SUBMISSION TO THE MINISTRY OF FINANCE, THE NATIONAL TREASURY AND PLANNING

ON THE QUESTION OF DOUBLE TAXATION AGREEMENTS

In the matter of treaties between Kenya-Barbados and Kenya-Singapore

Tax Justice Network Africa (TJNA) and The East African Tax and Governance Network (EATGN)
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Comments on the Double Tax Agreement between the Government of the Republic of Kenya and the Government of Barbados

1. Article 3: General Definitions

The term 'international traffic' has been defined as '*any transport by ship or aircraft operated by an enterprise which <u>has its place of effective management</u> in a contracting state, except when the ship or aircraft is operated solely between places in the other Contracting State and the enterprise operating the ship or aircraft is not an enterprise of that State'* (emphasis added)

The definition of international traffic to cover transport by enterprises whose place of effective management is in a contracting state opens avenues for tax planning. It is indeed possible that an enterprise that is not resident in Barbados but seeks to obtain the benefit of the treaty may manipulate its senior management operations to ensure that the effective management occurs in Barbados in order to obtain the benefit of the treaty.

Place of effective management has been defined to include *'the place where strategic management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made'*

This definition is, in our view, general and prone to abuse and manipulation. An entity seeking to enjoy treaty benefits can meet this threshold by either ensuring that the senior management offices are located in Barbados or requiring that all board meetings be held in Barbados.

<u>Proposed amendment</u>

In line with the OECD 2017 Model and the UN 2017 Model, we would recommend that:

i) the definition of International traffic be amended to read as follows:

any transport by ship or aircraft operated by an enterprise ~~which has its place of effective management in~~ of a contracting state, except when the ship or aircraft is operated solely between places in the other Contracting State and the enterprise operating the ship or aircraft is not an enterprise of that State'

This definition is in line with some of the more recent DTAs by Barbados (See Article 2 DTA between the Government of Barbados and the Government of the Republic of Singapore-signed in 2013)

ii) We would also propose that the definition of 'place of effective management' be deleted in its entirety and that instead, domestic law provisions of each contracting state be applied in

determining the place of effective management in cases where this is absolutely required (See Article 4 in the DTA between Barbados & Singapore (2013) and DTA between Barbados & Rwanda[1] (2014)

2. *Article 5: Permanent Establishment*

Paragraph 2 of this Article provides a list of the places that shall be determined to be a permanent establishment. The list is borrowed from both the OECD and UN Model double tax treaties. However, the list is by no means exhaustive and parties are at liberty to include other illustrations that relate to their specific circumstances

Proposed amendment.

We would therefore propose inclusion of the following examples:

g. *a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on*
h. *a warehouse in relation to a person providing storage facilities for others; and*

(See Article 5(2) DTA between Barbados- Rwanda)

These illustrations widen and clarify the instances in which a PE exists and should be considered for inclusion.

3. *Article 7: Business Profit*

Paragraph 1 provides for the taxation of profits attributable to the PE. The Article provides that income earned by a Barbados resident will be taxable in Barbados unless the income is attributable to a permanent establishment in Kenya. The UN Model convention proposes a widening of the taxing powers of the source country through a force of attraction rule. The rule allows the source country to tax the income of an enterprise even if it is not attributable to a permanent establishment. Where the rule is applied Kenya would be allowed to tax other business activities of a similar kind as those effected through the permanent establishment.

This is an anti-avoidance provision to ensure that an enterprise resident in one Contracting State does not divert business in the other Contracting State away from the PE in order to ensure that the PE does not reflect the income and therefore does not pay taxes on that amount.

[1] Ratified but not yet in force

Proposed amendment.

For purposes of completeness and ensure there is no ambiguity, we would propose that the standard wording in the UN Model 2017 be applied and that the provision be amended to include the underlined section as below:

1. *The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the 16 Article 7 other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*
   (see Article 7(1) Barbados-Rwanda DTA)

4. Article 8: Shipping and Air Transport

Paragraph 1 provides for the taxation of enterprises carrying out international transport using aircrafts. As noted in Section 1 above discussing the general definitions under Article 3, the use of 'place of effective management' as a criterion for the treaty benefit is likely to be subject to abuse.

Proposed amendment.

In line with the UN Model 2017 as well as earlier proposal to delete reference to place of effective management in the definition of international traffic, we propose that paragraph 1 be amended to read as follows:

> *Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.*

This amendment will reduce the risk of treaty shopping by an airline that creates a place of effective management in Barbados in order to enjoy the resultant treaty benefits.

5. Article 10: Dividends

Paragraph 2 provides for reduced tax rate of 5% for dividends paid to residents of Barbados. The Article however does not provide a threshold of the investment that must be held for the residents to qualify for the reduced rate. To encourage direct investment that is long-term, the provision should

limit the reduced rate to non-portfolio shareholders. Further, to ensure this provision is not abused by non-residents shareholders who by increasing their shareholdings just before dividends are paid in order to obtain the concessional tax rates, a share-holding period can be included. This will limit opportunistic access to reduced source country taxation and help foster genuine longer-term direct investment.

Proposed amendment.

In line with the provisions of the UN Model 2017 and the Companies (Amendment) Act, 2017 in relation to beneficial ownership, we propose that paragraph 2 be replaced with the following provision:

> *2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:*
>
> *(a) 5% per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganization, such as a merger or divisive reorganization, of the company that holds the shares or that pays the dividend); or*
>
> *(b) 10% per cent of the gross amount of the dividends in all other cases.*

6. *Article 22: Donations to Charitable Institutions Capital Gains*

This Article provides for exemption on donations made by a resident of a Contracting State to a Charitable Institution that is situated in the other contracting state. While there is leeway for the Contracting State allowing the deduction to apply any conditions that are already present in its income tax laws there is a risk that this may be abused.

Kenya's Income Tax Act for example, does not specifically provide for exemption for charitable institutions. Instead it has a broad description of entities that may qualify for tax exemption as those that are involved in educational, religious or relief of poverty activities and which are done for the public benefit. While there is leeway for Kenya to restrict the deductions to any conditions that are already present in the Income Tax Act, there is a risk that this may be abused if it is not specified in the Agreement.

The Competent Authority in Kenya can assess whether an entity meets such conditions set out in the Income Tax Act and can subject it to an audit process prior to granting it the exemption. The danger lies in that the parameters applied by the other contracting state may differ and that, for instance, private trusts may qualify as being charitable institutions.

Proposed amendment.

Our proposal is to delete this Article in its entirety. No similar provision can be found in the OECD or the UN Model Conventions and we have not found a similar provision in any of the recent tax treaties entered into by Kenya or by Barbados.

7. Article 30: Entitlement to Benefits

The Agreement limits the amount of tax that can be imposed on income derived in Kenya by residents of Barbados. To prevent abuse, Article 30 restricts entitlement of benefits by preventing the enjoyment of benefits by persons where it is evident that the principal purpose of the transaction or was to enjoy the benefit. This provision is useful in preventing treaty shopping. Despite this provision, the treaty can be abused where an entity which is a resident of Barbados establishes a permanent establishment in a third, low-tax jurisdiction such as Mauritius. There is therefore potential for abuse from the transfer of shares, debt-claims, rights, or property to permanent establishments set up solely for that purpose in countries that do not tax, or offer preferential tax treatment to, the income from such assets. Where Barbados exempts the profits attributable to such permanent establishments situated in Mauritius, the Kenya should not be expected to grant treaty benefits with respect to such income.

