Global Convergence of Tax Judgments and Principles between South African Courts and Foreign Courts:

Assessing evidence of convergence in South African case law and its desirability in a South African context

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Plagiarism declaration

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Declaration

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Abstract

This paper seeks to assess the presence of convergence of domestic and foreign tax judgments and principles in South African courtrooms. Besides the practical fact of assessing the general view of South Africa courts to the application of foreign cases and principles, it also explores whether convergence is beneficial to South African in a variety of contexts.

The case law review concludes that while South Africa courts are bound only to take foreign cases as persuasive and not as binding, they appear to assign such cases similar weight to domestic cases, refuting them primarily on the facts of the matter as they would any other domestic citation and not dismissing them purely due to their foreign nature.

With the evidence clearly favouring the existence of convergence, the paper goes on to assess whether this convergence is a benefit to South Africa, first in the example of the specific case law reviewed and then in the larger context of South Africa as a country. The cases largely show benefits from the inclusion of foreign cases, with the only caution that the court must be sensitive to the context of a foreign case, particularly when dealing with principles of language or business which may be culturally-specific.

In the larger context, the paper cites writers from American, European and South African sources. The conclusion from these varying arguments is that convergence is primarily a positive force to a country of South Africa's relative size, position and economic power. The greatest risk the country faces would be to be forced in a form of convergence which is detrimental to its needs by other more powerful countries – however, historic evidence of how convergence in the European Union has led to clusters of countries with similar principles (and with free movement between these groups) suggests that it is far from likely that convergence will become such an autocratic influence.

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Chapter 1 – Introduction

1.1 Background

1.1.1 Definition of tax convergence/harmonisation

In beginning to discuss the topic of global tax convergence or harmonisation, it is useful to acknowledge that from a lay perspective, the language used to describe it sounds inherently optimistic. Convergence implies agreement and connection, which sounds undeniably positive on a global scale, and even that is relatively neutral compared to "harmonisation". Who would not wish for global harmony, even if merely in the field of taxation?

Since part of the focus of this paper is on the desirability of convergence, it is thus important to focus on its implications (both positive and negative) in a tax sense and to be sensitive to any inherent cognitive bias in its favour.

So what is tax convergence? In *Tax Convergence and Globalisation* (Avi-Yonah, 2010) focuses on similar questions as outlined in this paper for the period 1980-2010, albeit on a more general global scale (i.e. Is there evidence of convergence? Is convergence positive or negative?), and while his assessment of the characteristics, benefits and disadvantages of convergence are extremely useful (and referred to in this paper), he takes it as read that all readers agree on the implied meaning of convergence.

If one turns to the IBFD Tax Glossary, it provides a definition of tax harmonisation (not convergence) as follows:

> "Harmonisation of tax is a common feature of certain forms of economic integration, such as customs or economic unions…In general terms harmonisation of tax involves an elimination of differences or inconsistencies between the tax systems of different jurisdictions or making such differences or inconsistencies compatible with each other. It has also been defined as 'the process of adjusting national fiscal systems to conform with a set of common economic aims' The term is sometimes used to refer to different degrees of the phenomenon, with at one extreme a complete standardization of taxes between taxing jurisdictions, each jurisdiction having the same taxes and same tax bases and rates ("total harmonisation") and at the other

extreme a complete absence of harmonisation measures (including absence of administrative cooperation and no tax treaties) .” (IBFD, 2018)

Per the IBFD Glossary, harmonisation appears to be a term which can be applied to multiple forms with different meanings. This might be expected as the natural result of any phenomenon which exists across multiple countries, all with their own preferences and interpretations. As tax harmonisation itself is a sub-set or a result of globalisation, many of the ascribed drivers of globalisation (such as increased and faster global communication/trade, and the rise of multinational entities) themselves drive tax harmonisation.

It is worthwhile referring to a distinction between harmonisation and more general globalisation. The above definition of harmonisation refers to a process of “adjusting national fiscal systems to conform with a set of common economic aims ” (IBFD, 2018) which would strongly imply that it is a conscious and coordinated process by a group or groups, whereas globalisation is often seen as an emergent process resulting from changes in society and technology which may be encouraged or resisted but is not inherently controlled by any party.

On one level, it is easy to see why harmonisation can be considered a more conscious, controlled process – published tax law is obviously rigorously controlled by the legal processes of the given countries, so any change to the published law must be the result of conscious control by that country’s government and in pursuit of an objective of some kind. Harmonisation can also be achieved through supranational law and directives such as those established by the EU.

That said, this view neglects to consider that law of all kinds is shaped not only by the published law but also by the decisions and precedents laid down in courts, and that these, as the results of the individual decisions of different judges, are not likely to be controlled and adjusted in the course of a common objective by a single group.

With that in mind, and in the absence of a preferable alternative, this paper shall define tax convergence and harmonisation as largely interchangeable terms meaning:

“the alignment of thinking, judgment and practice between different tax systems by any means such that the same set of factual circumstances in one system would yield the same result (or a complementary result) in another”.

1.1.2 Tax Divergence, Tax Sparing, Tax Competition and Tax Arbitrage

If tax convergence is as defined above, then there must be an opposite to such a state, a state of tax divergence where different tax systems are not aligned at all and where the same facts generate different results and even results which are actively opposed to the intents of one or both systems.

The two primary examples of such opposed results are tax avoidance and double taxation. Unlike tax convergence, both these terms are frequently and consistently defined across a variety of sources. For the sake of convenience, the same source has been used to define both for this paper, *Notes on South African Income Tax* (Haupt, 2016):

> **Tax Avoidance:** "an attempt to minimise tax liability using legal means" as opposed to tax evasion, being "the use of illegal means to reduce a tax liability" (Haupt, 2016, p. 638)
> **Double Taxation:** "the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter" (Haupt, 2016, p. 633)

Both of the above undesirable outcomes may occur **unintentionally** as a result of tax divergence. Indeed, the major purpose of most tax treaties (which, by definition, are tools of tax convergence) can be said to avoid such outcomes.

However, there can also be circumstances in which tax avoidance in particular can been deliberately fostered. These are tax sparing, tax competition and tax arbitrage.

> **Tax Sparing:** The intent of tax sparing is to "carry through" the intent of tax incentives in one state into an international taxation scenario (Haupt, 2016, p. 636). In such a case, one state might offer tax incentives to a particular class of business or individual which would in the normal course of affairs be nullified in an international tax situation but, by agreement between the states, this is prevented so the taxpayer does not forfeit the incentive. As this necessitates agreement between the states to cooperate on incentives, this is a tool of tax convergence.
>
> **Tax Competition:** Conversely, tax competition is non-cooperative in nature. It is not discussed in detail by Haupt, and so accordingly it is useful to turn to *The Intricacies of Tax and Globalisation* (Leviner, 2014, p.213) which contributes the following: "broadly stated, tax competition involves a strategic, non-cooperative interaction among nations, with each nation designing its tax system in response to the tax

arrangements of other countries to attract and retain productive resources." This is, of course, the classic example of the "Cayman tax haven" in which a country has deliberately designed its legislation to facilitate tax avoidance by foreign taxpayers, thus encouraging them to headquarter their companies and transfer their assets to that country (which otherwise would be too small or distant to hold any attraction). On the face of it, tax competition is antithetical to convergence and may be compared to a "tax arms race" in which tax havens and taxpayers conspire to stay ahead of the non-haven states which would normally tax such taxpayers. However, it should be noted that tax competition, even though non-cooperative, can still result in convergence in the same fashion that in any economic market, increased productivity can drive competitors to price (or in this case, tax) at similar levels and in similar ways to avoid being out-competed.

Tax Arbitrage: Avi-Yonah defines tax arbitrage as "the ability of taxpayers to exploit differences in the tax regimes of various countries to achieve double non-taxation" (Avi-Yonah, 2010, p. 5). In its effect, tax arbitrage is much like tax competition except with one important exception. Whereas tax competition implies the cooperation of at least one of the involved states, tax arbitrage is purely the taxpayer exploiting differences in legislation without the cooperation (implicit or otherwise) of any state.

1.1.3 Advantages and Disadvantages of Tax Convergence

This paper deals specifically with the desirability of tax convergence in a South African context, however, it is useful at this introductory stage to consider a brief abstract view on its advantages and disadvantages that can be reviewed in more detail and specifically applied to South Africa later in the paper.

1.1.3.1 Advantages

Leviner argues that increasing globalisation, which in turn permits the rapid transfer of capital, places increased pressure on countries as a result of tax competition. Leviner states that "It is against this backdrop that tax comparatists commonly argue that globalisation has resulted in an increased worldwide reliance on consumption taxes, accompanied by a corresponding 'flattening' of personal income tax rates and drastic reduction in corporate income tax brackets." (Leviner, 2014, p. 215)

He goes on cite an OECD report, *Tax Reform Trends in OECD Countries 3 (2011[1])* which observes that top personal tax rates in OECD countries in the mid-1980s were in excess of 65% while they now averaged 41.5% in 2011. Over the same time period, corporate taxes declined from over 45% to under 26%. (Leviner, 2014, p. 215)

Avi-Yonah cites tax convergence as a positive phenomenon in terms of reducing tax arbitrage. As an example, he cites the old imputation system in use in Europe and Oceania before 2000, which allowed US-based companies to engage in dividend-stripping structures in imputation countries. This structure is no longer feasible as the imputation countries have converged with the US on the dividend exemption basis. Overall, he states that "convergence has meant these opportunities are rarer and carry higher transaction costs, and for that I believe we should be grateful" (Avi-Yonah, 2010, p. 5)

Leviner agrees with this argument that convergence reduces tax arbitrage, however his view more guarded noting that: "Policies aimed at addressing international tax competition have been traditionally understood to include measures that advance cooperation, harmonisation, and integration of national tax structures, policies, and administrations. Until recently, however, such measures have focused more on addressing what are known today as 'tax havens' or 'harmful tax practices,' than on advancing broader integration or harmonisation." (Leviner, 2014, p. 221)

In other words, while convergence has reduced tax arbitrage and tax competition, the focus on these overly and obviously "negative" examples of tax divergence may have caused a loss of focus on broader issues. This viewpoint provides an excellent entry point into the possible negative aspects of convergence.

1.1.3.2 Disadvantages

Both Avi-Yonah and Leviner note that as tax rates flatten across countries as a result of convergence and to prevent tax arbitrage and competition, governments are driven to find alternate ways to raise revenue. Leviner observes that "despite drastic reductions in corporate income tax rates, evidence for the period from 1965 to 2010 shows that, over time, total

[1] Available at http://www.oecd.org/ctp/48193734.pdf

OECD corporate revenues as a percentage of total receipts not only remained stable but, in fact, slightly increased". (Leviner, 2014, p. 216)

Leviner goes on to quote Avi-Yonah's explanation as to how this has been achieved: "countries that formerly relied on income tax revenues now must increase relatively regressive taxes, such as consumption and payroll taxes, which in recent years have been the fastest growing taxes in the member countries of the Organization for Economic Co-operation and Development (OECD)." (Leviner, 2014, p. 218) In short, as states converge their taxation methods to meet the needs of mobile capital investors, they change their taxation focus to less-mobile forms of income like taxing consumption and employee salaries. This has the undesirable effect of creating a tax system in which the wealthy and highly-mobile are catered to above wage-earners who are relatively tied-down. It is worth noting however, that in the pre-convergence environment of tax competition, the mobile capital investors still had the advantage over the less-mobile – they simply had to move their ostensible residence to tax havens to achieve relief.

In continuing this note of caution, Vito Tanzi (Leviner, 2014, p. 222) warns that "we need to be very careful with harmonisation, because harmonisation can take place around the most burdensome tax system of the group of countries or can take place around a tax system that is so inefficient that the inefficiencies of one country are passed on to all the other countries." Similarly, Steven Dean argues in his paper, *More Cooperation, Less Uniformity: Tax Deharmonisation and the Future of the International Tax Regime*, that simply harmonizing tax regimes to achieve the same outcome is not desirable and that deharmonised **but cooperating** tax systems can serve complementary roles, particularly when the states themselves are profoundly different and would suffer under a one-fits-all tax approach. (Dean, 2009, p. 127).

Dean's argument is consistent with definition of tax convergence raised in 1.1.1: *"the alignment of thinking, judgment and practice between different tax systems by any means such that the same set of factual circumstances in one system would yield the same result* ***(or a complimentary result,*** *in the case of the avoidance double taxation) in another".*

It is accordingly submitted that the above concerns raised by Leviner, Avi-Yonah and Tanzi with tax harmonisation are in fact concerns with **tax uniformity**. Dean himself seems unclear

on the distinction between harmonisation and uniformity, since within his own article he states: “it may be helpful to shift our focus away from uniformity and towards harmony” while arguing in favour of deharmonisation. (Dean, 2009, p. 129)

Harmonisation does not automatically imply uniformity. Logically enough: a musical harmony involves complementary notes – if harmony meant uniformity, then every orchestra would play identical notes and timings and music would be a considerably more boring experience. For the purposes of this paper, the distinction will be made between tax convergence and harmonisation (which imply complementary behaviour which may **sometimes** be uniform) and tax uniformity (which implies absolute uniformity).

1.2 Research Problem/Objective

When discussing convergence, there are multiple sources of uncertainty which are discussed further below:

1.2.1 What is convergence?

Firstly, what exactly is convergence in a tax context? As discussed in 1.1, based review of related literature, this paper defines convergence as:

“the alignment of thinking, judgment and practice between different tax systems by any means such that the same set of factual circumstances in one system would yield the same result (or a complementary result) in another”.

1.2.2 What does convergence look like?

In light of this definition, the second source of uncertainty is whether convergence is actually occurring in a given tax environment and what is its observable form. It is important to note that despite the concept dealing (by definition) with more than one tax system, one can assess convergence in a specific tax system without requiring evidence of convergence in another. To put it another way, convergence is not necessarily bilateral and reciprocal, for example, the South African system might show signs of convergence with the UK tax system and yet there need be no reflection of this in the UK system and/or the UK might not even be aware of the South African convergence. In an increasingly interconnected global environment, it may reasonably be expected that tax systems are converging towards an overall model or ideal (such as the OECD model for tax treaties) instead of one-way convergence, but relative

strength (economic or otherwise) might still result in one nation coming in line with another's policy with relatively little say in the matter. Former influences may have resulted from colonialism, whereas now could be more indirect. One such example might be: the International Monetary Fund (IMF) lends money to a developing country; that debt includes conditions and covenants on government's economic and other policies; those changes entail changes in tax law or policy.

1.2.3 Is convergence desirable?

The final source of uncertainty is whether convergence is desirable. It is already clear from the introduction that there is no consensus on this issue. In the papers cited, Avi-Yonah primarily argued for convergence as a positive force due to its reduction in tax arbitrage (Avi-Yonah, 2010, p. 5), while Leviner agreed with same but was concerned with the possible inequalities generated by increased focus on consumption and payroll taxes as a result of convergence (Leviner, 2014, p. 218) and Dean was concerned with the risk of convergence propagating an inefficient tax system or one which is not ideal for every country (Dean, 2009, p. 141).

Without drawing any immediate conclusions, the following should be noted when considering this issue:

- Tax convergence does not necessarily imply tax uniformity.
- Desirability may differ between a global and national level (for example, the policies of "tax haven" countries may be viewed as undesirable on a global level while being highly desirable to those countries themselves in terms of attracting investment they would not normally receive).
- Desirability may take many dimensions and some of these may be contradictory (for example, tax law may be "unfair" in terms of the distribution of the tax burden, but that unfairness may be to incentivize economically or socially desirable outcomes).

In a South African context, the Constitution read with the Tax Administration Act (TAA) provides insight into what is considered desirable in a tax environment. In brief, Myburg notes that some of the relevant fundamental rights considered within the TAA are: (Myberg, 2016)

- the right to privacy
- the right to information

- the right to just administrative action
- the right to not give self-incriminating evidence and
- the right to a fair trial.

