees are “business profits”
 - SA Co has no PE in Kenya, therefore Kenya has no right to tax
- KRA perspective:
 - Article 22(3) “other income” applies to tax the fees in Kenya

LIMITATION OF BENEFITS

Example: Kenya

- Kenya introduced a unilateral limitation on benefits (“LoB”) in its Income Tax Act, with effect from 1 January 2015.
- The effect of the LoB clause is to prevent access to the benefits under a treaty if the underlying ownership in a resident of a contracting state that is claiming a reduced rate under a treaty is more than 50% held by individuals that are not resident in that same contracting state.
- Underlying ownership is defined to include direct and indirect ownership by individuals through interposed companies.

OTHER CONSIDERATIONS

- In-country CGT on indirect disposals of shares
- Casual business travelers
- VAT on imported services
- VAT apportionment
- Exchange controls

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