Proposed amendment

In line with the African Tax Administration Forum Model the OECD Model and the UN Model conventions, we propose the inclusion of the following provision:

Where

a) (i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and

(ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State,

the benefits of this Convention shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of [rate to be determined bilaterally] of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding any other provisions of the Convention.

b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).

Comments on the Double Tax Agreement between the Government of the Republic of Kenya and the Government of the Republic of Singapore

1. Preamble

The title and preamble of the treaty form part of the Convention and constitute a general statement of the object and purpose of the treaty. The preamble therefore plays an important role in the interpretations of the provisions of the Convention.

It is generally understood that the principal purpose of the tax treaty is to enhance bilateral trade between the contracting states by eliminating double taxation. Treaties have however been subject to abuse and have been used for tax planning and tax avoidance.

Following the work of the OECD/G20 relating to Base Erosion Profit Shifting, the OECD and UN Model 2017 propose the inclusion of the an explicit statement to the effect that the contracting states do not intend that the provisions of the Convention create opportunities for non-taxation or reduced taxation through tax evasion and avoidance. Including such a definitive statement in the preamble creates an all-encompassing General Anti Avoidance Rule (GAAR) that can be applied to disallow any kind of transaction that is intended for tax avoidance or evasion.

The preamble in the draft is however limited only to prevention of fiscal evasion but does not cover issues that have to do with avoidance, which, although legal, should expressly be discouraged from the outset.

Proposed Amendment.

A straightforward amendment would be to include the prevention of avoidance, reduced taxation or non-taxation by including the underlined section as follows:

> *The Government of Kenya and the Government of the Republic of Singapore:*
>
> *Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of* ***non-taxation or reduced taxation through tax avoidance or*** *fiscal evasion with respect to taxes on income,*
>
> *Have agreed as follows:*

Alternatively, the provision may be amended to follow the wording recommended in the UN Model 2017 and the OECD Model 2017 to read as follows:

> *The Government of Kenya and the Government of the Republic of Singapore:*
>
> *Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,*
>
> *Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third state),*
>
> *Have agreed as follows:*

This amendment will ensure that the General Anti-avoidance Rules apply not just to fiscal evasion but all kinds of tax avoidance including non-taxation.

2. *Article 1: Persons Covered*

Article 1 states that the treaty applies to persons who are residents of one or both of the Contracting States. This scope of "Persons Covered" is amenable to abuse. In particular, taxpayers may undertake hybrid mismatch arrangements to forego tax obligations that would otherwise accrue. Hybrid mismatch arrangements may arise where Multinationals use the following loopholes in the tax systems of two States to avoid paying taxes in either of States:

a) entities are treated as transparent for tax purpose in one country and as non-transparent in the other country (e.g Kenya treats partnerships as transparent non-taxable entities and taxes the individual partners)
b) entities are resident in two different countries for tax purposes (this may result in both countries failing to tax the income on the assumption that the other country already taxed the income)
c) instruments are treated differently for tax purposes in the two Contracting States or where transfer arrangement are treated differently for tax purposes in the two Contracting States.(in such a case there is a mismatch in classification of transactions that may result in double non-taxation e.g a payment may be classified as interest in the jurisdiction of the payer and as dividend in the jurisdiction of the recipient)

Proposed Amendment.

To reduce the risk of such abuse, we propose adoption of the wording of the UN Model 2017 and OECD Model 2017 to include the following additional paragraph in Article 1:

> 2. *"For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State"*

3. *Article 3: Persons Covered*

Paragraph 2 provides for an exception to the beneficial ownership rule in which trusts or trustees that are liable to tax in the contracting state may be considered to be the beneficial owner of such income and therefore entitled to treaty benefits.

We note that such provision has never before been applied in Kenya's DTAs and does not form part of the treaty policy. In any event, the specific exemption of trusts or trustees creates an explicit avenue for treaty shopping by 3rd party resident companies who will set up trusts in either contracting states in order to enjoy the reduced rates availed in the treaty for the three sources of passive income. It should also be noted that Singapore trust law permits the formation of various kinds of trusts taxed at varying rates, including foreign trusts, which qualifies for tax benefits, including exemption on tax on the distributions to beneficiaries of such trusts.

Kenya's policy, as stipulated in Section 41(5) of the Income Tax Act is to only allow treaty benefits where the underlying ownership of the entity is held by persons that are resident in the other contracting state.

Proposed Amendment.

Paragraph 2 of Article 3 should be deleted in its entirety and the rules applicable relating to beneficial owner as stipulated in the OECD and UN Model Treaty and Commentaries should be applied to trusts as with any other kind of legal entity.

4. Article 4: Resident

Paragraph 3 of this Article deals with the determination of the residence of a person other than an individual. The Article sets out that in case of a tie (i.e where the person may be deemed resident of both states) the place of effective management is the sole factor to be considered in determining the residence companies and other body of persons consideration.

The Article as worded provides opportunity for abuse. The place of effective management of a company can easily be manipulated and shifted in order to ensure that a company is resident in a jurisdiction with favorable taxes or treaty terms. To prevent such abuse, both the UN Model and OECD Model recommend the determination of a tie breaker on a case by case basis, taking into account various factors such as where the person's headquarters are located or where the board meetings are held or where its accounting records are kept etc. The two models further recommend that where the residence of that person cannot be determined, then the person may not be entitled to certain treaty benefits.

Proposed Amendment.

We propose that Paragraph 3 to Article 4 be amended in line with international best practice as stipulated in the OECD Model 2017 and the UN Model 2017 to read as follows:

> *"Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting State."*

5. Article 5: Permanent Establishment

A. Paragraph 2

This paragraph provides a list of the places that constitute a permanent establishment (PE). The list is borrowed from both the OECD and UN Model double tax treaties. However, the list is by no means exhaustive and parties are at liberty to include additions that relate to their specific circumstances. Since Kenya is an agricultural country, we propose that the list include farming activities.

Proposed Amendment

We would therefore propose inclusion of the following examples:

i. *a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on*
j. *a warehouse in relation to a person providing storage facilities for others.*

(See Article 5(2) DTA between Singapore & Rwanda (2016))

These illustrations widen and clarify the instances in which a PE exists and should be considered for inclusion.

B. Paragraph 3 (a)-Time threshold

This paragraph provides a 12-month threshold for which a building site, construction and similar activity may constitute a PE. The UN Model Convention, which is favoured by developing countries,

recommends that the threshold for construction PE be limited to a 6-month period. This is because modern technology can enable construction, assembly, and similar activity to be carried out in a very short duration and still result in substantial profit for the enterprise. If the provision remains as is, Kenya is likely to lose revenue where such activities take a shorter period than the stated 12 months.

Similarly, Kenya applies the 6-month threshold in determination of a PE in domestic law. Therefore, for consistency, it is recommended that the same threshold or a shorter period should be applied for all its treaties.

We also note that Singapore has applied this time threshold of 6 months or 183 days in recent treaties including its DTA with Tunisia (2019), Rwanda (2016 and Nigeria (2018)

Proposed Amendment.

The paragraph should be amended in line with the UN Model Convention to provide for a threshold of 6 months as follows:

> *A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than ~~12~~ six (6) months.*

C. Paragraph 3 (b)- Anti-abuse provision for time threshold

The OECD Model Commentary 2017 points out that some that enterprises, in a bid to beat the PE threshold, divide their contracts up into several parts, each covering a shorter period than the time stipulated in the DTA. Each contract is then attributed to a different company owned by the same group. In doing so, the entity is able to beat the PE threshold as each company undertakes an activity for less than the stipulated time it takes to constitute a PE.

It is therefore in Kenya's best interest to prevent such abuse as it will result in reduced revenue where such fragmentation happens.