Obviously, these rights are considered in the context of tax administration only, whereas this paper is concerned with the larger tax environment. However, Myburg (combined with the above discussion) provides a useful approach to define desirability in a larger tax context for the purposes of this paper. We can sum this approach up as follows.

Convergence is desirable in a South African context if it is:

a) constitutionally desirable (i.e. supports or at a minimum does not contradict the rights enshrined in the Constitution). Note that the constitutional desirability is assessed in line with the modern South African Constitution (*Constitution of the Republic of South Africa*, 1996), not the constitution under Apartheid or pre-Apartheid. Constitutional desirability is in part a stand-in for ethical desirability and the modern constitution is a far better representation of what is considered ethical in today's society than the previous versions.
b) economically desirable, in that it broadly contributes to the overall growth and stability of the economy either by supporting key industries over others or the economy as a whole (either is acceptable so long as the net impact to the whole economy can be considered positive)
c) socially desirable – what is socially "good" is itself a complex question, so for the purposes of this paper, the constitution shall be considered a proxy for ideal social outcomes
d) internationally desirable, most obviously in reducing possibility for tax competition and tax arbitrage, and making economic interaction with other countries as easy as possible
e) theoretically desirable, meaning that it results in tax law and decisions which are logically clear and in line with current tax thinking and theory.

These principles are ranked in order of priority: for example, tax incentives to locally-owned businesses are internationally undesirable under point d) since they create an uneven basis for interaction with foreign businesses and thus make economic interaction with them harder. However, the barriers to entry created by those incentives may be economically desirable

under b) in terms of protecting local business from the global market to the detriment of the national economy. In such a case, the incentives could be considered desirable overall as they benefit a higher-priority principle.

These criteria will not be all be applied as an analytical framework to every circumstance raised in this paper: There may well be situations in which the answer is self-evident by considering only one or two of the criteria. However, this framework provides a tool for assessment when the outcome of a decision is not obviously desirable or undesirable. It should also be noted that these criteria could be the subject of more exhaustive discussion (for example, assessing constitutional desirability could open up an entire review of the intended impact of constitutional law) but that is not their intended purpose in this paper. Rather, they are used to ensure a certain systematic application of different perspectives on the outcome of a decision so as to achieve a determination of desirability with more logical rigor than simply stating a subjective impression that a decision is flatly "good" or "bad".

1.2.4 Statement of Research Question

Based on the above uncertainties noted, this paper states its final research question as:

Is there evidence that tax convergence is occurring in South Africa case law and is it desirable in a South African context?

This question relates back to the above sources of uncertainty as follows:

- What is convergence? *The definition for the purposes of this paper has been provided*
- What does convergence look like? *This shall be discussed further under the research method, but can be assessed based on the South African environment alone (though additional external sources can be desirable). In the context of case law, convergence would be demonstrated by South African courts accepting and using citations and principles from foreign courts.*
- Is convergence desirable? *For the purposes of this paper, desirability shall be assessed in order of preference as being constitutionally, economically, socially, internationally and theoretically desirable. In the context of case law, court decisions that are more desirable under these measures as a result of the use of foreign sources shall be considered examples of desirable convergence, whereas uses of foreign sources which are dismissed, irrelevant or result in less desirable outcomes according to the above measures shall be considered undesirable. This will be followed by a*

review of theoretical arguments for and against convergence being desirable from a variety of sources to provide a macro perspective to support the micro perspective of the case law review.

1.3 Research Method and Limitations of Scope

The research question necessitates the analysis of two underlying and separate issues. Firstly, convergence may exist or not exist in South Africa and, secondly, whether occurring or not whether convergence is desirable or not for the country.

Besides being separate issues, they necessitate different analysis as the first may be grounded in factual reality whereas desirability, as the second issue, is a subjective assessment. This affects the research methodology used for each issue.

1.3.1 Is convergence occurring?

The largest and most immediately obvious source of information on convergence is the law itself. South Africa's colonial history causes it to draw on Roman-Dutch law, English law and African customary law so there is an argument to be made that it was already "pre-converged" to some degree. However, this is a sufficiently well-known and historically-distant fact that this element of convergence borders on a truism. Furthermore, the nature of tax law and its need for annual amendment means that this common ancestry does not imply recognizable convergence in the present day. One could attempt to assess convergence in the pure law by reviewing the actual wording of the Act against all other tax acts looking for common principles, an exercise which would be both impractical and tedious.

However, a more practical proxy for convergence in fiscal legislation and its interpretation is to review South African tax case law for signs of convergence and more specifically for citations of foreign cases and principles. Theoretically, any tax case might draw on a foreign principle even if it is a purely domestic matter, but it is logical that cases involving foreign states or taxpayers are more likely to draw on them. This provides an area from which to draw data. Theoretically, cases could be assessed statistically, however the relatively low volume of affected cases allows for more individual review. In such a review, two questions are of principle importance:

- Was a foreign case or principle cited and by whom?
- Was the foreign case or principle accepted and did it form part of the judgment?

The case law review must also consider any visible changes over time that might indicate a larger trend.

1.3.2 Is convergence desirable?

Firstly, desirability can be assessed on a micro level through the case law review. Accordingly to the two case law questions regarding occurrence we can add the third on desirability:

- Did the foreign case or principle improve or worsen the judgment made?

This question goes directly to the concerns of Tanzi and Dean that a "cookie-cutter" approach may simply spread bad tax precedence around. This is by necessity a subjective assessment, however one which can be supported by factual review of questions such as:

- What would the likely outcome of the case have been if the foreign case/principle was not used?
- Were principles raised by the case supported or overruled by subsequent cases, and did those cases deepen or reduce any reliance on foreign cases/principles?
- Was the outcome of the case clearly counter to the conditions of desirability raised under 1.2.3?

On a macro level, desirability can be assessed by reviewing discussion and writings on the topic in various forms and formats. The European Union has, for obvious reasons, been the subject of a great deal of discussion on economic and tax convergence. While this is a valuable resource, there are substantial differences between the average European country and South Africa. Accordingly, the focus in use of such writings should be in broad principles which can be applied in any case as opposed to those more unique to an African or European context. In *Taxation and Development: What Have We Learnt from Fifty Years of Research*, Richard M. Bird highlights the tendency of economists post-WW II to attempt to apply developed-world tax policies to the "heterogeneous group of developing countries" (Bird, 2013, p. 6) and the resultant mistakes caused by such a "one-size-fits-all" approach.

Accordingly, writings on convergence in South Africa specifically are likely to be the best possible sources. That said, such writings do not approach the volume and depth of writing on the EU situation, as neither the African Union nor any other body of developing countries has been in a position to exert the kind of relatively organised influence that underpins the

EU. There is therefore a necessary trade-off in reviewing sources between the availability of EU sources and the possible increased relevance of South African sources.

A third possible source of discussion is convergence in the United States. Due to its relatively unusual system of having separate Federal and individual State taxes, the US is in the unlikely position of being able to experience convergence and divergence in tax policy within the same country. However, it is subject to the same development-disparity with South Africa as the EU, and also differences in legal, political and accounting structures – in many ways, the US system does not share the common ancestry with the EU that South Africa's colonial history gives it.

In conclusion, desirability can be assessed on a micro level through case review and on macro level through journals and other articles, though care must be taken to assess the applicability of such arguments to a South African context.

1.4 Paper structure

The structure of this paper is largely informed by the two underlying questions of the research question and thus broken up into sections as follows:

Chapter 2 – Is Convergence Occurring in South Africa?

This chapter is primarily one of case review. It first defines the criteria by which cases are assessed for inclusion and categorized once included. As noted previously, the focus of research is on cases with an international aspect as more likely to cite foreign laws and principles, but this focus is not exclusive.

Each case must be addressed in terms of two aspects *for each occasion* in which a foreign law, principles or case is cited:

- Is the use of the foreign law/principle/case in the South African case indicative of convergence?
- If it is, then did the convergence result in a better or worse decision in terms of the desirability criteria? (While this issue goes to the second question of desirability, it is better in terms of structure and logic to conclude on this issue in the main case review. Such conclusions can then be referred back as high-level examples in later sections of the paper without needing to review or refer back to the facts of specific cases repeatedly.)

In terms of grouping the cases into a meaningful narrative (where possible and without projecting structure where there is none), they have been grouped into categories based on similar legal issues under discussion: for example, cases regarding the role of source and residency in assessing the right to tax form one such group. Within those groupings, cases have been assessed chronologically wherever possible in order to assess whether there are noticeable trends in interpretation and judgment. Finally, any cases dealing with isolated issues which do not merit groupings of their own have been collected under an "Other" category.

Chapter 3 – Arguments For and Against Convergence

This chapter reviews papers written from various sources (both local and international), laying out the points for and against convergence as expressed by the authors and commenting on their validity and applicability.

The eventual conclusion of this chapter is to reach an overall assessment of the arguments for or against convergence in academic discourse

Chapter 4 – Conclusion

Lastly, this chapter draws together the factual state of convergence in South Africa with its relative desirability and attempts, where possible, to predict possible future developments with regard to South Africa convergence and highlight areas for future research.

1.5 Conclusion of Chapter 1

At this point, the definition of convergence and desirability for the purposes of this paper has been set. The subsequent chapter focuses on the detailed review of cases and their impact on the research question.

Chapter 2 – Case Law Review: Is Convergence Occurring and Desirable in South Africa?

2.1 Introduction

In identifying cases relevant to the issue of convergence it is useful to classify them into broad criteria to differentiate them from other cases under law. In doing so, one can apply the same criteria used by this author and others in a paper prepared for the Global Tax Treaties Commentaries to assess the role of foreign court decisions towards global convergence in the interpretation of tax treaties. (Carvalho, et al., 2017)

This paper dealt specifically with the factual status of convergence in the interpretation of tax cases involving tax treaties from a South African context. Accordingly, substantial portions of the following discussion draw from it to assess where convergence is occurring, though it does **not** go on to ask the additional question considered in this paper as to whether such convergence is desirable. Accordingly, this paper will draw from that analysis wherever possible so that greater focus can be given to the question of desirability. While later chapters shall look at the desirability of convergence on a broader scale, this chapter reviews whether convergence was of benefit in the microcosm of individual cases, i.e. whether the individual judgment was enhanced or hindered by the foreign reference, or if it had no real impact.

2.1.1 Assessment Criteria

It is theoretically possible, in South Africa, for any case to make use of a foreign principle in a purely domestic matter. However, given the breadth of South African case law, it would seem unlikely that those involved would need to look outside the South African context in a domestic matter except if the facts were so unusual or rare (for example, when dealing with new innovations) that foreign examples were the only available ones.

Accordingly, it is far more likely to encounter references to foreign principles in cases which already contain a foreign element, such as a taxpayer operating across two or more states or an international transaction. In such a situation, the following combinations of reference to foreign principles exist (Carvalho, et al., 2017)

i) Direct references to foreign cases or principles of the other involved state(s) (cited with approval, disapproval or distinguishable on the facts);

ii) References to foreign cases of a third state not directly involved in the matter (cited with approval, disapproval or distinguishable on the facts), also noting whether or not the case law from such third state is considered subsidiary or inferior to that of the states directly involved in the matter;

iii) No references to foreign cases of any state despite being clearly available. Such lack of reference may infer either a lack of awareness of such case law or an unwillingness or inability to use such case law.

Categories i) and ii) may provide support for convergence or divergence: approval of a foreign case is clear evidence of convergence but distinguishing it based on the facts can **also** be evidence of convergence **if** the manner in which the distinction is raised is in line with how a *similar domestic case* cited would be treated. The court failing to support a foreign case or distinguishing it purely on circumstances relating to being foreign in nature would support divergence.

Category iii) is the hardest to assess as it is difficult to reasonably assess the difference between ignorance of foreign cases by those involved, as opposed to the decision not to make reference to them. Accordingly, this is more likely to be identified in commentary or reporting around cases where third parties might attack or approve of the handling of the case by referencing foreign principles and cases not used.

2.1.2 Sources of Case Law

In identifying applicable cases for review, this paper draws on two primary sources:

- The International Bureau of Fiscal Documentation (www.ibfd.org):

  Described on their site as "world's foremost authority on cross-border taxation", the IBFD has a logical focus on tax convergence or divergence and serves corporate, government and individual parties. One would also hope that their status as an international non-profit also would provide a more unbiased report than either specific tax advisors who may focus their agendas towards generated future revenue and maintaining their relevance, or governmental institutions who may naturally be unwilling to discuss deficiencies or inconsistencies between their legislation and international trends.

- The International Tax Law Reports (as provided by LexisNexis):

The reports themselves are useful as detailed reports on the most significant international cases, but they are further supported by detailed commentary and analysis on those cases. This is of particular use when assessing the quality of decisions made which goes back towards the question of desirability in the larger context: a judge is logically expected to reach a conclusion he or she finds reasonable for the specific case, while a commentator, unconstrained by the need to resolve a specific matter, has more freedom to assess the implications of a decision on past and future cases and the larger tax and business environment.

2.1.3 Case Review Structure

As discussed earlier in the paper, when reviewing an individual case, there are two questions that must be addressed:

- Is the use of the foreign law/principle/case in the South African case indicative of convergence?
- If it is, then did the convergence result in a better or worse decision in terms of the desirability criteria?

The individual cases have been grouped by the common questions of legal principle wherever possible and within that grouping (if possible) chronologically to see any possible trends over time.

The common legal questions/categories identified are as follows:

- The role of source and residency in assessing the right to tax
- The validity of retrospective application as regarding tax treaties and individual state law
- Reliance on foreign court judgments to define the meaning of specific terms and language
- The use of foreign court judgments for principles of law and business.

These shall now be explored in detail in the following sub-sections.

2.2 Case Review: The role of source and residency in assessing the right to tax

Prior to 2001, South Africa operated on a source basis of taxation before transferring to its current residence basis. However it is worth noting that the concept of source remains relevant under the residence basis, seeing that non-residents are taxed by South Africa on local source income and that many tax treaties consider similar questions to those of source.

Accordingly, while some older cases would have been resolved differently under the residence basis, the principles raised by them as regards source basis are still of relevance for modern cases involving source basis.

Carvalho et al. (2017) reference *Commissioner for Inland Revenue v Epstein (19 SATC 221 1954 Appellate)* as an early example in which there was a clear split between judges on the both the principles of source and the necessity of involving foreign cases. During the case, the court was presented with and referenced a number of foreign cases from the UK. Centlivres CJ stated in the majority judgment that

> "however appropriate these distinctions may be in interpreting English income tax legislation, they seem to me to be out of place in considering the proper interpretation to be placed on the definition of 'gross income' in section 7 of our Act" (Epstein, supra, p. 231).

Prior to the Appellate Division, the Special Court had based their judgement in part on foreign cases and indeed concluded their judgment with reference to an Australian case (Commissioner of Taxation of Western Australia v D. and W. Murray Limited, 42 C.I.R. 332, 1929), so while clear that foreign cases were not dismissed out of hand, Centlivres was concerned as to the relevance of applying principles from one legal system to another. In the case referenced above, he referred to a distinction in UK law between "business" and "trade" (in which trade is considered to be a narrower subset of business) and questioned the relevance of such distinction given the South African Act made no reference to either business or trade in the relevant definition (*Epstein*, supra, p. 231)

Centlivres's eventual conclusion drew upon local cases of *Millin v Commissioner of Revenue 1928 AD 207* and *Commissioner for Inland Revenue vs Lever Brothers and Unilever Ltd 14 SATC 1, 1946* to conclude that the source of a taxpayer's income was where he applied his efforts, quoting with approval Watermeyer CJ from *Lever Brothers* (supra) that the source of income was

> "the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them. The work which he does may be a business…an enterprise…or an activity in which he engages…it may take the form of personal exertion, mental or physical, or…employment of capital either by using it to earn income or by letting its use to someone else." (Epstein, supra, p. 232)

It is noteworthy that Watermeyer's definition is considerably wider that the "wits and skills" definition used in *Millin* (supra) covering as it does a variety of forms of exertion and employment of capital both directly and through lending.