Proposed Amendment.

We propose that the same anti-fragmentation provision be included in this paragraph, immediately after 3(a) as follows:

For the sole purpose of determining whether the six-month period referred to in paragraph 3(a) has been exceeded:

i) *where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding six months, and*

ii) *connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,*

these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project.

D. Paragraphs 4 (a) &b)

The paragraphs are part of a list of activities that do not constitute a PE. We note that the two paragraphs include '***delivery***' of goods and merchandise as constituting activities that do not form part of the PE activities. The word 'delivery' should be deleted from the listed activities so as to reflect business reality where an enterprise, for instance one dealing purely with online retail services (such as Amazon), may have a warehouse in a contracting state where it does not have a PE. The warehouse used solely for the purpose of delivery by the retail company may therefore constitute a PE

Proposed Amendment.

In line with the UN Model Convention the word '*delivery'* should be deleted from paragraph 4 (a) and (b) of Article 5

E. Paragraph 4(f)

Paragraph 4(f) is part of the list of activities that do not constitute a PE. The paragraph states that:

the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

The wording and arrangement of this paragraph implies that the requirement for services to be auxiliary or preparatory in nature applies only to sub-paragraph (f) rather than to the entirety of Paragraph 4- subparagraphs (a) to (f).

If the phrasing is left as it stands, then any of the instances listed will not be considered a PE even where these activities constitute the sole business of particular enterprises.

Proposed Amendment.

This anomaly was picked up and amended in the 2017 UN and OECD Models and the wording has been amended, which we propose to be incorporated in this draft as follows:

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.~~ provided that such activity or, in the case of subparagraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

This phrasing will ensure that the qualification of preparatory or auxiliary character applies to the entire Paragraph 4 and not just Paragraph 4 (f).

F. Paragraph 4.1 Anti-fragmentation

We propose the inclusion of Paragraph 4.1 which was added to the OECD and UN Models in 2017 pursuant to the OECD BEPS Action 7 Report to counter the fragmentation of activities among different places or among connected enterprises to take inappropriate advantage of the exception to the definition of a PE in Paragraph 4.

The provision is intended to prevent an enterprise from fragmenting a cohesive business operation into several smaller operations that might qualify as preparatory or auxiliary activities by themselves.

In the absence of such an anti-fragmentation rule, the exceptions in Paragraph 4 would apply to each place separately.

Proposed Amendment.

We therefore propose the Agreement include following provision in line with the UN and OECD 2017 Models:

4.1. Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and:

a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

G. Paragraph 5

Paragraph 5 deals with instances where an agent can constitute a PE. The paragraph as worded is open to abuse as it would allow a Singapore entity to use commissionaire agents and other intermediary agents to artificially avoid creating a PE in Kenya. Since Kenya, under the Agreement, can only tax the Singapore entity if it establishes a PE in Kenya, such arrangements have an adverse impact on Kenya's tax base.

Proposed Amendment.

We therefore propose that paragraph 5 be deleted and amended to reflect the updated provisions of the OECD and UN Models 2017. The updated provisions will capture the use of such intermediary agents while also ensuring that independent agents do not constitute a PE provided the agent is not exclusively or almost exclusively acting for the entity. The updated provision provides as follows:

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of independent status to whom paragraph 7 apples, is acting in a Contracting State on behalf of an enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, if such a person:

a) *habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are*
   i) *in the name of the enterprise, or*
   ii) *for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or*
   iii) *for the provision of services by that enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or*

b) *the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in that State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise.*

H. Paragraph 7

The paragraph as stated in the Agreement provides that an agent of independent status shall not create a PE of its principal. This however is open to abuse as it does not set out conditions that must apply to demonstrate independence. These conditions are included in the UN and OECD Models 2017 and should also be included in the draft treaty.

Proposed Amendment.

The provision should therefore be amended to include an additional sentence as follows:

7. *An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carried on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.*

1. ***Article 7: Business Profits***

Paragraph 3 of this Article provides for deduction of expenses (including general and administrative expenses) in the determination of profits made by a PE. However, there is no restriction on these deductions with regard to related party expenses. Such an open provision for deducting any expenses is bound to be abused by multinationals to shift the profits to a related entity in a low tax jurisdiction. It is to prevent such shifting of profits that the deduction of such expenses is limited under Section 18 of the Income Tax Act. The same should be applied in the Agreement.

Proposed Amendment

To limit instances of abuse and profit shifting, we propose adoption of the following restriction provided for in the UN Model 2017 as part of Paragraph 3:

> *In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.*

6. Article 8: Shipping and Air Transport

We note that the draft DTA proposes exclusive residence taxing rights for income earned by enterprises carrying out international air transport and shipping.

Kenya's ports connect the landlocked East African countries to the rest of the world. A provision that limits taxation to only the state of residence will likely deny Kenya income from shipping lines and airlines resident in Singapore.

Proposed Amendment.

We therefore propose deletion of the Article in its entirety and a replacement of the same with the following provision that is in line with the UN Model 2017: *Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.*

1. *Profits of an enterprise of a Contracting State from the operation of ships in international traffic shall be taxable only in that State unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by 50 per cent.*

2. *The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.*

7. Article 10: Dividend

Paragraph 2 provides for reduced tax rate of 5% for dividends paid to residents of Singapore. The Article however does not provide a threshold of the investment that must be held for the residents to qualify for the reduced rate. To encourage direct investment that is long-term, the provision should limit the reduced rate to non-portfolio shareholders. Further, to ensure this provision is not abused by non-residents shareholders who by increasing their shareholdings just before dividends are paid in order to obtain the concessional tax rates, a share-holding period can be included. This will limit opportunistic access to reduced source country taxation and help foster genuine longer-term direct investment.

Proposed Amendment.

In line with the provisions of the UN Model 2017 and the Companies (Amendment) Act, 2017 in relation to beneficial ownership, we propose that paragraph 2 be replaced with the following provision:

> *2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:*
>
> *(a) 5% per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10~~25~~ per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate ~~reorganisation~~reorganization, such as a merger or divisive ~~reorganisation~~reorganization, of the company that holds the shares or that pays the dividend); or*
>
> *(b) 10% per cent of the gross amount of the dividends in all other cases.*

8. Article 9: Associated Enterprises

The Agreement does provide for an exemption to the requirement for a Contracting State to make a corresponding adjustment in instances where the adjustment is as a result of fraud, gross negligence or willful default.

The UN Model Treaty 2017 includes an additional paragraph 3 aimed at promoting accountability. This provision denies the secondary adjustment recommended in paragraph 2 in cases where the enterprise is found guilty of fraud, gross negligence or willful default.

Proposed Amendment.

We propose a similar provision as paragraph 3, in line with the UN Model treaty be included as follows:

> "*3. The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or willful default.*"

9. Article 11: Interest

Paragraph 2 of this Article provides that withholding tax apply at the rate of 10%. Although States are at liberty to determine the appropriate rate of tax, 10% is significantly low as compared to the rates applied in other double taxation agreements.

Proposed Amendment.

We propose the rate be amended to 12.5%.

10. Article 12: Royalties

The agreement provides for a rate of 10%. Although States are at liberty to determine the appropriate rate of tax, 10% is significantly low as compared to the rates applied in other double taxation agreements.

Proposed Amendment.

We propose the rate be amended to 12.5%.

11. Article 12A: Technical Fees

The Agreement does not contain a clause on technical fees. This means that technical fees can only be taxed by the source country (for example Kenya) where the entity has a PE in Kenya. This provides an avenue for profit shifting since it is rarely necessary for an entity to be physically present in Kenya to provide technical services. Thus, to prevent abuse of the treaty we propose the inclusion of an Article on Taxation of Technical fees as proposed in the UN Model 2017.

Article 12A was added to the UN Model Convention to allow a Contracting State to tax fees for certain technical services paid to a resident of the other Contracting State on a gross basis. Under this Article, a Contracting State is entitled to tax fees for technical services if the fees are paid by a resident of that State or by a non-resident with a permanent establishment or fixed base in that State and the fees are borne by the permanent establishment or fixed base.

Until the addition of Article 12A, income from services derived by an enterprise of a Contracting State was taxable exclusively by the State in which the enterprise was resident unless the enterprise carried on business through a permanent establishment in the source State.

With the rapid changes in modern economies, particularly with respect to cross-border services, it is now possible for an enterprise resident in one State to be substantially involved in another State's economy without a permanent establishment or fixed base in that State and without any substantial physical presence in that State.

As such, in the absence of a PE or fixed place of business, the source state will not have any basis to tax such fees paid to a non-resident enterprise.

While Article 14 makes provision for taxation of technical services, this is only limited to cases where the services are provided by an individual and where he meets the threshold of fixed base operating in a contracting state for 183 days

Proposed Amendment.

We therefore propose the inclusion of an Article 12A in line with the UN Model treaty (2017) as follows:

"FEES FOR TECHNICAL SERVICES

1. *Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
2. *However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and subject to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed 12.5% per cent of the gross amount of the fees.*
3. *The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:*

    a) *to an employee of the person making the payment;*
    b) *for teaching in an educational institution or for teaching by an educational institution; or*
    c) *by an individual for services for the personal use of an individual.*

4. *The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State and the fees for technical services are effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be shall apply.*
5. *For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or fixed base in connection with which the obligations to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.*
6. *. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.*
7. *Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement"*

12. Article 13: Capital Gains

We note that the Article on taxation of capital gains on the disposal or alienation of asset does not cover taxation on the alienation of shares of a company resident in either contracting state or whose underlying value is derived either directly or indirectly from property situated in the other contracting state.

The taxation of gains on transfer of shares is crucial in the ability to transfer taxation of assets. This is because most enterprises are constituted as limited liability companies. In most cases, a separate LLC

can be created purely to hold assets. Where the shares in such an LLC are transferred, the underlying assets are also transferred to the new shareholder. Failure to tax these shares would mean that there would be no tax on the transfer of the assets. The exclusion of this provision will lead to revenue losses for Kenya as it has no taxing rights over such share and will encourage profit shifting.

<u>*Proposed Amendment.*</u>

We therefore propose inclusion of the following paragraphs immediately after paragraph 2 and re-number paragraph 4 to paragraph 6

3. *Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.*
4. *Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least 25 per cent of the capital of that company or entity.*

5. *Gains from the alienation of any property other than that referred to in the preceding paragraphs shall be taxable only in the Contracting State of which the alienator is a resident*.

The above proposed amendments are in line with the UN Model Convention.

13. Article 16: Directors Fees

We note that the Article on taxation of director's fees only covers persons who are members of the board of directors of a company resident in a contracting state. However, it has been considered that the remuneration paid to persons in top level management position, resident in the other contracting state should also be subject to the same principle as director's fees. Since it is the practice for many enterprises to have foreign residents hold top-level management positions, exclusion of this provision would lead to tax revenue loss in Kenya.

Proposed Amendment.

We therefore propose that the paragraph in the draft be numbered 1 and the inclusion of a second paragraph to the Article as follows:

2. *Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.*

14. Article 26: Exchange of Information

Paragraph 2 of this Article provides for a limited application of the information exchanged for tax purposes only. However, it may be the case that the information may be applied for other purposes beyond collection or enforcement of taxes-e.g in cases of anti-money laundering, provided approval is received from the other contracting state.

Proposed Amendment.

In line with the OECD and UN Model conventions, we propose inclusion of the following line (underlined) at the end of paragraph 2

2. *Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.*

15. Article 27: Miscellaneous Rule/Entitlement to Treaty Benefits

The draft treaty does not have provisions concerning the entitlement to treaty benefits to specifically state instances in which the treaty benefits would not be applied. Instead, the Article states that the contracting states may apply the anti-avoidance rules in domestic law provided *'…they do not give rise to taxation contrary to the agreement'*

We consider that an anti-avoidance rule must be included in a DTA to mitigate the risk that a taxpayer would argue that the application of the domestic ant-avoidance rule will lead to a result that is contrary to the agreement.

The provision of the Article is too general and subject to varying interpretations and difficulties in the enforcement of anti-avoidance rules. In addition, the treaty can be abused where an entity which is resident in Singapore for example establishes a permanent establishment in a third, low-tax jurisdiction such as Mauritius. There is therefore potential for abuse from the transfer of shares, debt-claims, rights, or property to permanent establishments set up solely for that purpose in countries that do not tax, or offer preferential tax treatment to, the income from such assets. Where Singapore exempts the profits attributable to such permanent establishments situated in third party tax, then Kenya should not be expected to grant treaty benefits with respect to such income as the same would result in erosion of its tax base.

Proposed Amendment.

We therefore propose that the Article be deleted in its entirety and replaced with the following provision that gives clarity of the application of anti-avoidance rules to the Agreement.

ENTITLEMENT TO BENEFITS

1) Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

2) Where

a) (i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and

(ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State,

the benefits of this Convention shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of [rate to be determined bilaterally] of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding any other provisions of the Convention.

b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).

16. New Article: Assistance in Collection of Taxes (to be included before Article 29)

Assistance in collection of taxes is a vital part of co-operation between member states. Unless the laws of either contracting state specifically disallow this assistance, then the standard practice is to have a clause allowing for the assistance in collection of taxes.

Proposed Amendment.

We therefore propose the application of the following provision contained in the UN and OECD Model Commentaries on mutual assistance as follows:

ASSISTANCE IN THE COLLECTION OF TAXES

1. The Contracting States shall, to the extent permitted by their respective domestic law, lend assistance to each other in the collection of revenue claims. This assistance is not restricted by

Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. *The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed by the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.*

3. *When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.*

4. *When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.*

5. *Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.*

6. *Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.*

7. *Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be*
   a) *in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or*
   b) *in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection*

   the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

8. *In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:*
   a) *to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;*
   b) *to carry out measures which would be contrary to public policy (ordre public);*
   c) *to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;*
   d) *to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.*

17. Protocol to the Treaty: Paragraphs 3,4,and 5

The Protocol to the treaty contains 3 paragraphs that provide for a Most Favoured Nation (MFN) clause. The MFN provides that in the event that Kenya negotiates a subsequent treaty with any other

country and in that subsequent treaty provides for lower rates or for exemption on taxes chargeable for dividend, interest or royalties, then the same must automatically apply to the Kenya Singapore treaty.

Dividend, interest, and royalties are the main ways in which non-resident enterprises draw funds from the investments made in the source country and are among the most debated provisions in the negotiation of tax treaties. The source countries in turn heavily rely on these provisions to be able to get better provisions in other terms or to attract certain kind of investments from different states depending on the circumstances.

MFN provisions such as these, are problematic for a number of reasons:

1) The MFN is one sided and allows Singapore to benefit from treaty negotiations between Kenya and another country without regard for the special situations or circumstances that lead to a certain result in a treaty with another party.

2) Singapore, on the other hand is under no similar obligation and as such the MFN treatment would result in the abolition of the principle of reciprocity which forms the backbone of bilateral agreements. Singapore therefore becomes a kind of 'free-rider' in all future treaties, benefiting even where it is not intended to.