Conversely, while writing the minority judgement, Schreiner JA suggested, with regard to Watermeyer's definition, that he had used language

> "which might suggest that the source is always where the taxpayer himself does or has done the acts which result in his receiving the income, but that cannot have been the Chief Justice's intention." (Epstein, supra, p. 233)

In support of this, Schreiner went on to cite the example of shares earning dividends being taxed, where it would not be material where the taxpayer physically bought the shares or stored the share certificates. Accordingly, he argued that in such a case (or the case of a partnership like in *Epstein* (supra)) the source "is not where he himself personally exerts himself, assuming that he does so, but where the business profits are realized" (*Epstein*, supra, p. 233-234).

Unlike Centlivres, Schreiner JA also specifically approved of the use of foreign cases stating that only two South African cases were relevant to the matter and that the overseas cases carried "a great weight of persuasive authority". (*Epstein*, supra, p. 235-236)

Epstein (supra) thus provides an excellent example of two judges disagreeing on a fundamental principle of source and that disagreement in part coming from one judge dismissing foreign cases and the other accepting them.

So the question then becomes, was convergence a positive influence in this case? Phrased differently, was Schreiner's view superior to Centlivres due to his use of foreign sources?

There are two ways to assess this question: the first, and simplest, is to consider whose view has stood the test of time and is closer to the modern interpretation. While the most current view is not inherently the best, it does suggest a degree of reinforcement and support by subsequent case law and parallel reasoning with preceding cases. The second approach is to

assess the decision against the requirements of being constitutionally, economically, socially, internationally and theoretically desirable, as laid out in the previous chapter.

Beginning with the simpler method: while the search could be limited purely to cases which are post-Epstein, there is relevance to cases that precede it as they may indicate parallel reasoning and still support the conclusion. Note also that these cases include Namibian/Rhodesian and Botswanan cases. It could be argued that they are not relevant as they are foreign themselves, however the countries are sufficiently closely tied to South African law that they are frequently used as citations – in effect an example of local, rather than global, convergence. These countries also share a common history of colonial rule and similar European legal influences, though it should be borne in mind that cases before they achieved independence may be indicative of foreign control over their own preferences.

In the case of *Lever Brothers* (supra), it is interesting to note that Schreiner was involved and once again dissented with the majority view (*Lever Brothers*, supra, p.23). This case considered a loan made and whether the location the loan was contracted or the location where the funds were employed was the source. While Watermeyer concluded that the location where the loan was made was the source, Schreiner likened the situation to a lease of property and argued that in a lease there would be little dispute as to where the source of income was – it would be the leased asset itself (*Lever Brothers*, supra, p.17). Despite this disagreement, the majority ruling makes it pro-Centrilives.

In *Liquidator, Rhodesia Metals Ltd vs Commissioner of Taxes, Southern Rhodesia, 9 SATC 363 1938* (pre-Namibian independence), the sale of mining claim rights in liquidation was determined to have a source located with the actual claims as opposed to the sale, making it pro-Schreiner (*Rhodesia Metals*, supra, p. 377). Unlike *Lever Brothers* (supra), a clearly demarcated asset with a verifiable location likely assists in the Schreiner argument. A loan raised might be used to fund many ventures in different locations, making it much harder to determine where the source of income generated by it would be found.

Overseas Trust Corporation Ltd v Commissioner for Inland Revenue 2 SATC 71, 1926, while a case focused on share-dealing and capital vs revenue issues, also dealt with a source issue as to whether transactions conducted by German brokers and an office located in Namibia rendered shares relating to South African companies as foreign source. Here, as per Schreiner's example in *Epstein* (supra), it was found that the source was South African

despite the efforts being outside the country, making this a pro-Schreiner argument (*Overseas Trust*, supra, p. 73).

Commissioner for Inland Revenue v Black 21 SATC 226, 1957 found that a brokerage operating in London on instructions from a South African taxpayer generated income in London despite the taxpayer applying his wits and skills in South Africa. While apparently a pro-Schreiner case, it should be noted that this issue was muddied by the question of whether the sales and purchases were controlled by the taxpayer or if the broker had discretion to act upon his behalf (*Black*, supra, p. 227).

Commissioner of Taxes v British United Shoe Machinery (SA) Pty) Ltd 26 SATC 163, 1964 reached a pro-Schreiner conclusion by finding that the place where leased machinery was used was of greater relevance that where the lease was signed (*British United Shoe*, supra, p. 164).

Lastly, the case of *Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana, 29 SATC 97, 1967* found that the source of income was where physical hides were tanned, rather than where the traders who sold them employed their wits and skills. Admittedly, this case also dealt with the issue of which was the more relevant skills: the specialist knowledge of the traders versus the work of the tanning itself, but overall is a pro-Schreiner argument in that the source concluded was the one where the assets were located and the tanning physically occurred (*Transvaal Associated Hide*, supra, p 98).

In summation, it appears that the majority of cases have resolved pro-Schreiner, except in cases like *Lever Bros* (supra) where a loan of funds rather than physical assets was involved. It is worth noting that *Lever Bros* (supra) also does suffer from a deficiency against Schreiner's "dividends" argument, in that one might compare a loan to a share certificate with a fixed payment term and rate (and indeed redeemable preference shares often simulate such). In such a case, if a loan can be functionally identical to a share then why should the location of its source differ? Regardless, it appears that Schreiner's argument is the more successful and accordingly, that the argument backed by foreign cases made for a better case and therefore that convergence was beneficial in this case.

Having reviewed the case law, the second, more subjective test, of whether a convergence-based decision made for a better result according to the criteria defined by this paper must be reviewed.

i) *Constitutionally:* there is no clear benefit to either argument from a constitutional perspective

ii) *Economically:* dividing the source of income based on the underlying assets rather than the actions of a few decision-makers would seem more egalitarian and practical. If Schreiner's argument did not hold, then theoretically all the revenue generated by a variety of investments could be considered to come from a few localised groups of decision-makers in locations like stock markets, rendering the rest of the world effectively desolate for the purposes of income sources. That said, this does allow those same few decision makers to exert effective control from a few isolated locations while spreading their revenue through a wider network, which can be abused.

iii) *Socially*: If one considers *Transvaal Associated Hide* (supra) as a particularly effective example, the implications of Schreiner's rule make the difference between tax revenue being generated in South Africa or Botswana. If one considers the eventual benefits of that revenue in terms of increased government spending and (hopefully) improved quality of life, it would seem socially equitable that this benefit accrue to the workers as opposed to centring on South Africa and only benefiting the few traders involved in the enterprise. Obviously, South African tax revenue would not only benefit the few traders, but in the microcosm of *Transvaal Associated Hide* (supra) if the tax does not accrue to Botswana then the workers do not receive any benefit.

iv) *Internationally*: The economic and social benefits of spreading tax sources also apply in terms of international benefit as it prevents a few countries containing key deal-makers from getting unrestricted access to tax revenue. As a principle, the income allocated should be linked to where the actual value is created. This concept also has the advantage of being in-line with current Base Erosion and Profit Shifting (BEPS) thinking which cautions against misapplied transfer pricing resulting in "outcomes in which the allocation of profits is not aligned with the economic activity which produced the profits" (OECD, 2015, p. 9).

v) *Theoretically*: As already noted above with reference to *Lever Brothers* (supra) and the redeemable preference share argument, it appears that Schreiner's argument is more consistent across a wider set of circumstances.

Overall then, in the matter of source and residency, it appears that the convergence-backed view has generated a superior conclusion making it a positive force in regard to this issue.

2.3 Case Review: The validity of retrospective application as regarding tax treaties and individual state law

The issue of retrospective application of law is inherently a contentious one, given the substantial risk of unfairly disadvantaging taxpayers by judging their actions under rules which did not exist at the time they took said actions.

In *Mark Krok v. the Commissioner for the South African Revenue Services (2014),* the court noted that "it is a firmly established principle of South African law that a statute is not retrospective merely because a part of the requisites for its action is drawn from time antecedent to its passing", from which we take the general understanding that retrospective application should not be presumed (Krok, 2014, p. 26),

Carvalho, et al. (2017, p.21) observe that in cases involving multiple countries, there is an increased risk of discrepancies in law resulting from timing differences, due to the various forms of legislation and rules interacting (i.e. each countries' own laws, any shared treaty, and any model on which said treaty might be based). A change in approach may be evidenced in a single country's laws or in an underlying model and then only gradually be formally stated in the other rules. Accordingly, in such cases, the concept of retrospective application is of particular importance since on the one hand it may allow the intended spirit of an approach to be enacted even though one set of rules took longer to "catch up", but this must be counterbalanced with the risk of abuse.

In the case of *Mark Krok* (supra), the principle issue was with regard to the degree of cooperation between two different tax authorities: being SARS and the Australian Tax Office. Krok argued on two aspects: firstly, the principle of the "revenue rule" and secondly the argument that while the original tax treaty between the countries had contained a clause with regard to sharing of **information**, but that a provision dealing with assistance in **collection** of taxes in the manner relevant to the case (SARS securing Mr Krok's South African assets against an Australian tax liability) was only added after the relevant events, and that the Tax Administration Act upon which SARS also relied was added even later. In support of the second argument, he cited the general rule of interpretation that "in the absence

of express provisions to the contrary, statutes should be construed as affecting future matters only".

Dealing first with the issue of the revenue rule, *Mark Krok* (supra) is a case of particular import because it involved the SCA explicitly placing limitations on the rule and contextualising it in regard to tax treaties. Speaking broadly, the revenue rule states that a revenue authority is not obligated and should not act to enforce the will of a foreign revenue authority. The SCA stated the agreement between countries such as tax treaties could contain clauses which would, in effect, cause the revenue rule to cease to exist. *Carvalho, et al.* (2017, p.22) note the importance of this concept in the context of global convergence, as a strict interpretation of the revenue rule such as Krok espoused would render any tax treaty clauses regarding assistance in tax collection and information sharing unenforceable. Furthermore, the court stated that the revenue rule did not exist for the purpose of protecting taxpayers, which was effectively the manner in which Krok hoped to use it. The court drew on a UK case, *Government of India v Taylor (1955)* in support of this point.

Krok's second argument was also refuted with reference to a foreign case, *Ben Nevis (Holdings) Ltd (2013),* which had been decided by the Court of Appeal of England and Wales ('CAEW'). The court concluded that it was clear that at the point that the new provisions came into effect, they impacted all outstanding tax claims at that point regardless of if the tax had been levied earlier. It is important to note that the court circumvented the general rule on retrospective application by clarifying that the relevant articles were effectively concerned with debt collection and not with the circumstances under which those debts arose, so in fact there was no retrospective application required.

Reviewing the matter of *Krok* (supra), both elements of the decision made use of foreign cases. With regard to whether convergence made for a better decision, as noted above, to apply the law as Krok requested would have rendered many cooperative elements of treaties unenforceable, and the use of foreign cases supported the defeat of this argument which was clearly contrary to both the principles of global convergence and the intent of the contracting states. Accordingly, convergence does appear to have led to a desirable outcome and indeed an outcome which further supports the practical application of converging tax concepts in tax collection.

Continuing with the theme of retrospective application, *Carvalho, et al*. (2017, p.23) make reference to the cases *Cohen Brothers Furniture (Pty) Ltd and Another V Minister of Finance*

(1998) and *ITC 1544 (1992).* Both cases deal with the concept of dividend withholding tax based on nationality.

In the case of *ITC 1544* (supra), the court determined that to impose non-resident shareholders tax ("NSRT") on a Netherlands-based, non-South African company was contrary to the provisions of s25(1) of the 1971 South Africa Netherlands Double Taxation Convention, which effectively prohibited the contracting states from placing a greater tax burden on non-nationals for no reason other than nationality. *ITC 1544* (supra) itself did not deal with matters of retrospective application, but was drawn on by *Cohen* (supra) which did, and is accordingly worth brief comment in this context.

Additionally, in terms of the larger issue of convergence, *ITC 1544 (supra)* did draw upon foreign precedent to resolve the matter at hand, making use of the foreign case *Ostime (Inspector of Taxes) v Australian Provident Society (1960)* to confirm the principle that terms of a Double Tax Convention on which statutory status has been conferred are to be considered with identical weight to any "natural" statutory provisions. In the case of *ITC 1544* (supra), this was sufficient to support that the NSRT contravened the Double Tax Convention and that the taxpayer was correct to dispute it.

Cohen (supra) drew upon *ITC 1544* (supra) in dealing with a similar matter of withholding taxes (by extension drawing upon the foreign case of *Ostime* (supra)), but was further complicated by the issue of retrospective application.

In the case of *Cohen* (supra), a South African company received dividends from a Ciskei subsidiary and was subject to a withholding tax as a result of the Ciskei legislation. In apparent direct response to the findings of *ITC 1544* (supra), the government of Ciskei changed the basis of the taxation from one of nationality (a so-called "external company") to one based on the factual location of the effective management of a company. Through this decree (Income Tax Amendment 2 of 1993), the government effectively circumvented the *ITC 1544* (supra) argument as regards discrimination of nationality. This was further complicated by the fact that the government explicitly made Income Tax Amendment 2 retrospective to 1985.

In the context of *Cohen* (supra), the withholding tax had been deducted in 1991. The question now became whether the Amendment passed in 1993 in response to a case decided in 1992, with retrospective application to 1985 would prevent the taxpayer from applying the *ITC 1544* (supra) argument for tax deducted in 1991.

The fact that the amendment if applied fully retrospectively would make the *ITC 1544* (supra) argument null and void was not in dispute, but ironically, the taxpayer turned to yet another foreign case (Wijesuriya v Amit, 1965) in their defence (*Cohen*, supra, p. 11)

In *Wijesuriya* (supra), heard in Ceylon (now Sri Lanka), the court concluded that while a specifically-retrospective amendment must necessarily be applied retrospectively, it should only be applied to legitimize already-collected taxes. While the court in *Cohen* (supra, p.11) did not object to the use of a foreign case, they decided that the taxpayer sought to "stretch" this finding by claiming that "the Commissioner had to show that the pre-existing collection and enforcement machinery could apply to the case of past unpaid taxes without modifications and violence to the scheme of the Act" which was not part of the Wijesuriya finding. Accordingly the taxpayer lost the case.

While both *Cohen* (supra) and *ITC 1544* (supra) showed the court's willingness to consider foreign cases, in support of the factual existence of convergence, the further question of whether convergence improved the quality of the rulings remains. With reference to the already-established criteria:

i) *Constitutionally:* neither *Cohen* (supra) nor *ITC 1544 (*supra) is an especially constitutional issue, except insofar as section nine of the Constitution prohibits discrimination on various grounds including social origin and birth. Accordingly, the principle of not discriminating based on nationality raised by the Double Tax Convention supported in *ITC 1544* (supra) is in line with constitutional principles. Given that *ITC 1544* (supra) was in turn supported by the foreign case *Ostime* (Supra). This suggests that use of foreign cases was indirectly supportive of constitutional goals, or at least of a double taxation agreement which was in line with constitutional goals.

ii) *Economically:* Both cases may be considered to have economic impact from the perspective that withholding taxes which penalise foreign shareholders may reduce foreign direct investment to the detriment of the economy. This was clearly a key facet of *ITC 1544* (supra). While *Cohen* (supra) effectively found in favour of the withholding tax, it related to Ciskei, a so-called "homeland", which no longer exists (nor was ever internationally recognised). *ITC 1544* (supra), in contrast, benefited foreign shareholders from the Netherlands as a major European

country. *ITC 1544* (supra) retains greater economic relevance than the decision in *Cohen*.

iii) *Socially*: Neither case appears to have particularly strong social implications

iv) *Internationally*: Linked to the above point on economic impact, withholding taxes against foreign investors are not desirable in the international market.

v) *Theoretically*: *ITC 1544* (supra) and its foreign links to *Ostime* (supra) are theoretically sound. The idea that a tax treaty or convention given statutory weight must be considered equal to "natural" statues is logical, since any other decision would defeat the purpose of giving the treaty statutory power and strike at the underlying basis of all such tax treaties. It would be disadvantageous to a foreign country to consent to a treaty knowing that the terms of the treaty would always be given "second-class-status" versus the local legislation.

However, while *ITC 1544* (supra) is an example of foreign law applied to the benefit of the matter, the actions of the taxpayer in *Cohen* (supra) by applying *Wijesuriya* (supra) are more questionable. If the *Wijesuriya* principle had been imported into South Africa law, it would effectively limit all retrospective legislation to the role of legitimizing already-gathered taxes. In effect, the purpose of a retrospective application would be only to acknowledge that the revenue authority had erred in collecting taxes under the law at the time while simultaneously ratifying and legalizing their actions. This does not appear theoretically or logically desirable. Fortunately, the court did not agree with this interpretation, however they refuted the taxpayer's interpretation based on the facts of the *Wijesuriya* (supra) ruling rather than on its foreign nature alone.

In conclusion, the cases of *Cohen* (supra) and *ITC 1544* (supra) indicate that like any local precedent, foreign cases can be a two-edged sword. They can logically support the power of treaties, like *Ostime* (supra) *in ITC 1544* (supra) or they can unnecessarily narrow the power of retrospective legislation, like *Wijesuriya* (supra) in *Cohen* (supra). However, as the court demonstrated in the matter of *Cohen* (supra), by logically assessing the foreign decision and the taxpayer's interpretation thereof, it is still possible to identify and discount invalid reasoning regardless of its foreign or local source.

2.4 Case Review: Reliance on foreign court judgments to define the meaning of specific terms and language

Despite the best intentions of drafters and judges, there are inevitably sections in law and precedent where the meaning of a given statement is unclear. *Natal Joint Municipal Pension Fund v Endumeni Municipality (2012)* provides one of the best recent summaries of the approach to be taken when interpreting ambiguous phrasing as follows:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation." (*Natal Joint Municipal Pension Fund,* supra, p.15)

To summarize this lengthy commentary, the approach begins with the ordinary meaning of the language and the context it is found in, before moving on to the apparent purpose of the wording and the material known to the writer. In effect, the first two points deal with the use of language in an abstract sense, while the second two go towards the motives of the draftsman.

In following this approach, the first resort of the court is often the dictionary definition of a word as an apparently entirely neutral and unbiased source. The qualifier of "apparently" is made because as dictionaries are updated, the definitions and usage of specific terms change in line with the norms of the culture around them and may no longer carry the same meaning as they did when used by the writer. Consider for example, the term "Lord" which in its original form refers to a nobleman (who in some cases might have received a title as a result of serving in the judiciary, but most often would not have) in its usage in many modern courts, who continue to use the term even in countries which entirely lack a noble class structure – such as South Africa itself.

So if a dictionary definition is a convenient starting point, but may sometimes lack the additional legal context required, the next logical source is definitions as provided in other cases. In the context of convergence, the question obviously becomes whether one can draw only on local cases or if foreign sources are appropriate.

This question has already been raised earlier in this paper with reference to *Epstein* (supra*)* in which Centrilives CJ explicitly noted that a definition of English law was inappropriate with reference to a South African case. Specifically, the respondent attempted to use the British case of *Grainger & Son v Gough (1986)* to import the concept that "trade" is a narrower concept within the larger concept of business dealing specifically with buying and selling. Centrilives CJ's reasoning was that within UK law at the time, trade and business were treated as separate concepts but South African law showed no such distinction or that one was intended. If not for this conclusion, one need only consider the consequences in the use of the word "trade" in s11(a) of the Income Tax Act referred only to business which bought and sold goods, thus abruptly denying the general deduction to all service businesses and other profit-making ventures. It is perhaps in response to such risks that the act as written now contains a specific definition of trade to make it abundantly clear the *Grainger* approach is not appropriate.

So when drawing on foreign cases for definitions of language, one must bear in mind that the benefits of added legal context (particularly when dealing with new or rare concepts, which may only have been tested in law elsewhere in the world) are counterbalanced by the risks of incorrectly carrying over part of that definition which has a different meaning in its original context. Fortunately as *Natal Joint Municipal Pension Fund* (supra) makes clear, the meaning of a word is only one of a number of indicators when interpreting legislature and the judge is perfectly within their rights to do as Centrilives did in *Epstein* (supra) and override the foreign definition.

In the context of whether convergence is **desirable** when looking at the usage of terms, the question is thus whether historical cases have generally used foreign definitions appropriately and disallowed inappropriate ones.

In the case of *Tradehold Limited v SARS* (2012), the issue raised was whether the use of the word "alienation" in a tax treaty between South Africa and Luxembourg included deemed disposals of assets in terms of the Eighth Schedule. If such disposals were included, then the

treaty would prevent SARS from levying tax on the disposal of certain assets if Luxembourg had already taxed them.

In support of the argument that deemed disposals were not part of the definition of alienation, SARS drew on the well-founded British dictum of Cave J in *R vs Norfolk County Council*, (1891) to deal with the definition and characteristics of "deeming". Cave stated that when something is deemed to be something else, it is implicitly confirmed that it is specifically **not** the thing it is deemed to be. In the context of the case, SARS argued that anything deemed as a disposal in terms of the Eighth Schedule was not factually a disposal or alienation and so should not be considered as such outside the specific ambit of the Eighth Schedule (*Tradehold Limited*, supra, p. 7).

While Cave's dictum is indeed of use when considering the nature of deemed items, the court referred to the case of *Downing v Secretary for Inland Revenue* (1975) which in turn made reference to the Australian case of *Ostime* (supra) noting that treaties make use of "international tax language" in their writing rather than only the specific meanings of either country's domestic laws. *Carvalho, et al.* (supra, p. 17) comment that the mere existence of the concept of "international tax language", and its acceptance by SA courts, is a strong argument for the factual existence of convergence. The court further directly cited *Ostime* (supra) as a "helpful approach" for looking at the correlation between local laws and treaties which stated that the first step in interpretation was to determine which section of the treaty governed it and then to determine if the tax could be imposed without breaking the obligations of the affected treaty section. In effect, this point of *Ostime* made in 1959 in Australia, shares common logic with the domestic ruling of *Natal Joint Municipal Pension Fund* (supra) in 2012, by referring the context of the words and the intentions and circumstances of the treaty.

Based upon this conclusion, the court determined that as the Eighth Schedule was in existence at the time of the treaty's writing and that capital gains tax was included within the ambit of that treaty, the intentions of the writers had been to use the term of "alienation" broadly including deemed disposals, and so SARS' argument was flawed.

Interestingly, it can be seen here that an attempt by SARS to apply a foreign definition of deeming was in turn defeated by foreign guidance on how the language of treaties should be interpreted. Effectively, the court's conclusion implies not that SARS was incorrect to draw on a British definition, but that in a treaty situation the use of the language in context of the

treaty "trumps" its context in any domestic law. This does also make logical sense that as treaties are the result of negotiation, no one side is likely to be able to consistently enforce its own interpretation on all terms and as a result of this push-and-pull, terms may end up being used in ways unlike either country would use them domestically.

Moving on to the case of *ITC 1364 (1980),* a taxpayer who had emigrated from the UK was required as a result of a separate agreement to maintain his ex-wife at a set income level post-tax. His argument was that this was effectively double taxation as he was paying tax on his own income and then having to pay sufficient pre-tax income to his wife to cover her British tax obligations. In refuting this argument, the court drew on a British case (*Canadian Eagle Oil Co Ltd v R, 1945*) to assess the definition of double taxation in which the court concluded that "the normal meaning of double taxation is that the same person pays tax twice on his income". On this basis, the taxpayer's argument was refuted as he was paying his wife's tax rather than being taxed twice. In this case, the use of a foreign case to define double taxation was clearly advantageous. Given the term of double taxation is one which primarily applies in an international context, it might also be argued that a foreign definition is more applicable for it than for a purely domestic term.

Lastly and most recently, there is the case of *AB LLC and BD Holdings LLC v SARS (2015)*. In this case, an airline consultancy based overseas faced taxation on the basis that it had created a permanent establishment in South Africa. Without exploring the full details of the case which are covered by *Carvalho, et al.* (2017*)* in depth, the primary implications in the context of foreign law are that the definition of permanent establishment itself drew on a foreign case (*De Beers Consolidated Mines Ltd v Howe,* Surveyor of Taxes, 1906, p. 3) in which the court concluded that a company "resides" where the real business is carried on and that real business refers to where the management and control is located and that core question resolved down in part to the usage of the word "include" in the treaty when listing examples of situations which qualified as permanent establishments to which the court again resorted to a foreign source, being an Indian case (*Dilsworth v Commissioner of Stamps*, 1899). In *Dilsworth* (supra), Lord Watson focused on the "enlarging" nature of the term "include" stating that when words are included, it is understood that the interpretation and connotation of these words is included as well. Clearly, in the case of *AB Holdings* (supra), the foreign courts were relied upon considerably as a source – the relative age of the cases is also noteworthy bearing in mind that both were over a century old at the time of *AB Holdings*

(supra), which suggests that in the eyes of the court they were providing relatively timeless points about language and logic rather than specifics of their legal circumstances.

In conclusion it appears that the desirability of using foreign cases for definitions of language and terms depends greatly on context. The preferred test of this paper in terms of constitutional, economic, social, international and theoretical desirability is not of particular use in this context due the fundamental nature of language in law. Depending on the statement of which a word forms part (and which laws and cases that statement belongs to), the meaning of a word can have wildly varying and far-reaching impacts across all five aspects.

In review of the cases discussed, while there appear to be risks with using foreign language, the principles of interpretation and context laid down by *Natal Joint Municipal Pension Fund* (supra) and others are sufficient to safeguard against negative outcomes. To put it in another way, when a court seeks to define language using foreign cases, it is already likely to be in a situation in which considerable interpretation is required and accordingly "sensitised" to the need to apply judgment and context. This in turn reduces the risk of a foreign definition being applied blindly out-of-context as that would contravene the existing interpretation principles.

Theoretically, a court could seek specific definitions for every word in every case placed before it. The practical nature of circumstances are that the meanings of words are largely commonly understood and that it is only in specific unusual cases that a formal definition is required, and that these cases **are** specific and unusual reduces the risk of a conclusion being based purely on a definition without context.

2.5 Case Review: The use of foreign court judgments for principles of law and business

The previous section dealt purely with the meaning of words and language in particular context. However, in any scenario, there can be principles which are understood as "normal practice". These may originate from a legal standpoint (such as "*ignorantia juris non excusat*" more commonly known as "ignorance of the law is no defence" which is widely applied in many legal systems without being explicitly stated in their laws) or they may be less formal principles specific to individual industries.

In the forum of taxation, *Carvalho, et al.* (2017, p.25-26) draw upon the example of *ITC 1503* (1990). In this case, the taxpayer was a foreign airline with a local branch, whose practice

was to transfer any excess funds from its South African bank account to a foreign bank account on a weekly basis so has to keep as much of its funds abroad as possible. The South African account did earn interest, but according to the taxpayer and supported by the facts, they did not change their transfer policy in response to any changes in interest earned.

The taxpayer was entitled under a double tax agreement to treat "all income derived from the business of sea or air transport between the Union of South Africa and other countries" as exempt. The taxpayer argued that the interest earned on their local account was derived from their air transport while SARS opposed this. So the question in terms of principles of business was whether the taxpayer's behaviour was normal behaviour for a company with excess funds or indicative of a second business operation outside air transport.

While the key question revolved around the principle of whether their income was derived from air transport, the court also felt the need to define the term revenue. It is not entirely clear why the court felt it necessary to define so fundamental a term, except perhaps because of the implications of the definition they chose from the *Stroud Judicial Dictionary Vol IV* (p 2287 5th edition) which they noted came from a foreign case (*LMS Railway v Anglo Scottish Railways Assessment Authority 150 LT 361*) and ran:

> '"Revenue" in relation to a business undertaking connotes those earnings of the undertaking which are the product of **or are incidental** to the normal workings of the undertaking.' (own emphasis)

The impact of using this foreign definition is to reframe the concept of interest income being derived in terms of whether the local account and its related interest were incidental to the normal airline operations (which they clearly were).

One might argue that while the use of a definition based on *LMS Railway* (supra) provides this useful perspective and is indicative of convergence, it is not necessarily indicative of **desirable** convergence. Is it really necessary to draw from a Scottish railway case to define revenue, and it is appropriate to carry elements of its wording across when South African law provides enough definition already?

However, such an argument can be easily refuted, as the court went on to note that a number of local cases had a similar approach (*ITC* 1048 26 SATC 226 at 227-8; *Commissioner for Inland Revenue v Black* 1957(3) SA 536(A) at 543.1 and *Commissioner of Taxes v William Dunn & Co Ltd* 1918 AD 607,167). The implications are clear: the use of a foreign definition

gave an answer which was congruent with local law, it was merely a useful phrasing, and accordingly it is an example of desirable convergence.

Returning from the revenue definition to the key question of in what circumstances income would be considered derived, the court drew at length from the British case *Reid's Brewery Co v Male, (1891).* In this case, a brewery extended credit and loans to its customers to such an extent that it effectively had a small money-lending department. However, these loans were not permanent investments and were only in relation to the relevant customer's dealings and transactions. The court found that this loan "side-business" was still part of the main business and not separate capital investment.

Based on this finding, the court found in the case of *ITC 1503* (supra) that the interest was ancillary and incidental to the air transport business and found in favour of the taxpayer.

As regards whether the convergence evidenced by relying on foreign cases was desirable, it clearly was in terms of basic business and banking practice – if any business holding excess cash reserves in a current account and earning interest would be deemed to be carrying on a side-business as an investor/lender, the implications would be impractical and absurd. The court recognised this explicitly saying in their judgment that "to hold otherwise would be to render the conduct of the business impossible".

Based on the above, it appears that consistent with the findings under 2.4 as regards language, convergence with regard to principles of law and business exists and results in desirable outcomes when carefully applied (and in the case of the use of *LMS Railway* (supra), with support from local sources were appropriate).

2.6 Conclusion

Looking back over the review of case law, it is useful to sum up the results by category.

Role of Source and Residency: The greatest number of cases over the longest time period was found under this category. *Epstein* (supra) and *Lever Brothers* (supra) both had majority judgments which did not draw on foreign law but featured minority judgments which did, summarized for convenience as "pro-Centlivres" and "pro-Schreiner" respectively. So in the case of these older judgments, convergence did not actually occur (as the majority judgment was non-convergent).

However, the convergent arguments raised by Schreiner may still have been desirable. In an attempt to determine if the foreign-supported judgment of Schreiner was actually more desirable, subsequent cases on similar issues were reviewed to see if the eventual consensus agreed with his findings.

Liquidator, Rhodesia Metals Ltd (supra), *Overseas Trust Corporation Ltd* (supra), *Black* (supra), *British United Shoe Machinery (SA) Pty Ltd* (supra) and *Transvaal Associated Hide and Skin Merchants* (supra) all followed similar principles to Schreiner's foreign-backed findings, suggesting that his perspective has "stood the test of time" and so benefited from reliance on foreign perspectives. This also suggests a general factual shift towards a more-convergent approach over time.

Schreiner's view was also found to be superior from an economic, social, international and theoretical perspective (with the opposing views being interchangeable from a constitutional perspective). The cases reviewed in the context of source and residency thus support the conclusion that convergence is desirable.

Retrospective Application: Krok (supra) showed the court making use of two foreign cases to refute the taxpayer's position and clarify the purpose of the revenue rule in light of tax treaties and the impact of retrospective application on debt collection. Given that the taxpayer's arguments would have negatively impacted the information-sharing sections of all tax treaties, this is clearly a desirable outcome with explicit convergence occurring.