3) The result of the MFN for Kenya is that it is not at liberty to negotiate any rates with third countries without constantly thinking about its effects to this treaty. This may be difficult to guarantee since Kenya is negotiating more treaties as time goes by. Other than the difficulty in ensuring the historical information is retained by all the different teams or departments negotiating the treaties; it will greatly limit the extent to which Kenya can negotiate the terms of future treaties.

4) Having an MFN clause indicates that Kenya may consider having similar MFN clauses in its other tax treaties. The likely result is that every state that Kenya negotiates treaties with will demand MFN clauses on the assumption that this is an indication of Kenya's tax treaty policy. It may also possibly influence other states with which Kenya has already concluded treaties with to request that their treaties be re-opened with a view of also getting an MFN clause and obtaining a benefit from any treaty that will ever be negotiated by Kenya.

It is our view that there is sufficient reciprocity in the draft treaty by having the non-discrimination clause in Article 24. An MFN provision only goes to tilt the balance against Kenya in a manner that is extremely unfair.

Having an MFN clause in an international bilateral treaty, especially a one-sided one of this nature, is a clear indication of a bad treaty with Kenya being the weaker party in this negotiation.

Proposed Amendment.

We therefore propose that the MFN provisions in paragraphs 3, 4 and 5 be deleted in their entirety and must not, in any form or substance, appear in any tax treaties that are negotiated by Kenya.

Annex Schedule 1: Tabulation of Comments on the Double Tax Agreement between the Government of the Republic of Kenya and the Government of Barbados

Article	Provision	Comments	Recommendations
Article 3: General definitions	1.The term 'international traffic' has been defined as '*any transport by ship or aircraft operated by an enterprise which has its place of effective management in a contracting state, except when the ship or aircraft is operated solely between places in the other Contracting State and the enterprise operating the ship or aircraft is not an enterprise of that State'*	The definition of international traffic to cover transport by enterprises whose place of effective management is in a contracting state opens avenues for tax planning. It is indeed possible that an enterprise that is not resident in Barbados but seeks to obtain the benefit of the treaty may manipulate its senior management operations to ensure that the effective management occurs in Barbados in order to obtain the benefit of the treaty.	The definition of international traffic to be amended to exclude place of effective management. The new definition to read as follow: *any transport by ship or aircraft operated by an enterprise ~~which has its place of effective management in~~ of a contracting state, except when the ship or aircraft is operated solely between places in the other Contracting State and the enterprise operating the ship or aircraft is not an enterprise of that State'* This definition is in line with some of the more recent DTAs signed by Barbados (See Article 2 DTA between the Government of Barbados and the Government of the Republic of Singapore-signed in 2013)

Article 3: General definitions	2.Place of effective management has been defined to include *'the place where strategic management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made'*	This definition is, in our view, very general and maybe prone to abuse and manipulation. It is easy for an entity to manipulate its affairs simply by ensuring that the senior management offices are located in Barbados or requiring that all board meetings be held in Barbados. This would result in the entity meeting the threshold set out for place of effective management and therefore enjoying treaty benefits meant to be enjoyed by residents.	In line with the OECD 2017 Model and the UN 2017 Model, we would recommend that *the definition of 'place of effective management' be deleted in its entirety and that instead, domestic law provisions of each contracting state be applied in determining the place of effective management in cases where this is absolutely required (See Article 4 in the DTA between Barbados & Singapore (2013) and DTA between Barbados & Rwanda (2014).*
Article 5: Permanent Establishment	2. The term "permanent establishment" includes: (a) a place of management; (b) a branch; (c) an office; (d) a factory; (e) a workshop; and (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.	Paragraph 2 of this Article provides a list of the places that shall be determined to be a permanent establishment. The list is borrowed from both the OECD and UN Model double tax treaties. However, the list is by no means exhaustive and parties are at liberty to include other illustrations that relate to their specific circumstances.	We propose inclusion of the following examples: *g. a farm, plantation, or other place where agricultural, forestry plantation or related activities are carried on* *h. a warehouse in relation to a person providing storage facilities for others; and*

			(See Article 5(2) DTA between Barbados-Rwanda) These illustrations widen and clarify the instances in which a PE exists and should be considered for inclusion.
Article 7: Business Profit	Paragraph 1 provides for the taxation of profits attributable to the PE. The Article provides: *The profits of an enterprise of a contracting state shall be taxable only in that state unless the state carries on a business in the other contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as is*	Paragraph 1 provides for the taxation of profits attributable to the PE. The Article provides that income earned by a Barbados resident will be taxable in Barbados unless the income is attributable to a permanent establishment in Kenya. The UN Model convention proposes a widening of the taxing powers of the source country through a force of attraction rule. The rule allows the source country to tax the income of an enterprise even if it is not attributable to a permanent establishment. Where the rule is applied the Kenya would be allowed to tax other business activities of a similar	For purposes of completeness and ensure there is no ambiguity, we would propose that the standard wording in the UN Model 2017 be applied and that the provision be amended to include the underlined section as below: *The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the 16 Article 7 other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to <u>(a) that permanent establishment; (b) sales in that other State of</u>*

	attributable to that permanent establishment.	kind as those effected through the permanent establishment. This is an anti-avoidance provision to ensure that an enterprise resident in one Contracting State does not divert business in the other Contracting State away from the PE in order to ensure that the PE does not reflect the income and therefore does not pay taxes on that amount.	<u>*goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*</u>
Article 8: Shipping and Air Transport	Paragraph 1 provides for the taxation of enterprises carrying out international transport using aircrafts.	As noted above discussing the general definitions under Article 3, the use of 'place of effective management' as a criterion for the treaty benefit is likely to be subject to abuse. To reduce the risk of treaty shopping by an airline, the place of effective management should be deleted from provision.	In line with the UN Model 2017 as well as earlier proposal to delete reference to place of effective management in the definition of international traffic, we propose that paragraph 1 be amended to read as follows: *Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.*

Article 10: Dividends	Paragraph 2 provides for reduced tax rate of 5% for dividends paid to residents of Barbados.	The Article does not provide a threshold for the investment that must be held for the residents to qualify for the reduced rate. To encourage direct investment that is long-term, the provision should limit the reduced rate to non-portfolio shareholders. Further, to ensure this provision is not abused by non-residents shareholders who by increasing their shareholdings just before dividends are paid in order to obtain the concessional tax rates, a share-holding period can be included. This will limit opportunistic access to reduced source country taxation and help foster genuine longer-term direct investment	In line with the provisions of the UN Model 2017 and the Companies (Amendment) Act, 2017 in relation to beneficial ownership, we propose that paragraph 2 be replaced with the following provision: *However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:* *(a) 5% per cent of the gross amount of the dividends if the beneficial owner is a company(other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that*

			would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend); or *(b) 10% per cent of the gross amount of the dividends in all other cases.*
Article 22: Donations to Charitable Institutions Capital Gains	This Article provides for exemption on donations made by a resident of a Contracting State to a Charitable Institution that is situated in the other contracting state.	Kenya's Income Tax Act does not specifically provide for exemption for charitable institutions. Instead it has a broad description of entities that may qualify for tax exemption as those that are involved in educational, religious or relief of poverty activities and which are done for the public benefit. While there is leeway for Kenya to restrict the deductions to any conditions that are already present in the Income Tax Act, there is a risk that this may be abused if it is not specified in the Agreement.	Our proposal is to delete this Article in its entirety. No similar provision can be found in the OECD or the UN Model Conventions and we have not found a similar provision in any of the recent tax treaties entered into by Kenya or by Barbados.

		The Competent Authority in Kenya can assess whether an entity meets such conditions set out in the Income Tax Act and can subject it to an audit process prior to granting it the exemption. The danger lies in that the parameters applied by the other contracting state may differ and that, for instance, private trusts may qualify as being charitable institutions.	
Article 30: Entitlement to Benefits	*I. Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction*	The Agreement limits the amount of tax that can be imposed on income derived in Kenya by residents of Barbados. To prevent abuse, Article 30 restricts entitlement of benefits by preventing the enjoyment of benefits by persons where is it evident that the principal purpose of the transaction or was to enjoy the benefit. This provision is useful in preventing treaty shopping. Despite this provision, the treaty can be abused where an entity which is a resident of Barbados	In line with the African Tax Administration Forum Model the OECD Model and the UN Model conventions, we propose the inclusion of the following provision: *Where* *(i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the*

	that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention. *2. Where a benefit under this Convention is denied to a person under paragraph I, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income, if such competent authority, upon request from that person*	establishes a permanent establishment in a third, low-tax jurisdiction such as Mauritius. There is therefore potential abuse from the transfer of shares, debt-claims, rights, or property to permanent establishments set up solely for that purpose in countries that do not tax, or offer preferential tax treatment to, the income from such assets. Where Barbados exempts the profits attributable to such permanent establishments situated in Mauritius, the Kenya should not be expected to grant treaty benefits with respect to such income.	*enterprise situated in a third jurisdiction, and* *(ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State,* *the benefits of this Convention shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of [rate to be determined bilaterally] of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding*

	and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in paragraph I. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State.		*any other provisions of the Convention.* *b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).*

Annex Schedule 2: Comments on the Double Tax Agreement between the Government of the Republic of Kenya and the Government of the Republic of Singapore

Article	Provision	Comment	Proposed change
Preamble	The preamble provides the purpose of the agreement.	The preamble in the draft is however limited only to prevention of fiscal evasion but does not cover issues that have to do with avoidance, which, although legal, should expressly be discouraged from the outset.	A straightforward amendment would be to include the prevention of avoidance, reduced taxation, or non-taxation by including the underlined section as follows: *The Government of Kenya and the Government of the Republic of Singapore:* *Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of **non-taxation or reduced taxation through tax avoidance or** fiscal evasion with respect to taxes on income,* *Have agreed as follows:* Alternatively, the provision may be amended to follow the wording recommended in the UN Model 2017 and the OECD Model 2017 to read as follows:

			The Government of Kenya and the Government of the Republic of Singapore: *Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,* *Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third state),* *Have agreed as follows:*
Article 1: Persons Covered	Article 1 states that the treaty applies to persons who are residents of one or	This scope of "Persons Covered" is amenable to abuse. In particular, taxpayers may undertake hybrid mismatch arrangements to forego tax	To reduce the risk of such abuse, we propose adoption of the wording of the UN Model 2017 and OECD Model 2017 to include the following additional paragraph in Article 1:

	both of the Contracting States.	obligations that would otherwise accrue. Hybrid mismatch arrangements may arise where Multinationals use the following loopholes in the tax systems of two States to avoid paying taxes in either of States: d) entities are treated as transparent for tax purpose in one country and as non-transparent in the other country (e.g Kenya treats partnerships as transparent non-taxable entities and taxes the individual partners) e) entities are resident in two different countries for tax purposes (this may result in both countries failing to tax the income on the assumption	5. *"For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State"*

		that the other country already taxed the income) **f)** instruments are treated differently for tax purposes in the two Contracting States or where transfer arrangement are treated differently for tax purposes in the two Contracting States.(in such a case there is a mismatch in classification of transactions that may result in double non-taxation e.g a payment may be classified as interest in the jurisdiction of the payer and as dividend in the jurisdiction of the recipient)	
Article 3: Persons Covered	Paragraph 2 provides for an exception to the beneficial ownership rule in which trusts or	We note that such provision has never before been applied in Kenya's DTAs and does not form part of the treaty policy. In any event, the specific	Paragraph 2 of Article 3 should be deleted in its entirety and the rules applicable relating to beneficial owner as stipulated in the OECD and UN Model

	trustees that are liable to tax in the contracting state may be considered to be the beneficial owner of such income and therefore entitled to treaty benefits.	exemption of trusts or trustees creates an explicit avenue for treaty shopping by 3rd party resident companies who will set up trusts in either contracting states in order to enjoy the reduced rates availed in the treaty for the three sources of passive income. It should also be noted that Singapore trust law permits the formation of various kinds of trusts taxed at varying rates, including foreign trusts, which qualifies for tax benefits, including exemption on tax on the distributions to beneficiaries of such trusts. Kenya's policy, as stipulated in Section 41(5) of the Income Tax Act is to only allow treaty benefits where the underlying ownership of the entity is held by persons that are resident in the other contracting state.	Treaty and Commentaries should be applied to trusts as with any other kind of legal entity.

Article 4(3): Resident	The Article sets out that in case of a tie (i.e where the person may be deemed resident of both states) the place of effective management is the sole factor to be considered in determining the residence companies and other body of persons consideration.	The Article as worded provides opportunity for abuse. The place of effective management of a company can easily be manipulated and shifted in order to ensure that a company is resident in a jurisdiction with favorable taxes or treaty terms. To prevent such abuse, both the UN Model and OECD Model recommend the determination of a tie breaker on a case by case basis, taking into account various factors such as where the person's headquarters are located or where the board meetings are held or where its accounting records are kept etc. The two models further recommend that where the residence of that person cannot be determined, then the person may not be entitled to certain treaty benefits.	We propose that Paragraph 3 to Article 4 be amended in line with international best practice as stipulated in the OECD Model 2017 and the UN Model 2017 to read as follows: *"Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting State*

Article 5(2): Permanent Establishment	This paragraph provides a list of the places that constitute a permanent establishment (PE).	The list is by no means exhaustive and parties are at liberty to include additions that relate to their specific circumstances. Since Kenya is an agricultural country, we propose that the list include farming activities.	We would therefore propose inclusion of the following examples: *k. a farm, plantation, or other place where agricultural, forestry plantation or related activities are carried on* *l. a warehouse in relation to a person providing storage facilities for others.*
Article 5(3)(a): Permanent Establishment	This paragraph provides a 12-month threshold for which a building site, construction and similar activity may constitute a PE.	The UN Model Convention, which is favored by developing countries, recommends that the threshold for construction PE be limited to a 6-month period. This is because modern technology can enable construction, assembly, and similar activity to be carried out in a very short duration and still result in substantial profit for the enterprise. If the provision remains as is, Kenya is likely to lose revenue where such activities take a	The paragraph should be amended in line with the UN Model Convention to provide for a threshold of 6 months as follows: *A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than ~~12~~ six (6) months.*

		shorter period than the stated 12 months. Similarly, Kenya applies the 6-month threshold in determination of a PE in domestic law. Therefore, for consistency, it is recommended that the same threshold or a shorter period should be applied for all its treaties. We also note that Singapore has applied this time threshold of 6 months or 183 days in recent treaties including its DTA with Tunisia (2019), Rwanda (2016 and Nigeria (2018).	
Article 5(3)(b): Permanent Establishment	Currently lacking in the draft	The OECD Model Commentary 2017 points out that some that enterprises, in a bid to beat the PE threshold, divide their contracts up into several parts, each covering a shorter period than the time stipulated in the DTA.	We propose that the same anti-fragmentation provision be included in this paragraph, immediately after 3(a) as follows:

		Each contract is then attributed to a different company owned by the same group. In doing so, the entity is able to beat the PE threshold as each company undertakes an activity for less than the stipulated time it takes to constitute a PE. It is therefore in Kenya's best interest to prevent such abuse as it will result in reduced revenue where such fragmentation happens.	*For the sole purpose of determining whether the six-month period referred to in paragraph 3(a) has been exceeded:* *iii) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding six months, and* *iv) connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,* *these different periods of time shall be added to the period of time during which the first-*

			mentioned enterprise has carried on activities at that building site or construction or installation project.
Article 5(4)(a) and (b): Permanent Establishment	The paragraphs are part of a list of activities that do not constitute a PE.	We note that the two paragraphs include '***delivery***' of goods and merchandise as constituting activities that do not form part of the PE activities. The word 'delivery' should be deleted from the listed activities so as to reflect business reality where an enterprise, for instance one dealing purely with online retail services (such as Amazon), may have a warehouse in a contracting state where it does not have a PE. The warehouse used solely for the purpose of delivery by the retail company may therefore constitute a PE	In line with the UN Model Convention the word '*delivery'* should be deleted from paragraph 4 (a) and (b) of Article 5.

Article 5(4)(f): Permanent Establishment	Paragraph 4(f) is part of the list of activities that do not constitute a PE. The paragraph states that: *the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.*	The wording and arrangement of this paragraph implies that the requirement for services to be auxiliary or preparatory in nature applies only to sub-paragraph (f) rather than to the entirety of Paragraph 4- subparagraphs (a) to (f). If the phrasing is left as it stands, then any of the instances listed will not be considered a PE even where these activities constitute the sole business activities of particular enterprises.	This anomaly was picked up and amended in the 2017 UN and OECD Models and the wording has been amended, which we propose to be incorporated in this draft as follows: *g) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.~~ provided that such activity or, in the case of subparagraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.* This phrasing will ensure that the qualification of preparatory or auxiliary character applies to the entire Paragraph 4 and not just Paragraph 4 (f).

Article 5(4.1): Permanent Establishment **Anti-fragmentation**	*Currently lacking*	We propose the inclusion of Paragraph 4.1 which was added to the OECD and UN Models in 2017 pursuant to the OECD BEPS Action 7 Report to counter the fragmentation of activities among different places or among connected enterprises to take inappropriate advantage of the exception to the definition of a PE in Paragraph 4. The provision is intended to prevent an enterprise from fragmenting a cohesive business operation into several smaller operations that might qualify as preparatory or auxiliary activities by themselves. In the absence of such an anti-fragmentation rule, the exceptions in	We therefore propose the Agreement include following provision in line with the UN and OECD 2017 Models: *17.1. Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and:* *c) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or* *d) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,*

		Paragraph 4 would apply to each place separately.	*provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.*
Article 5(5): Permanent Establishment **Anti-fragmentation**	Paragraph 5 deals with instances where an agent can constitute a PE.	The paragraph as worded is open to abuse as it would allow a Singapore entity to use commissionaire agents and other intermediary agents to artificially avoid creating a PE in Kenya. Since Kenya, under the Agreement, can only tax the Singapore entity if it establishes a PE in Kenya, such arrangements have an adverse impact on Kenya's tax base.	We therefore propose that paragraph 5 be deleted and amended to reflect the updated provisions of the OECD and UN Models 2017. The updated provisions will capture the use of such intermediary agents while also ensuring that independent agents do not constitute a PE provided the agent is not exclusively or almost exclusively acting for the entity. The updated provision provides as follows: *18. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of independent status to whom paragraph 7 apples, is acting in a Contracting State on behalf of an enterprise, that enterprise shall be deemed to have a permanent establishment in that State in*

			respect of any activities which that person undertakes for the enterprise, if such a person: *c) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are* *iv) in the name of the enterprise, or* *v) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or* *vi) for the provision of services by that enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business*

			(other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or d) *the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in that State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise.*
Article 5(7): Permanent Establishment	The paragraph as stated in the Agreement provides that an agent of independent status	This paragraph is open to abuse as it does not set out conditions that must apply to demonstrate independence. These conditions are included in the UN and OECD Models 2017 and	The provision should therefore be amended to include an additional sentence as follows: *An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carried on business in that State through a broker,*

	shall not create a PE of its principal.	should also be included in the draft treaty.	*general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.*
Article 7: Business Profits	Paragraph 3 of this Article provides for deduction of expenses (including general and administrative expenses) in the determination of profits made by a PE.	The paragraph does not provide any restrictions on deduction of related party expenses. Such an open provision for deducting any expenses is bound to be abused by multinationals to shift the profits to a related entity in a low tax jurisdiction. It is to prevent such shifting of profits that the deduction of such expenses is limited under Section 18 of the Income Tax Act.	To limit instances of abuse and profit shifting, we propose adoption of the following restriction provided for in the UN Model 2017 as part of Paragraph 3: *"In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or*

		The same should be applied in the Agreement.	*elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of*

			<u>*commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices."*</u>
Article 8: Shipping and Air Transport	The Article proposes exclusive residence taxing rights for income earned by enterprises carrying out international air transport and shipping.	Kenya's ports connect the landlocked East African countries to the rest of the world. A provision that limits taxation to only the state of residence will likely deny Kenya income from shipping lines and airlines resident in Singapore.	We therefore propose deletion of the Article in its entirety and a replacement of the same with the following provision that is in line with the UN Model 2017: *Profits of an enterprise of a Contracting State from the operation of aircraft in international traffic shall be taxable only in that State.* *9. Profits of an enterprise of a Contracting State from the operation of ships in international traffic shall be taxable only in that State unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that*

			other State shall be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by 50 per cent. 10. *The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.*
Article 9: Associated Enterprises	No provision in the current agreement	The Agreement does provide for an exemption to the requirement for a Contracting State to make a corresponding adjustment in instances where the adjustment is as a result of fraud, gross negligence or willful default.	We propose to include a similar provision as paragraph 3, in line with the UN Model treaty as follows: "*3. The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to*

		The UN Model Treaty 2017 includes an additional paragraph 3 aimed at promoting accountability. This provision denies the secondary adjustment recommended in paragraph 2 in cases where the enterprise is found guilty of fraud, gross negligence or willful default.	*penalty with respect to fraud, gross negligence or willful default."*
Article 10: Dividend	Paragraph 2 provides for reduced tax rate of 5% for dividends paid to residents of Singapore.	The Article however does not provide a threshold of the investment that must be held for the residents to qualify for the reduced rate. To encourage direct investment that is long-term, the provision should limit the reduced rate to non-portfolio shareholders. Further, to ensure this provision is not abused by non-residents shareholders who by increasing their shareholdings just before dividends are paid in order to obtain the concessional tax rates, a	In line with the provisions of the UN Model 2017 and the Companies (Amendment) Act, 2017 in relation to beneficial ownership, we propose that paragraph 2 be replaced with the following provision: *2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:* *(a) 5% per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly*

		share-holding period can be included. This will limit opportunistic access to reduced source country taxation and help foster genuine longer-term direct investment.	*at least 10 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend); or* *(b) 10% per cent of the gross amount of the dividends in all other cases.*
Article 11: Interest	Paragraph 2 of this Article provides that withholding tax apply at the rate of 10%.	Although States are at liberty to determine the appropriate rate of tax, 10% is significantly low as compared to the rates applied in other double taxation agreements.	We propose the rate be amended to 12.5%.
Article 12: Royalties	The agreement provides for a rate of 10%.	Although States are at liberty to determine the appropriate rate of tax, 10% is significantly low as compared	We propose the rate be amended to 12.5%.