The cases of *Cohen* (supra) and *ITC 1544* (supra) both dealt with withholding dividends tax and foreign shareholders and in both cases convergence in the form of use of foreign cases factually occured. Overall the outcomes based on foreign cases were found to be constitutionally, economically, internationally and theoretically desirable (with no strong social implications) in that they prevented discrimination or findings which would discourage foreign investment. All the retrospective application cases thus show a desirable result from convergence.

Meaning of terms and language: Epstein (supra) shows a judge ruling that use of a foreign case to interpret language was inappropriate due the nuances of the different legal systems. *Tradehold Limited* (supra) had foreign cases on both sides, with SARS relying on the British case *R vs Norfolk County Council* (supra) for the definition of "deeming" while the court referred to the Australian *Ostime* (supra) to note the existence of "international tax language"

where words may have commonly-understood implications in international context which differ from their domestic uses.

While the above cases paint an ambiguous view of the usefulness of foreign cases for defining terms, *ITC 1364* (supra) and *AB Holdings* (supra) both relied on foreign cases to assess the definitions and usage of "double taxation" and "include" with no contradiction or controversy. With all of the cases except *Epstein* (supra) allowing the use of foreign cases, it appears clear that convergence has occurred. The desirability of using foreign cases is more in question (particular in the case of *Tradehold* (supra) with foreign cases on both sides of the debate) In conclusion, it was noted that there are risks in using foreign cases to interpret the meaning of language, but that these risks can be managed by application of the principles of interpretation laid out in *Natal Joint Municipal Pension Fund* (supra) and accordingly their use is desirable.

Principles of Law and Business: Lastly, *ITC 1503* (supra) drew on foreign cases to define "revenue" and to assess whether interest earned was derived from a main business or a separate undertaking. This foreign-based outcome was desirable as the opposing view was explicitly noted by the court as would have made "the conduct of the business impossible".

In conclusion, the case review appears to have shown that convergence is definitely occurring with only a few older cases ruling against using a foreign case due purely to its foreign nature (and even those cases, *Epstein* (supra) and *Lever Bros* (supra) had convergent minority judgements). This is not to say that the courts blindly accept foreign cases, but rather than it appears a foreign case is subject to the same treatment as a domestic case when assessing its relevance and value.

In terms of desirability, the use of foreign cases is almost unreservedly beneficial for purely legal issues like source/residency and retrospective application, while it is a more double-edged sword when dealing with issues of language and common business practice (which may be more subject to subtle differences between various cultures). However, this double-edged sword can still be wielded beneficially so long as the court is sensitive to this added layer of complexity and considers it when deciding whether to apply a foreign usage.

Chapter 3 – Arguments for and against Convergence

3.1 Introduction

This chapter constitutes an assessment of the arguments for and against convergence as a positive force. For the sake of convenience, from this point arguments "for" and "against" convergence shall be deemed to be referring only to its *desirability*, not its existence (as that has been covered at length in chapter 2).

Arguments Raised by US Sources

3.1.1 Overview of US sources

An immediate advantage of US papers as source is the sheer volume of them and the relative ease of access, with many published by US universities as free to read. While quantity is not automatically the same as quality, this does allow for easy comparison of a variety of perspectives. This is further supported by those US articles written in partnership with other institutions worldwide to provide a more global perspective. The US sources are also perhaps the easiest to group for the purposes of argument, given their focus on qualitative discussion points.

While the US may have a wealth of available material, its perspective is less immediately transferable than other sources. It lacks the advantage of having gone through a focused convergence process (as opposed to EU sources) and it also maintains substantial legal, accounting and political differences from the rest of the world. This can be seen clearly in terms of accounting practices, where the United States maintains US GAAP while South Africa and most other countries worldwide comply with IFRS, and with VAT which the US has declined to adopt in opposition to the global trend towards it. The US is also obviously economically very different from South Africa in terms of size and strength.

3.1.2 Arguments for Convergence: US

While this chapter is focused on the consequences of convergence rather than its existence, there are degrees of dissension as to what extent of convergence exists and what it really "means". At one extreme, *Leviner* (2014) quotes Avi-Yonah in *International Tax as International Law: An Analysis of the International Tax Regime 1 (2007),* stating that:

> "[A] coherent international tax regime exists, embodied in both the tax treaty network and in domestic laws, and that it forms a significant part of international law . . . The practical implication is that countries are not free to adopt any international tax rules they please, but rather operate in the context of the regime, which changes in the same way international law changes over time. Thus, unilateral action is possible, but is also restricted, and countries are generally reluctant to take unilateral actions that violate the basic norms that underlie the regime." (Leviner, 2014, p. 223)

So in this context, there is a clearly-understood global income tax "framework" which does not necessarily provide rules for every occasion but guides the behaviour of states in a convergent fashion.

At the other extreme, *Marian* (2010) is concerned with the relative immaturity and lack of "self-consciousness" in comparisons between international tax law, noting that:

> "for hundreds of years, legal practices and ideas have circulated…it is possible to accept a 'common core' formed during centuries-long processes of borrowing…however this assumption is doubtful in comparative tax…Individual income taxation, in its modern form, is barely 200 years old. Taxation of corporate entities dates back about a hundred years. VAT...is merely sixty years old…on the scale of legal history, still an infant." (Marian, 2010, p. 468)

So Marian's case is that tax as a relatively "young" body of law, cannot be expected to have converged on principles to the same extent as other bodies of law, and even in a converging environment we cannot assume we all speak the same "international tax language" referenced in *Ostime* (supra) in chapter 2.

Current tax convergence is submitted to fit between the two extremes. Avi-Yonah himself in *Tax Convergence and Globalisation* (2010) notes that "if one compares any two national tax law (*sic*), the most obvious finding is divergence" (Avi-Yonah, 2010, p. 1) and while Marian's point about the youth of tax is accepted, the rise of globalisation and e-commerce should substantially decrease the amount of time required to come to a common understanding, particularly compared to the spread of Roman civil law across the Ancient World.

So we can assume that convergence includes the spread of a common tax language and principles but that this is an ongoing process and there are still areas of "mistranslation" that will occur even in a convergent environment. *Marian* (2010, p. 451) provides a particularly good example, noting that an American tax scholar would probably assume US tax administration and Saudi Arabian tax administration, if not the same, could at least be reasonably compared in terms both sides would understand. Unfortunately, under Saudi law, Saudi nationals do not pay tax and are instead subject to the Islamic law requirement of "Zakat", which requires charitable giving to the needy. So at this extreme example, we have a case where one would struggle to get agreement between two countries on the principle of what a tax *is*, much less how to administer it.

So the example of Zakat provides one obvious potential benefit to further tax convergence: the greater the degree of convergence, the less presumed "mistranslations" in international tax language can occur – and it seems a reasonable assumption that mistranslation and miscommunication is **always** undesirable as it is inefficient and can lead to incorrect or contradictory goals being achieved.

Avi-Yonah (2010, p. 5) further explains how convergence has led to a movement to handle dividends through exemption rather than imputation/credits, which is more efficient as it prevents certain dividend-stripping arrangements and does not prejudice domestic or foreign shareholders. Here we see convergence causing a superior tax solution to spread globally.

In terms of tax competition, tax sparing and tax arbitrage, *Avi-Yonah* (2010, p. 5) considers tax convergence to be a primary tool in preventing tax arbitrage (the dividend imputation issue is basically a subset of this problem) which is of considerable benefit, particularly considering that in an arbitrage situation **both** taxing states are exploited/disadvantaged by a taxpayer exploiting the system, as opposed to tax competition where at least one state is involved/complicit.

Speaking in more detail about the dynamics behind tax competition, *Leviner* (supra, p. 214) observes that globalisation causes reduced trade barriers, which increases capital mobility and tax competition and arbitrage as businesses and other high-capital taxpayers move to the best tax locations (in other words, tax competition or arbitrage occurs). A natural result of this mobile capital is the governments increased reliance on payroll taxes and consumption taxes

which are less easily transferred. Countries globally thus converge on increased payroll and consumption taxes to preserve their revenue bases.

In response to the dropping of trade barriers and globalisation (a force tax law is unlikely to be able to reverse), the tax mix has shifted in favour of consumption taxes over income taxes to ensure revenue remains consistent and through convergence, this approach has spread across the world. *Avi-Yonah* (2006, p. 1) cites Joseph Banksman and David Weisbach in their paper, *the Superiority of an Ideal Consumption Tax over an Ideal Income Tax (2006)* where they argue that consumption taxes like VAT are better than income taxes because they:

i) Do not discriminate between current and future consumption;
ii) Are as good at redistribution of wealth as income taxes; and,
iii) Are considerably easy to administer and less complex.

If this perspective is correct, then the adoption of consumption taxes through tax convergence would be an unqualified success. However, there are disadvantages to the increased use of consumption taxing. *Leviner* (supra, p. 218) also quotes Avi-Yonah in a different paper *Globalisation, Tax Competition and the Fiscal Crisis of the Welfare State (2000)* where he notes that consumption and payroll taxes are "socially regressive".

The regressive nature of consumption and payroll taxes is only logical. These taxes are attractive because it is harder for people to shift their consumption overseas (particularly if they are in lower income brackets) and it is also harder for employees to control in which country their employer chooses to pay them. In effect, what has been achieved is that as companies, wealthy individuals and employers (those with the power to move freely) remove their value from the tax base, we have increased the tax base on the poorer, conventionally-employed members of society who are trapped where they are. This is supported by economic research by various papers worldwide and locally, such as *An Analysis of South Africa's Value Added Tax* (Delfin, et al., 2005, p. 19) which characterises VAT in South Africa as "mildly regressive" (but does note that it can be restructured to be less regressive).

Accordingly, consumption taxes are not inherently negative, but it is important to bear in mind that while they have solved one problem, they run the risk of creating another one and this risk must be managed. *Avi-Yonah* (2006, p. 20) also notes the important symbolic value

of income taxation in forcing the rich to "pay their fair share": increased capital mobility and tax competition advantages to the wealthy risks undermining faith in the system as a whole.

However, while the consumption/payroll tax solution has some problems, it is not the only tool tax convergence can bring to bear. *Avi-Yonah* (2010, p.3) observes that the international tax community has also clamped down on the mobility of capital by reducing the requirements for a taxpayer to be "trapped" by a permanent establishment and increased the provisions to tax foreign investment vehicles and Controlled Foreign Companies (CFCs). It is telling that in 1980, just before globalisation is commonly considered to have begun in earnest, there was a clear split between countries that taxed on a worldwide basis and those that tax on a source basis (including South Africa itself) and very few provisions to tax CFC-type arrangements. By 2010, almost all countries (including South Africa, again) tax on a worldwide basis and many CFC-type provisions have been introduced *Avi-Yonah* (2010, p.3).

So while consumption and payroll taxes have provided a partial solution to fleeing capital, the international tax community has also been converging to use new techniques to stop capital from moving so freely and solve the underlying problem.

Avi-Yonah (2006, p. 7-8) also raises an interesting point with regard to convergent tax behaviour during and after World War II among OECD members. During the war, the governments naturally increased taxes in a crisis response to make sure they had sufficient funds. However, after the war, rather than reduce taxes again (as happened to some degree after WW I), they used the increased revenue to offer increased social insurance and cover in the form of universal pension and health insurance. These programmes began in the post-war "flush" when the governments would have been collecting taxation at the crisis-level but reducing wartime spending. As this artificial cash boon was gradually utilised and as the pressures of globalisation mounted, rather than increase income taxes still higher (and leave themselves open to tax competition), they adopted consumption taxes which allowed them to maintain their social commitment. Here we can again see states moving in a convergent manner to solve a common problem. One could argue that the solution of consumption taxing was a logical one which each country would have adopted in complete isolation with no need for convergence, but while theoretically possible, this view seems practically implausible, particularly given that one notes that countries outside this geographically-close and convergent group (most obviously the US) did not adopt universal social care schemes and

also have not adopted VAT. The far more likely answer is that, again, a good solution to a given set of circumstances was propagated through convergent tax systems.

Having discussed specific examples of convergence in history and its positive (if sometimes qualified) outcomes, it may now be useful to assess convergence from a more theoretical perspective. Speaking broadly about desirability in tax, *Avi-Yonah* (2006, p.3) defines the three goals of taxation as:

i) To gather revenue
ii) To redistribute wealth
iii) To regulate behaviour (particularly corporate behaviour)

This view is supported by *Tanzi* (2010, p. 1) who notes that the popular view of taxation as a pure revenue-gathering tool is "a little detached from reality" in light of the policy implications of taxation and the non-tax ways governments can raise funds (of which government bonds are the most obvious).

Dean (supra, p. 152) identifies three costs of tax complexity:

i) Rule complexity (the cost incurred by taxpayers to understand tax legislation)
ii) Compliance complexity (the cost incurred by taxpayers to comply with said)
iii) Transaction complexity (the lost efficiencies by taxpayers' structuring business operations in non-optimal ways to pursue tax benefit)

Obviously, Dean's costs of complexity can be restated as *benefits* of simplicity. So the question becomes, does tax convergence help achieve these?

i) *Gathering of revenue* – as discussed in the example of mobile capital, tax convergence allowed a response to a reducing capital base caused by factors outside its control (since globalisation is caused by more factors than just tax: most obviously technology) to recover lost revenue and reduce mobility of capital for tax purposes.
ii) *Redistribution of wealth* – taxes are already tools for the redistribution of wealth in a domestic sense; tax convergence merely makes them more effective. If one considers the classic example of the wealthy businessman moving funds off-shore,

tax convergence makes this harder by reducing mobility of capital and by encouraging information-sharing. Accordingly, it allows wealth to be redistributed in line with state policy which might otherwise escape the revenue authorities.

iii) *To regulate behaviour* – in no different way than companies might move overseas to countries with lax labour laws, companies may attempt to escape behaviour constraints by moving overseas. The most obvious example would be polluters moving to areas with less developed carbon taxation systems. Converging taxation systems would prevent these escapes, and indeed many such models already work on a system of trading carbon credits from low-polluters to high-polluters: convergence just allows a smoother global market.

iv) *Simplicity* – Initially, the changes to domestic legislation and/or increases and alterations to tax treaties will increase complexity in cases. But as more tax systems come in line, these costs reduce and the costs of trying to reconcile multiple irreconcilable tax systems fall away. This should address rule and compliance complexity, and by reducing opportunities for tax arbitrage, convergence also reduces transaction complexity.

In conclusion, this section has assessed what it means to be convergent (and to what extent we can reasonably converge), cited specific examples where convergence has led to positive outcomes, and then assessed how convergence leads towards theoretically optimal goals for taxation.

3.1.3 Arguments against Convergence: US

While there are advantages to convergence, there are also obviously downsides. As already noted, some convergent solutions (such as use of consumption and payroll taxes) are not without their negative aspects. *Leviner* (supra, p. 211) quotes *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 Va. Tax Rev. 133, 203 (Marian 2012) that "much as a comparative approach is desirable, it is also dangerous if ill-executed. Bad comparisons produce inaccurate guidance that may not bring about the desired results". Leviner expands on this, noting the risks of transplanting tax policy decisions without sufficient understanding – to put it another way, convergence can spread an inefficient and destructive tax solution as fast as a beneficial one – and that an oversimplified view of the differing needs of tax regimes may mean one cannot tell the difference until it is too late.

Even if a spreading tax approach is not outright destructive, *Tanzi* (1995, p. 133) observes that convergence reduces the freedom of a country to control its own tax policy and that this may be particularly damaging for smaller countries with less global influence when compelled to converge with a tax approach which is not in their best interests.

Tanzi (supra, p. 134-137) refers to this effect in Europe as "tax degradation". He also notes that with the shift in taxable income from source to worldwide basis, there are administrative complexities in detecting unreported worldwide income. On the one hand, tax convergence (particularly in the form of information-sharing sections in tax treaties) makes it easier to track unreported income, but on the other hand, that same convergence may make it easier for taxpayers to move between increasingly-similar tax regimes. There is thus effectively a race between the forces of globalisation and convergence making it easier for taxpayers to move around, and also making it easier for tax authorities to track them. Particularly in countries with relatively weak tax administration, they may have the theoretical power to track the taxpayers (as a result of treaties) but lack the resources to practically exercise it.

A practical example is transfer pricing: while the concept of establishing arms-length prices is relatively well-established, there are still substantial practical challenges to agreeing on tests and examples. In such circumstances, there is a disproportionate challenge to the tax authority to prove that prices used by taxpayers are not arms-length. Given the expertise in their chosen fields (particularly those taxpayers large enough to contribute to industry norms), it may be extremely difficult for tax authorities to prove that transfer prices used by taxpayers are unreasonable, unless they are obviously absurd. Similarly, in *Tax Systems in the OECD: Recent Evolution, Competition and Convergence* (2010, p. 13-14), Tanzi notes that the convergent reduction in trade barriers and focus on "self-reporting" taxes like VAT may also have opened up new opportunities for tax evasion and tax fraud, particularly the case of "fake exports" within EU countries, where taxpayers may abuse self-reporting to either misrepresent local sales as zero-rated exports or even wholesale fabricate them, with the goal of claiming net VAT input from the tax authority.

While Tanzi may have provided multiple examples of challenges in convergent scenarios, it is interesting to note that he concludes by noting that many of these could be overcome by a more global taxation system monitored by a global authority with enforcement powers and notes that "perhaps the time has come to establish one" (Tanzi , 1995, p. 140).

While the primary focus of the above disadvantages has been around inefficiencies and the possibility for abuse, there are also strains on any convergent tax environment because of inherently conflicting goals. *Leviner* (supra, p. 219) references Michael Livingston in *From Mumbai to Shanghai with a Side Trip to Washington: China, India, and the Future of Progressive Taxation in an Asian-Led World,* (2010), noting that tax policy has a number of potentially conflicting goals:

- Progressivity
- Economic efficiency
- Simplicity
- Ease of administration
- Competiveness with other nations

Furthermore, he also references Kathryn James in *An Examination of Convergence and Resistance in Global Tax Reform Trends,* (2010) that above and beyond these goals, taxation is also "fundamentally about the rules of the game that determine, amongst other things, the level of social spending in society, the distribution of property among social groups and the concentration of power" (Leviner, 2014, p. 225).

Many of these conflicting responsibilities exist merely in *domestic* taxation, but in a convergent international environment, the issue is further magnified when trying to establish a coherent tax approach that balances the conflicting goals of countries on both an internal and external level. It is almost inevitable that some goals will lose out, and as noted by Tanzi earlier, the smaller countries are more likely to suffer. To take it a step further, if one considers that in a smaller, less-developed country an ethically-desirable goal like "progressivity" is likely to take a backseat to practically-desirable ones which will increase resources for development like "ease of administration", the logical conclusion is that the goals most likely to be disadvantaged by a conflict of needs resulting from global convergence will be the most ethically-desirable goals in the most vulnerable societies.

Even if the goals can be balanced in an optimal manner, some writers question whether it may be accurately assessed as to what is progressive or regressive for a given society. *Marian* (2010, p. 465) argues that it may not even be possible to agree on a definition of progressivity. If, as he posits, it is at least partly related to redistributing wealth (consistent with one of Avi-Yonah's goals of taxation as cited under the advantages section) then what does that mean to individual countries? He cites Italy, India and Israel as three examples of

relatively mature tax regimes with differing focus of redistribution: with Italy focused on wage earners, India on supporting the agricultural sector and Israel on pursuing social ideologies.

Marian's argument would conclude that it is not currently possible to define progressive tax law in an international, impartial context, much less to achieve it. However, *Avi-Yonah* (2006, p.12-14) provides at least some philosophical guidance. He explains that there are different perspectives on measuring welfare: some argue that any increase in total welfare in society is optimal, while others place differing values on improved welfare at different levels of society (generally prioritising improvements in welfare of the poor). Phrased another way, a tax law which provides one rand (or dollar…etc…) of value to a poorer economic sector is superior to one that provides that same value to a wealthier one, because *the poor value that rand/dollar more. Tanzi* (2010, p. 20-21) makes a similar argument (though at the upper end of the wealth/success scale) where he notes that taxes designed to encourage or discourage behaviours at the top levels of given structures may actually have more effect on those on their way to those positions rather than those actually there, who are sufficiently secure that a marginal increase in tax will not affect their behaviour. To put it another way, there are certain levels of wealth which are more or less sensitive to tax changes than others. Returning to *Avi-Yonah* (2006, p. 14), he goes on to observe that welfarist arguments focus only on the benefit of consumed/used wealth but that there are also arguments for redistribution that are more fundamentally related to concepts of equality.

Avi-Yonah asks why one would want to redistribute wealth more evenly, if one discards the initial emotional appeal to fairness as a concept. He explains that there are at least two arguments that greater equality of wealth is desirable in a democratic society. The first is that in democracy, all sources of power should ultimately be accountable to the people. Private accumulations of wealth provide power which is not accountable because it is outside any democratic process, and it is by tax-based redistribution that this power can made accountable to the people (for example, by electing left-leaning politicians who increase taxes on the wealthy and social welfare). The second argument against excessive private accumulation of wealth is based on what he calls "complex equality" – which is to say, that every social "sphere" of influence should have its own principles and priorities and that power in one sphere does not automatically translate in power to another (Avi-Yonah, 2006, pp. 15-16).

Obviously, one example of this would be that wealth is a dominant sphere and that it can and is used to accrue illegitimate power in other spheres such as politics. The more extreme the accumulation of wealth in the hands of a small group, the greater these distortions become and taxation is one method to address this (Avi-Yonah, 2006, p. 17). That is not to say that accumulation of wealth is inherently undesirable, only that in extreme cases there may be a need for redistribution to prevent worse outcomes, and taxation is a method of redistribution. Equally, there are methods of wealth redistribution which are undesirable because they violate more fundamental tenets of society, such as land seizures and evictions by force.

While Avi-Yonah's arguments stray from the arena of tax into the realms of economics and moral philosophy, the point is that *Marian* (2010, p.465) may be mistaken when he argues that determining what is progressive is subjectively linked to individual societies – there are ways to identify certain concepts "from first principles" as desirable regardless of social context.

Avi-Yonah's arguments provide a counterpoint to Marian's case, but he is not the only one to raise the concern that convergence cannot be beneficial in a world of differing countries. There are many examples, particularly of cultural differences, which merit review and Avi-Yonah's techniques provide useful insight in extreme examples (like the example of wealth creating political corruption) and less effective with more nuanced scenarios. *Dean* (2009, p. 128) observes that the tax landscape is considerably less homogenous than it was a century ago – when he argues the foundations of much of the international tax landscape and early tax treaties were established (the first treaty being agreed between England and Switzerland in 1872 to address double taxation of death duties).

Dean's view of the tax landscape as initially homogenous is predicated on the concept that initial tax treaties and principles were set up by a relatively small group in an era of colonial power who could enforce transplanted tax principles of their colonies (and later, tax treaties complicated by the East-West tension of the cold war). He argues that with those artificial constraints forcing homogenous behaviour gone, the idea of harmonizing between different states is not practical (Dean, 2009, p. 126).

While Dean may have a good point about the eras in which many tax treaties were conceived, that is perhaps more of an argument to review and update them rather than to dismiss them as useless. With regard to his comments on countries being less homogenous, *Leviner* (supra, p. 224) argues that there are increased similarities between countries in the globalised era not

because countries are all alike, but because globalisation "levels the playing field". To put it another way, our shared common ground is growing at a faster rate than our cultural differences.

That said, the concerns Dean raises do have still merit – *Marian* (2010, p. 22) also notes that convergence runs the risk of being Eurocentric. Even if one discounts Dean's historic concerns, the relative power of the EU could still result in an excessively Eurocentric international tax regime, which goes back to *Leviner's* (supra, p. 211) concerns at the start of this section that convergence can spread a destructive (or in this case, culturally-biased) form of taxation just as easily as a beneficial one. Even *Avi-Yonah* (2010, p.5) arguing in favour of convergence agrees that "tax laws cannot and should not be completely harmonized". He does however observe that "there are reasons to decry tax convergence, if one believes that cultural diversity is important…however, one should remember that tax convergence is a relatively narrow phenomenon".

So it is clear there is some debate on the degree to which tax can influence societies and the cultural impact it has. On the one side, Avi-Yonah clearly feels the benefits of convergence outweigh the downsides, and cautions against alarmist assumptions that tax convergence has a dramatic impact on cultures. On the other hand, Leviner and Kathryn James have made reference to the power of taxation to set "the rules of the game" which suggests a strong cultural impact. To look closer at this issue of tax and culture and whether tax is affects a country's culture as a whole or is a "narrower" issue, it is useful to consider *Marian* (supra, p.423) quoting Michael Livingston's *From Milan to Mumbai, Changing in Tel-Aviv: Reflections of Progressive Taxation and "Progressive" Politics in a Globalised but Still Local World* (2006) who identifies "tax culture" as a subset of overall culture, being the "body of beliefs and practices shared by tax practitioners and policy makers" which "provide the background or context in which substantive tax decisions are made". Marian (supra, p. 431) also refers to the *legal formants approach* developed by Rodolfo Sacco in *Legal Formants: A Dynamic Approach to Comparative Law* (1991), which similarly suggests that there are a small group of tax role-players in a society and their cultural perspective influences tax law. *Leviner* (supra, p.225) also supports the view of tax as having a "narrower" influence, stating that "in any jurisdiction law is but one piece of a broader cultural puzzle"

As the focus moves from risks of tax to the interactions between tax and culture, it is useful to consider Likhovski's *Chasing Ghosts: On Writing Cultural Histories of Tax Law* (2011) which focuses in on the tax-cultural interactions in two very specific periods in history: the enforcement of British-style taxation in Palestine at the start of the twentieth century and the debate over tax privacy in late-eighteenth/early-nineteenth century Britain. Likhovski (supra, p. 849) considers law and culture to be "mutually constitutive", meaning law "both reflects and constitutes culture" as part of a "single feedback loop".

In the case of Palestine, Likhovski explains some of the cultural challenges finding a tax system which reconciled the differences between Jewish, Arabian and European attitudes to wealth and consumption. Part of these discrepancies were due to social norms on what a person was expected to pay for and what support they could expect from their community, as well as what luxuries were important and how they were priced and lastly moral norms around business practice, bribery and tax evasion. While some of the concerns raised at the time of British rule were obviously products of the era and cultural perspectives around race and nationality, even accounting for bias that there were significant fundamental cultural differences that made enforcing a tax regime more challenging (Likhovski, 2011, pp. 857-858).

On the other hand, while Likhovski discusses the challenges that cultural differences created in Palestine, he also observes the existence of "invented culture" where culture attitudes would be distorted or exaggerated to legal ends (Likhovski, 2011, p. 851). This was clearly identifiable in the discussion around income tax in Britain in which a discussion about taxation became an issue of privacy. Likhovski (2011, p. 851-852) observes that the concept of privacy in a legal sense was actually a relatively recent invention to resist attempts by the state to gain more access to their private affairs. Before the income tax, British citizens were taxed based on ownership or control of certain wealth signifiers such as: male servants, carriages, houses, windows, lights, dogs, clocks and watches (Likhovski, 2011, pp. 875-876). Looking behind these taxes, Likhovski notes that the effect was that taxation was in some way voluntary because it was driven by the taxpayer's own consumption of luxuries. If one was not inclined to pay taxes, one could live quietly and be ignored, whereas if one craved the trappings of wealth and status then taxation was part of the price. To the British taxpayer a change from this voluntary system to a concept where every coin earned was the business of the state, regardless of what one did with it, would have been an extreme shock.

Accordingly, arguments to resist the new tax focused the intrusion into the taxpayer's private life and the concept of "every Englishman's house being his castle" (Likhovski, 2011, p. 881).

In conclusion then, Likhovski identifies situations in which tax and culture do have direct interactions but he also cautions against more cynical exaggerations of that cultural impact for legal purposes. In the scope of the larger issue of tax convergence having a negative impact on culture, it appears that while one should not discount cultural differences when applying tax principles, convergence is not automatically culturally destructive, nor are cultural differences an insurmountable challenge for it overcome.

Dean (2009, p.127-130) is concerned about the ability of convergence to deal with differing cultures and the potential damage caused by applying blanket solutions due to a simplified perspective of the global landscape. As Dean argues, tax systems respond to unique social and administrative pressures and so cannot effectively converge. His proposed solution to this is what he refers to as tax deharmonisation which he defines as "international tax cooperation that calls cooperating states to fill complementary roles". Using the definition of tax convergence established in Chapter 1 of this paper, his "deharmonisation" is effectively another form of convergence and a rejection of tax uniformity. *Marian* (2010, p. 438-439) also makes reference to a similar approach proposed by Anthony Infanti in *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the US International Regime* (2002) which he calls "tax coordination". Marian also notes that (much like Dean) Infanti rejects a version of tax harmonisation which in the "general discourse" would be referred to as "outright unification of laws" and that Infanti's tax coordination would likely be considered by the general discourse to be tax harmonisation.

Regardless of the terms used, what Dean (2009, p. 156) proposes is that states adopt tax regimes which complement each other rather than attempting to create an overarching common regime. He argues that sharing revenue duties between complementary systems makes far more sense than each revenue authority conducting all the same roles: comparing it to requiring each member of a community to grow all their own food. *Tanzi* (2004, p.13) unintentionally provides an example when discussing Latin America (and particularly Argentina) explaining that developing countries need higher taxes to raise more funds to develop, but lack the administrative framework to spend the funds as efficiently as countries which are already developed.

One of Dean's own examples is the Southern African Customs Union which facilitates the collection and sharing of tax revenues between South Africa, Botswana, Lesotho, Namibia and Swaziland where South Africa uses its superior administration facilities to administer customs-related taxes for itself and the other Union members (Dean, 2009, p. 134). While one might assume South Africa would abuse its administrative powers to take a larger slice of revenue, it actually takes a lower proportion of revenue that it ostensibly deserves (Dean, 2009, p. 164). According to Dean, this is because the benefits of having the free trade zone the agreement allows provide a greater benefit to the relatively-advanced South African economy that its smaller neighbours. While this would appear to be a perfect example of Dean's deharmonisation, he notes that there appears to be a need to obscure it with a "veneer of harmonisation", with the SACU agreement being revised in 2002 to remove South Africa's control and make the parties involved equal, at least on paper. However, since the revision, South Africa has continued to maintain the same administrative role without change (Dean, 2009, p. 127). While one can understand Dean's frustration with a change to an agreement which appears to have no effect except to create the appearance of equality, it is worth noting that while asymmetric cooperation can definitely be beneficial, there is a very human resistance to situations which are seen as "unjust" and put one party above the others. One could well argue that if a "veneer of harmonisation" makes asymmetric cooperation more palatable to those involved and their citizens, because it creates the possibility that things could be equal and they have *chosen* to give another increased authority, then where exactly is the harm?

Similarly, Dean (2009, p.136) observes that many information-sharing clauses of tax treaties are "formally reciprocal" but in practical terms the information is likely to flow one way (particularly if the agreement is between a large developed country like the US, and a smaller potential tax haven – while the US will want to know about its taxpayers structuring their businesses through the haven, the haven is unlikely to be concerned about its citizens running away to America for tax reasons). Again though, if formal equality and the "illusion of symmetry" is useful in negotiating such treaties, there appears to be no disadvantage – and perhaps one day after changes in both countries' economies and tax regimes, the information may indeed flow the other way.

Matters of appearance notwithstanding, Dean (2009, p. 137; 162-164) divides his concept of deharmonisation into two categories: administrative deharmonisation and base deharmonisation. Administrative deharmonisation is the less "radical" of the two, envisioning

two parties sharing or pooling administrative resources. Dean considers tax treaty information-sharing to be one such example of administrative deharmonisation. In effect, the parties share some of the administrative burden of collecting revenue (as there is a time and opportunity cost to supplying a treaty partner with information, with no immediate payback).

Conversely, base deharmonisation involves actively pooling and sharing revenue as SACU does. As Dean (2009, p.137) puts it, it "calls for states to share the benefits of cooperation in the same way that they share the burdens". Besides SACU, Dean (2009, p.149) notes that carbon emission taxes are one potential example of this scenario, with states having differing levels of involvement and cost (based on their administrative frameworks and their polluting infrastructure) but sharing in the benefit of improved environmental conditions and even "selling" carbon credits between partners where necessary to balance the scales.

Administrative deharmonisation can be said to already exist on an increasingly large scale, due to the aforementioned move in favour of information-sharing. While base deharmonisation is an appealing concept, one concern could be that in order to construct a lasting asymmetrical cooperation scenario such as Dean describes may in fact require greater insight and understanding into different tax systems and cultures than a symmetrical one. Consider the relative difficulty of setting "ground rules" between a group of individuals where all are forced to abide by them, compared to setting rules which give certain individuals additional duties and privileges in certain scenarios – which is likely to take longer? In some ways, the cultural complexities which Dean argues are the weakness of conventional convergence may be even more damaging in attempting to negotiate a base deharmonisation scenario. SACU certainly shows that this is not impossible, but it is worth noting that this case involves a relatively small group with a clearly dominant member, and only covers a particular type of revenue.

One could argue that this kind of in-depth understanding wouldn't be necessary to create an asymmetric base deharmonised agreement, and that if each party just negotiated for terms that made sense for their specific circumstances, they would arrive at the ideal outcome (what Marian (2010, p.439) quotes as Infanti's "spontaneous coordination"). However, it must be noted that this seems extremely close to the economic theory of allowing "the invisible hand" to guide us to an optimum outcome – and indeed, if it were that easy, why has it not already occurred as part of normal tax treaty negotiation?

3.2 EU Sources

3.2.1 Overview of EU Sources

EU sources have a practical advantage over US sources, in that the simple existence of the EU is an enormous force of convergence on numerous fronts, not even merely taxation. While the EU formally came into existence in 1993, its predecessors, the European Coal and Steel Community (ECSC) and European Economic Community (EEC) have existed since the 1950s and one can accordingly argue that policy convergence (in one form or another) has been heavily on the mind of the European community for well over fifty years. This also allows for a more quantitative analysis of actual convergence trends.

In the following section, there is thus the opportunity to contrast the theoretical views raised by the US sources with the historical experience of the EU while undergoing convergence, to prove or disprove the hopes or fears raised in relation to a converging world of tax.

3.2.2 Arguments for Convergence: EU

Delago (1998) provides a cluster analysis of EU countries over the period 1965 to 2003. Delago explicitly refers to the possibility of Germany serving as a leader country influencing EU policy, concluding that there is some evidence of a catching-up to Germany's approach but the only long-run convergence to Germany's lead is from Austria (Delagdo Rivero, 1998, p. 7). This goes some way to refuting *Tanzi* (1995, p 134) raising the concern that smaller countries may be dominated by larger ones. That said, from a more world-wide perspective, *Challenges in Designing Competitive Tax Systems - Tax Reform Trends in OECD Countries.* finds that there is evidence that larger economies like the US and Japan have more "effective sovereignty" over their tax policies (OECD, 2011, p. 3). Overall, it appears there is some merit in Tanzi's concerns but that it is a relatively gentle effect as opposed to a "tax dictatorship" of large economies over smaller ones.

Also in favour of convergence being a "gentle effect", *Delago* (1998, p. 9) notes that while some countries (Sweden, Finland, Greece, Luxembourg, Ireland. Italy and the Netherlands) have converged more over the time period, there are others (Denmark, Germany and Portugal) who have actually diverged more. It appears that tax convergence is not a one-way street, nor is it an insurmountable force. This is further supported by his cluster analysis (summarised below in table form), which shows five separate clusters. Delago (1998, p. 9)

focuses on two main aspects: the "fiscal pressure" (or tax burden) on citizens, and the proportion of those taxes which are used for social contributions:

Groups	1965	2003	Characteristics
1	Germany, Austria, Belgium, France, Netherlands, Italy, Luxembourg	Germany, Greece, Netherlands, Portugal, Spain	Fiscal pressure below average, less social contributions as proportion of taxes levied
2	Denmark, Finland, Sweden, United Kingdom	Austria, France, Italy	Fiscal pressure above average, less social contrib
3	Portugal, Spain	Belgium, Finland, Luxembourg, Sweden	Fiscal pressure above average,more social contributions
4	Greece, Ireland	Ireland, United Kingdom	Fiscal pressure below average,very low social contributions as proportion of taxes levied
5	—	Denmark	Fiscal pressure very high but lowest social contributions as prop of taxes

While one might expect a simple split between more socialist countries (with higher social welfare and higher taxes to support them) and those with lower taxes and welfare programs, there are actually a number of combinations. Also, rather than converging on a few popular methods, there is considerable movement between all the clusters (with only Germany, Ireland and the Netherlands remaining in the same cluster in both time periods).

Counter to *Dean* (supra, p. 151)'s concerns about tax uniformity, it appears that the convergence leads to small "tax clubs" of similar countries, rather than one universal order. This may also address some of the cultural challenges raised by *Likhovski* (supra) and others: rather than an artificial "one-fits-all" solution, a country in a converging environment can choose from a field of options that best fits its specific cultural and economic needs.

Vintila and Tibulca (2012, p.4) complete a similar cluster analysis to Delago as summarised below.

Without focusing on the detail of comparing the two sets of quantitative findings (which is outside the scope of this paper) both papers agree on the overall principles of there being multiple clusters with movement back and forth between them over time.

No	Comment	1965	1973	1981	1986	1995		2007	2010
1	Medium to high fiscal pressure, equal reliance on goods and services tax and social security contrib, little direct tax	Germany, Netherlands, Luxembourg	Germany, Netherlands, Luxembourg, France, Italy, Belgium	Germany, Netherlands, Luxembourg, France, Italy, Belgium, Greece	Germany, Netherlands, France, Italy, Greece, Portugal, Spain	Germany, Netherlands, Italy, Greece, Portugal, Spain, Austria	Belgium, Czech Rep, Germany, Estonia, Spain, France, Italy, Hungary, Netherlands, Austria, Finland, Luxembourg	Belgium, Czech Rep, Germany, Spain, France, Italy, Netherlands, Austria, Finland, Luxembourg	Belgium, Germany, Spain, France, Italy, Netherlands, Austria, Finland, Luxembourg
2	High fiscal pressure, high direct tax	France, Italy, Belgium	Ireland, UK, Denmark	Ireland, UK, Denmark	Ireland, UK, Denmark, Belgium, Luxembourg	Denmark, Luxembourg, Finland, Sweden, UK, Belgium	Denmark, Luxembourg, Finland, Sweden, UK, Ireland	Denmark, Ireland, Sweden, UK, Cyprus, Matla	Denmark, Ireland, Sweden, UK, Matla
3	Low to medium fiscal pressure, similar reliance on direct and goods/services tax plus social contrib					Ireland, France	Bulgaria, Greece, Cyprus, Latvia, Lithuania, Malta, Portugal, Romania	Bulgaria, Greece, Latvia, Lithuania, Portugal, Romania, Estonia, Hungary, Poland, Slovenia, Slovakia	Bulgaria, Greece, Latvia, Lithuania, Portugal, Romania, Estonia, Hungary, Poland, Slovenia, Slovakia, Czech

Moving away from cluster analysis studies and into more general comment from EU sources, Carl Fernlund, speaking on the methodology of the EU court in unharmonised regions, makes reference to the EU court's use of the EU "fundamental freedoms" as a benchmark against which the EU assesses unharmonised taxation (Fernlund, 2017). This is reminiscent of *Avi-Yonah* (2007) as quoted by *Leviner* (2014, p. 223) in the US sources section, describing the existence of an international tax regime in the form of basic norms that countries are reluctant to overrule rather than an explicit framework of rules. The application of the fundamental freedoms in an EU context seems consistent with this idea of maintaining "principle consistency" without requiring "rule consistency".

OECD (2011, p.1) agrees with this assessment, noting that of the 34 member states in the OECD, there are more similarities than differences in their tax regimes. They also observe the general focus on tax structures which "make work pay" – which is to say, make it easier for lower-income households to enter the job market and uplift themselves (OECD, 2011, pp. 4-5). This approach to redistribution also appears in line with *Avi-Yonah* (2006, p. 14) and his

theories on redistribution prioritising the poorer as they value a marginal increase in wealth more.

The OECD also considers the bywords of good reformed tax systems to be fairness, simplicity and transparency and focus on these values to maintain taxpayer confidence in tax systems (OECD, 2011, p.13). *Dean* (supra, p.127) might still argue the benefits of asymmetrical coordination and dismiss the "veneer of harmonisation" but in practical terms it appears vital that at least some appearance of equality is maintained for taxpayer trust. There may also simply be a practical problem that asymmetric coordination is a more complex set of relationships and thus harder to make "simple" and "transparent". One can hope, however, that examples like SACU show that asymmetric solutions are still possible in more specific and localised circumstances.

3.2.3 Arguments against Convergence: EU

Turning now to the EU perspectives on the downsides of convergence, Rudolf Mellinghof (Mellinghof, 2017) provides the perspective from Germany that there are numerous challenges to applying foreign court principles and cases in other countries:

- language barriers and risk of mistranslation
- finding resources for foreign cases
- insufficient knowledge of foreign jurisdiction to interpret cases

Mellinghof also notes that given foreign cases are not binding but may be persuasive, which means their use is largely at the discretion of the court. If the court has not made its view on foreign cases clear, litigants may be unwilling to risk building an argument on something that the court may disregard entirely. That said, Mellinghof does also observe that there are a number of advantages to convergence when these challenges are overcome:

- increased legal certainty and predictability between jurisdictions
- efficient use of resources (arguments not needing to be repeated in a domestic context just to become relevant)
- better coordination of international law
- better interpretation of domestic law (on the assumption that additional perspectives from other countries can improve the dialogue on legal issues)

John Avery Jones (Jones, 2017) also cites difficulties in dealing with foreign translations when applying foreign cases in the UK as well as when the ruling gives insufficient detail for the reasoning behind it (which is an existing problem in interpreting domestic judgments, but may be aggravated if a foreign court leaves out what they consider common local knowledge). While alive to these challenges, Jones is overall in favour of convergence, noting that it is inconsistent for states to "agree with the interpretative provisions of the Vienna Convention and then ignore the main source of supplementary means of interpretation in this area". He does elaborate that "convergence is desirable in principle but not an end in itself", stressing the importance of analysis and context when applying foreign principles (not unlike the principles laid down by *Natal Joint Municipal Pension Fund* (2012) as discussed in chapter 2). Jones also summarises the findings of other papers on references to foreign decisions prepared for the conference he was speaking at: with Argentina, Italy, Germany, Spain, Russian and Brazil not giving foreign decisions much regard while Canada, the UK, New Zealand, Sweden, India and South Africa were given as states paying more attention but with some way to go.

It is interesting to note that some of the states listed as not converging have be used by other authors as examples of converging, but it should be highlighted that this conference was focused purely on case law referencing, which is only one form of convergence. Indeed, Jones also discusses that there is a healthy tradition of citing common law principles across multiple jurisdictions which is an alternate (and often less controversial) form of convergence and also quoting Viscount Dilhorne in *James Buchanan & Co Ltd v Babco Forwarding and Shipping Ltd* ([1977] 3 All ER 1048, 1060) that:

> "If a corpus of law had grown up overseas which laid down the meaning of [a particular treaty provision], our courts would no doubt follow it for the sake of the uniformity which it is the object of the convention to establish."

Much like Mellinghof, Jones appears to see the benefit in making interpretation more consistent and predictable and using all available resources. He does however note wryly that convergence does not always lead to a simpler answer and can even create a kind of "analysis paralysis", explaining that "my favourite example is where a UK court referred to 30 decisions of continental European courts leading to 12 different interpretations of the *Convention on the Contract for the International Carriage of Goods by Road* (Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd. [1997] 1 WLR 625)." It should be pointed out though, that this sort of over-analysis is no stranger to domestic law – arguably the only complication

unique to convergence is that domestic law generally still has a clear hierarchy of which courts overrule others while there is no "Global Court of Supreme Appeal for Tax" to clarify where a decision from one state fits in relation to another.

Lastly, *Bird* (supra, p.3) provides a historical perspective from a European writer but about matters outside the EU: more specifically on the successes and failures of taxation over fifty years in the developing world. According to *Bird* (supra, p.7), the imposing of taxation in developing countries has undergone notable (and unsuccessful) phases. The first model being defined as an income tax based on economics literature of the 1950s and 60s which largely failed to improve tax gathering in the 1970s and 1980s. Model two was the application of consumption taxes like VAT which he considers to be driven primarily by the "Washington Consensus" – being ten proposed points of a standardised economic reform for developing countries proposed in 1989 by John Williamson. (Wikipedia, 2018). There is a strong theme in Bird's paper of the developing world serving as a "test bed" for first world economists to deploy their current preferred economic solutions – while he considers the VAT model to have been more successful, he comments that it may be considered *"to be either a fine example of how good tax research can influence tax policy or a horrible instance of how the rich and powerful can and do employ research selectively to support their personal interests"* (Bird, 2013, p. 7). Regardless, he now posits the arrival of a third model of custom-built tax solutions for developing countries, as opposed to the transplantation of over-simplified "silver bullet solutions" (Bird, 2013, p. 14). This does seem to support *Dean* (supra) and his argument that cultures and countries differ too greatly for convergence solutions: though one might raise the question of whether a "custom-built" solution might still be constructed from a variety of generally-agreed modular tax concepts: thus combining the benefits of flexibility and consistency. It also worth referring back to *Marian* (supra, p. 468) and his comments on the relative youth of income taxation: the failure of previous models may just be a natural learning process for circumstances that are still relatively new in their current forms and not a sign that that tax authorities are doomed to continue to search for silver bullets.

Commenting on other writers, *Bird* (supra, p.8) references Kaldor in his paper, *'Will Underdeveloped Countries Learn to Tax?'* (1963) that there is a natural tendency towards fiscal inertia because *"the main reason taxes have not gone up in most countries is not because circumstances make it difficult, but because it is seldom in the interest of those who dominate the political institutions to increase taxes".* According to *Bird* (supra, p.8), this causes economists to default to the "always unwelcome medicine of fiscal Puritanism" by

recommending the simple and conservative approach of spending less funds and improving tax collection.

Bird is also skeptical of the OECD, stating that despite a "mountain of empirical studies" only a few "small mice of agreement have yet emerged from the mountain" (Bird, 2013, p. 8). This point is arguable given the findings of *Vintila and Tibulca* (2012) and *Delago* (1998) referred to earlier, who clearly do show convergence on principles is occurring. It may be though that this convergence is more spontaneous due to circumstances than actively planned and arranged (much like *Infanti's* "spontaneous coordination" referred to by *Marian* (supra)). Bird makes a similar point, observing that according to Babcock and Loewenstein's paper *Explaining Bargaining Impasse: the Role of Self-Serving Biases* (1997) "there are many problems which people are unable to solve in the abstract, but are able to solve when placed in a real-world context" and suggesting international taxation may be one of these (Bird, 2013, p. 10). He also comments that *Tanzi* (1995)'s recommendation for an international tax organisation is "several giant steps closer to world government" than anyone is likely to go in the near future (Bird, 2013, p. 10). Overall, while Bird appears skeptical of coordinated external policies being implemented, he does seem to suggest that "soft governance" like the OECD appears to work well: which is consistent with *Avi-Yonah* (2007) as quoted by *Leviner* (supra) and as discussed earlier in this section: "principle consistency" over "rule consistency".

3.3 SA Sources

3.3.1 Overview of SA Sources

Most obviously, articles written by South African authors (or foreign authors specifically about South Africa) have the advantage of being focused on the South African perspective. They also avoid any risk of conclusions generated from specific elements of foreign law or economic policy which could be misleading if applied to South Africa. Lastly, they have the advantage of implicitly including the social, legal and economic ramifications of post-Apartheid South Africa which still have a dramatic impact on the country and which have no recent first-world equivalent. There are some corollaries with other countries with high wealth gaps and "positive discrimination laws" equivalent to Black Economic Empowerment, but a South African article can be reasonably expected to have those issues implicit in the discourse.

Unfortunately, compared to the US and EU, there is a relative shortage of SA sources. Accordingly, besides analysing those sources that were identified, this section highlights and refers back to US and EU sources which are particularly relevant to a South African context.

3.3.2 Arguments for Convergence: SA

West, speaking from a South African perspective on convergence and divergence in BRICS countries, (West, 2017) comments on the case of *Downing* (supra) referred to back in chapter 2, confirming that the court found that treaties must by necessity override domestic law and that modified domestic methods of interpretation must be used when interpreting a treaty so long as they do not extend into reading concepts into the treaty which do not exist. This view, combined with the reference of the court to an "international tax language", shows a clear conclusion of the court in favour of convergence both existing and being a useful and necessary part of managing international tax matters.

In a paper on the same issue, *South Africa: Tendencies in case law concerning cross-border tax disputes in BRICS Countries* (West, 2016, p. 65), West concludes that "there is an obvious need to develop clear and common meaning in treaty interpretation" and that this may be a project that could be pursued within the BRICS group.

Various writers have raised the issues of creating a tax regime convergent with international principles while also reconciling domestic cultural and economic differences. Even with the racially-charged, high-wealth-gap environment created post-Apartheid, South Africa is arguably not as culturally divergent from international norms as British Palestine, as referenced by *Likhovski* (supra), or Saudi Arabian Zakat as referenced by *Marian* (supra). In fact, US writer William Baker, cites South Africa's adoption of CGT to promote democratic policy post-Apartheid, as an effective example how a country can use tax reform to "redefine itself a democratic nation" (Baker, 2005, p. 103). Baker notes the initially-convergent and relatively-unique situation that South African civil law comes from Dutch tradition, while its common law is British in origin – as he puts it, South Africa already combined two "legal families" (Baker, 2005, p. 108). *Baker* (2005, p.114) also speaks approvingly of how "the government of South Africa carefully considered the experience of other countries in deciding how to reform its own tax system", painting a picture of South Africa's ability to cherry-pick effectively from global law in the best interests of a reinvented national identity.

Earlier, *Dean* (supra) cited the Southern African Customs Union as an example of South Africa coordinating and cooperating effectively with other tax regimes. Similarly, South

Africa has also adopted VAT successfully in line with global trends. Overall, these examples depict South Africa as generally successful in converging with global trends, not to mention the case law review chapter of this paper, which generally concluded that South African courts made use of foreign decisions effectively and to the benefit of their findings. South Africa's success is also noteworthy if one considers that the artificial isolation of sanctions during the Apartheid era could have made the return to a more globalised world stage devastatingly disruptive, but there has been no evidence of such. Looking at other potential convergence risks raised, the language barrier concern of *Jones* (supra) is relatively minor given the legal and business language of South Africa is predominantly English.

One of the principle advantages of convergence as a weapon against tax competition is also of particular value given South Africa's geographic proximity to Mauritius as a notorious tax haven. Admittedly, in today's globalised world, travel times are not that pressing a concern but it would still be practically far easier for a South African-based company to maintain a front in Mauritius by commuting for necessary board and management decisions in an attempt to avoid tax than it would be for a more distant company.

South Africa's relatively recent legal reinvention also allows it to merge smoothly with current legal trends without as much legacy disruption – for example, the recent focus on carbon taxes is consistent with the South African Constitution's provisions on environmental issues. The Constitution itself is widely considered to be one of the most progressive in the world, though there is dispute on whether the country has lived up to its promise (*Oechsli & Walker*, 2015).

It should be noted that in recent years there have been significant concerns raised about disruption to SARS as a revenue-gathering and administrative unit under the leadership of President Jacob Zuma, as widely covered in local media as well as various non-fiction works (most recently including *The President's Keepers* written by journalist Jacques Pauw (Pauw, 2017)) and the locally-infamous scandal around the possible existence of a "rogue unit" in SARS, described by Johann van Loggerenberg in his book, *Rogue: The Inside Story of SARS's Elite Crime-Busting Unit* as a deliberate attempt to destroy the credibility and management structures of SARS which posed a threat to political insiders (van Loggerenberg & Lackay, 2016). While the recent interactions between the executive, SARS and the media could serve as a paper in themselves, there is definitely a risk that disruptions to SARS and government operations may make future convergence far less effective than the previous

attempts that Baker and Dean praise. That said (and again something that could arguably serve as paper in itself), Zuma has spent a significant amount of his presidency in court in one form or another up to and including his landmark loss in the Constitutional Court at the end of 2017 (Hampton, 2017), which generally paints a picture of a robust judiciary willing to hold the executive branch to account and maintain legal principle despite strong political pressure. One can only hope this trend is maintained.

3.3.3 Arguments against Convergence: SA

Moving on to the risks and concerns raised about convergence, *Tanzi* (1995, p.113) raised concerns about smaller countries being dominated in a convergent situation to adopt tax regimes not in their best interests. This may apply to South Africa, but then again as evidenced by *Dean* (supra) SACU shows SA itself as geographically dominant in Southern Africa. A larger concern may be in the context of BRICS, where South Africa is by far the smallest economy by GDP with a 2016 GDP of $294.84 billion versus its next-largest rival of Brazil at $1.8 **trillion -** to say nothing of China's $11.2 trillion. (Global Times CN, 2017)

A simple example of a potential conflict has been raised in Integritax, *Transfer Pricing – India Experience,* (Grant Thorton, 2014). The author notes that of the BRICS countries, India is widely considered to have the greatest experience with transfer pricing and has expressly committed to assisting SARS with guidance and training on the issue. The concern raised is that South Africa's current guidelines are largely based on OECD principles, while India is not a member of the OECD and applies different principles. In a conflict between the OECD and India on principle, SA might reasonably decide to side with its economic ally which might cause either an isolated or general split from OECD guidelines – or perhaps worst of all, an unwieldly combination based on the respective bargaining power of prospective mentors. Given the sheer volume of Indian case law (and its shared British civil law background with South Africa), it is definitely within the realm of plausibility that the BRICS relationship could cause India's approach to dominate South African interpretations across a number of areas.

West (2017) also notes that despite having 75 tax treaties SA is still lacking in case law. One possible explanation he raises is that amended legislation allows cross-border disputes to be settled by revenue authorities outside of court, thus reducing the number of issues which make it to public record. While this may be cost-effective and efficient, it may be hard to successfully converge with another approach with so little evidence of the current policy and

approach. One might argue that one could simply assume all outside court situations irrelevant and transplant foreign rules whole, but if there is an existing "unrecorded" approach applied by SARS which *works* (which if disputes are being settled successfully suggests they may be getting something right…) then this could prove hugely disruptive – not to mention *Bird* (supra) and others have already commented on the risk of transplanting foreign law without taking the time to understand the existing domestic situation.

South Africa's Apartheid past is also tailor-made for what *Likhovski* (supra) referred to as "invented culture" (i.e. attempting to use pre-existing racial tensions and accusations of discrimination to derail tax-gathering)

Another cultural issue is that of Broad-Based Black Economic Empowerment: the attempts to redistribute wealth and opportunities to the previously disadvantaged. While spreading wealth to victims of historic prejudice is not a goal unique to South Africa, Apartheid is a particularly explicit and long-standing example of prejudice and it may be that South Africa experiences conflict between attempts to right the historical scales and the larger global approach – conflict which could spill into the tax environment in terms of allowable deductions, treatment of grant funding and other issues.

Lastly, there is the general risk of override as noted by Dean (supra) and others – that South Africa may be forced into convergence that is not in line with its cultural needs. However, West (supra) does note that the Constitution remains supreme and tax issues have indeed been taken to the Constitutional Court. (*Metcash Trading Ltd v Commissioner, South African Revenue Services 2001 (1) SA 1109* and *South African Reserve Bank and Another v Shuttleworth and Another (CCT194/14, CCT199/14) [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) (18 June 2015)* to name two). It is possible that South Africa's progressively-lauded Constitution may serve as a cultural shield to any unwanted side effects of convergence.

3.4 Conclusion

While there is some limited contention as to the existence of an international tax regime as described by *Avi-Yonah* (2007) by authors such as *Marian* (2010) who consider the field of tax functionally too immature for proper conversion, these views appear to be in the minority.

A more contentious issue is whether convergence is practical and desirable when dealing with countries with differing social and administrative pressures (as *Dean* (2009) observes

while rejecting the idea of a consistent global tax approach) and whether applying the same principles across multiple tax regimes can simply spread bad practices as *Leviner* (2014) notes or allow more-economically-powerful countries to spread tax policies that disadvantage weaker ones as *Tanzi* (1995) posits. *Bird* (2013) raises the concern that the historical track record of first-world countries transplanting policies to the developing world is not a strong one, supported by *Likhovski's* (2011) detailed review on the challenges of introducing British taxation policies in culturally-diverse Palestine. This is obviously a major concern for South Africa as a relatively-weak country on the global stage (as well as within the members of BRICS) who could accordingly be subjected to such negative interferences. *Grant Thorton* (2014) provides one immediate possibility by noting how India's influence on South Africa's transfer pricing policies may put it into conflict with the OECD approaches.

Reviewing the data, studies of the European Union by *Delago Rivero* (1998) and *Vintila & Tibula* (2012) suggest that countries are more likely to cluster into small groupings of convergence with relatively-free movement between the clusters over time. This counters the concern of powerful countries creating a unified tax regime and appears more in line with *Bird's* (2013) proposal of a more customizable approach to tax in the developing world. In such a case, South Africa would be able to choose to join a smaller cluster which more closely fits its needs and would be free to move to another cluster should those needs change. *Dean* (2009) provides an existing example of such a cluster (which involves South Africa itself) in the form of the Southern African Customs Union.

These examples provide some factual support that the dangers of convergence may not come to pass, and there are also positive examples of ways that convergence has benefited by spreading effective tax policies like dividend imputation, consumption taxing and reducing tax arbitrage as discussed by *Avi-Yonah* (2010). *Dean* (2009) also discusses at length the ways in which coordination of tax regimes can be more beneficial that outright duplication of the systems of other countries.

Practical difficulties regarding translation and local knowledge are raised by scholars such as *Mellinghoff* (2017) and *Jones* (2017), but both agree on the benefits of convergence and merely note the administrative challenges. This is supported by *West* (2016) who notes a need to develop common ways to interpret treaties and proposes BRICS as a possible forum to facilitate this. While such practical difficulties definitely do exist, *Baker* (2005) notes with approval South Africa's previous successes in marrying differing legal families and choosing

the best policies while reforming its legal system post-Apartheid. These success may be best demonstrated by the robust way in which the court systems have resisted attempted governmental override of revenue authority and the power of the Constitutional Court to ensure that any convergence does not overcome core South African cultural values and needs.

Overall, while the concerns raised about the dangerous of convergence are valid and must remain under consideration, the historical track record largely suggests that these concerns can be mitigated and managed through clustering and other methods and that there are clear benefits to convergence that have been experienced. Similarly the practical difficulties of convergence appear to be raised largely to show the potential challenges of achieving it, rather than to determine that it is not worth achieving.

Chapter 4 – Conclusion: the South African Way Forward with Regard to Convergence

4.1 Purpose of this Conclusion

This conclusion serves to sum up the current factual state of convergence in South Africa and assess desirability both theoretically and as demonstrated by case law. This is followed by brief commentary on possible future outcomes of convergence in South Africa and suggestions for future research.

4.2 Current State of Convergence

The review of case law in chapter 2 showed that across multiple groupings of case law, foreign judgments and principles were accepted by South Africa courts. In some older cases, like *Epstein* (supra) and *Lever Brothers* (supra) the court explicitly discounted foreign judgments as not relevant to South African law, but these cases were contested by minority judgments which did make use of the foreign cases, and moving into more recent cases, the court repeatedly showed a willingness to use foreign cases and judgments on similar issues to *Epstein* (supra) and *Lever Bros* (supra) generally showed a trend towards the minority/foreign-supported approach, suggesting that the foreign-backed view has stood the "test of time" while excluding foreign cases has not.

When considering the meaning of language and common business principles, it was noted by the courts that there are risks to applying foreign cases due to differences of language, culture and practice. However, the courts were not averse to using foreign sources so long as due consideration was given to the cases and their context.

As a general theme, SA courts appear to treat foreign cases with similar regard to domestic ones, despite the fact that they are persuasive rather than binding. When foreign cases are discounted, it is due to distinguishing factors in the facts or disagreement with the reasoning much like any domestic case would be.

Outside the case law review, South Africa's legal tradition already draws on two separate legal families and has successfully integrated themes of international law into its post-Apartheid reforms, as evidences by the adoption of VAT, Capital Gains Tax and the development of the Constitution.

As regards the desirability of convergence: the case law review showed that reliance on foreign decisions generally produced better decisions against the established benchmarks of constitutional, economic, social, international and theoretical desirability. Supportive of the case law conclusion, review of sources on the desirability of convergence generally showed benefits from convergence in preventing tax arbitrage and spreading effective tax solutions, and that the risks of convergence are manageable and have not overwhelmed the benefits, both in the historical example of the EU, and also in a South African context where international aspects of law have been successfully adopted without any evident disadvantages. Perhaps the greatest concern raised was that South Africa might find itself conflicted between adopting taxation principles preferred by the OECD and those preferred by its BRICS partners. While this concern is valid, review of the EU evidence suggests that convergence is not a binary affair, allowing countries to convergence into smaller clusters of like-minded approaches and move between them, rather than being forced to adopt a single approach. This suggests it is possible for South Africa to successfully navigate international pressures as opposed to being dominated by them.

4.3 Likely Future Outcomes

In the immediate future, it appears unlikely South African courts will alter their approach of accepting foreign cases and principles. However, given the comparative rarity of cases which require foreign citation as a pivotal element, this is a relatively slow approach to convergence.

More rapid convergence is likely to come through areas of international negotiation, such as tax treaties and the application/interpretation thereof, as well as cooperative exercises by international bodies to which South Africa subscribes. In the end, this may be for the benefit of South Africa, since this would suggest that convergence of tax law is likely to be a gradual matter of negotiation and collaboration outside the courtroom, rather than being formed by individual contentious cases setting precedent. Accordingly, when such cases to come to court, there may already be a collaborative framework in place, seeking only confirmation by the court – in much the same way the OECD model and Vienna Convention already guide interpretation of tax law without setting absolute rules. This would seem an approach consistent with *Avi-Yonah's* (2007) "international tax regime" as cited by *Leviner* (2014, p.223) – a gentle consensus where "unilateral action is possible, but is also restricted, and

countries are generally reluctant to take unilateral actions that violate the basic norms that underlie the regime".

4.4 Areas for Future Research

As noted by *West* (2016), there is still much work to be done to establish common approaches to treaty interpretation. Similarly, *Mellinghoff* (2017) and *Jones* (2017) citing the language and availability difficulties of relying on foreign cases, show there are other practical obstacles to those seeking to rely on foreign law.

Accordingly, there would be substantial benefit to work assisting in resolving these differences either by documenting and combining approaches to provide common guidelines to interpretation of international law or by creating and improving upon databases of international tax law and cases such as the IBFD. As *Dean* (2009) has pointed out the effectiveness of small cooperative groups like SACU, it may be best to start such projects within existing groups of countries of which South Africa is already a part like SACU itself and BRICS. Accordingly, this may smooth the way towards creating a cluster of convergent tax law which can be more easily absorbed into the larger world.

Given the conclusion of this paper is that convergence in South Africa is occurring and desirable, then the next logical step is to facilitate and smooth the path of such convergence so that the country may reach this desirable outcome faster and more easily.

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