		to the rates applied in other double taxation agreements.	
Article 12A: Technical Fees	No current provision	The Agreement does not contain a clause on technical fees. This means that technical fees can only be taxed by the source country (for example Kenya) where the entity has a PE in Kenya. This provides an avenue for profit shifting since it is rarely necessary for an entity to be physically present in Kenya to provide technical services. Thus, to prevent abuse of the treaty we propose the inclusion of an Article on Taxation of Technical fees as proposed in the UN Model 2017. Article 12A was added to the UN Model Convention to allow a Contracting State to tax fees for certain technical services paid to a resident of the other Contracting State	We propose the inclusion of an Article 12A in line with the UN Model treaty (2017) as follows: *"FEES FOR TECHNICAL SERVICES* 8. *Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.* 9. *However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and subject to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged*

		on a gross basis. Under this Article, a Contracting State is entitled to tax fees for technical services if the fees are paid by a resident of that State or by a non-resident with a permanent establishment or fixed base in that State and the fees are borne by the permanent establishment or fixed base. Until the addition of Article 12A, income from services derived by an enterprise of a Contracting State was taxable exclusively by the State in which the enterprise was resident unless the enterprise carried on business through a permanent establishment in the source State. With the rapid changes in modern economies, particularly with respect to cross-border services, it is now	*shall not exceed 12.5% per cent of the gross amount of the fees.* *10. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:* *d) to an employee of the person making the payment;* *e) for teaching in an educational institution or for teaching by an educational institution; or* *f) by an individual for services for the personal use of an individual.* *11. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a*

		possible for an enterprise resident in one State to be substantially involved in another State's economy without a permanent establishment or fixed base in that State and without any substantial physical presence in that State. As such, in the absence of a PE or fixed place of business, the source state will not have any basis to tax such fees paid to a non-resident enterprise. While Article 14 makes provision for taxation of technical services, this is only limited to cases where the services are provided by an individual and where he meets the threshold of fixed base operating in a contracting state for 183 days	*resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State and the fees for technical services are effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be shall apply.* *12. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or fixed base in connection with which the obligations*

			to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base. *13. . For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.* *Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and*

			the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement
Article 13: Capital Gains	Not provided for	We note that the Article on taxation of capital gains on the disposal or alienation of asset does not cover taxation on the alienation of shares of a company resident in either contracting state or whose underlying value is derived either directly or indirectly from property situated in the other contracting state. The taxation of gains on transfer of shares is crucial in the ability to transfer taxation of assets. This is because most enterprises are constituted as limited liability companies. In most cases, a separate	We therefore propose inclusion of the following paragraphs immediately after paragraph 2 and re-number paragraph 4 to paragraph 6 *11. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.*

		LLC can be created purely to hold assets. Where the shares in such an LLC are transferred, the underlying assets are also transferred to the new shareholder. Failure to tax these shares would mean that there would be no tax on the transfer of the assets. The exclusion of this provision will lead to revenue losses for Kenya as it has no taxing rights over such share and will encourage profit shifting.	12. *Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least 25 per cent of the capital of that company or entity.* *13. Gains from the alienation of any property other than that referred to in the preceding paragraphs shall be taxable only in the Contracting State of which the alienator is a resident.*
Article 16: Directors Fees	Not provided for	We note that the Article on taxation of director's fees only covers persons who are members of the board of	We therefore propose that the paragraph in the draft be numbered 1 and the inclusion of a second paragraph to the Article as follows:

		directors of a company resident in a contracting state. However, it has been considered that the remuneration paid to persons in top level management position, resident in the other contracting state should also be subject to the same principle as director's fees. Since it is the practice for many enterprises to have foreign residents hold top-level management positions, exclusion of this provision would lead to tax revenue loss in Kenya.	3. *Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.*
Article 26: Exchange of Information	Paragraph 2 of this Article provides for a limited application of the information exchanged for tax purposes only.	It may be the case that the information may be applied for other purposes beyond collection or enforcement of taxes- e.g. in cases of anti-money laundering, provided approval is received from the other contracting state. *3.*	In line with the OECD and UN Model conventions, we propose inclusion of the following line (underlined) at the end of paragraph 2 4. *Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and it*

				shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. <u>Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.</u>

Article 27: Miscellaneous Rule/Entitlement to Treaty Benefits	The treaty provides for use of domestic anti-avoidance rules	The draft treaty does not have provisions concerning the entitlement to treaty benefits to specifically state instances in which the treaty benefits would not be applied. Instead, the Article states that the contracting states may apply the anti-avoidance rules in domestic law provided *'…they do not give rise to taxation contrary to the agreement'* We consider that an anti-avoidance rule must be included in a DTA to mitigate the risk that a taxpayer would argue that the application of the domestic ant-avoidance rule will lead to a result that is contrary to the agreement. The provision of the Article is too general and subject to varying interpretations and difficulties in the	We therefore propose that the Article be deleted in its entirety and replaced with the following provision that gives clarity of the application of anti-avoidance rules to the Agreement. *ENTITLEMENT TO BENEFITS* *1) Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.* *2) Where*

		enforcement of anti-avoidance rules. In addition, the treaty can be abused where an entity which is resident in Singapore for example establishes a permanent establishment in a third, low-tax jurisdiction such as Mauritius. There is therefore potential for abuse from the transfer of shares, debt-claims, rights, or property to permanent establishments set up solely for that purpose in countries that do not tax, or offer preferential tax treatment to, the income from such assets. Where Singapore exempts the profits attributable to such permanent establishments situated in third party tax, then Kenya should not be expected to grant treaty benefits with respect to such income as the same would result in erosion of its tax base.	*c) (i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and* *(ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State,* *the benefits of this Convention shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of [rate to be determined bilaterally] of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State,*

			notwithstanding any other provisions of the Convention. *b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).*
New Article: Assistance in Collection of Taxes	Not provided in the current agreement	Assistance in collection of taxes is a vital part of co-operation between member states. Unless the laws of either contracting state specifically disallow this assistance, then the	We therefore propose the application of the following provision contained in the UN and OECD Model Commentaries on mutual assistance as follows: *ASSISTANCE IN THE COLLECTION OF TAXES*

(to be included before Article 29)		standard practice is to have a clause allowing for the assistance in collection of taxes.	*1. The Contracting States shall, to the extent permitted by their respective domestic law, lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.* *2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed by the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.*

			3. *When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.* 4. *When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted*

			for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection. 5. *Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not,*

			in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State. 6. *Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.* 7. *Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be* c) *in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that*

			time, cannot, under the laws of that State, prevent its collection, or *d) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection* *the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.* *8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:* *e) to carry out administrative measures at variance with the laws and*

			administrative practice of that or of the other Contracting State; *f)* *to carry out measures which would be contrary to public policy (ordre public);* *g)* *to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;* h) *to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.*
2. Protocol to the Treaty: Paragraphs 3, 4 and 5	The Protocol to the treaty contains 3 paragraphs that provide for a Most Favoured Nation	Dividend, interest and royalties are the main ways in which non-resident enterprises draw funds from the investments made in the source country and are among the most	We therefore propose that the MFN provisions in paragraphs 3, 4 and 5 be deleted in their entirety and must not, in any form or substance, appear in any tax treaties that are negotiated by Kenya.

	(MFN) clause. The MFN provides that in the event that Kenya negotiates a subsequent treaty with any other country and in that subsequent treaty provides for lower rates or for exemption on taxes chargeable for dividend, interest or royalties, then the same must automatically apply to the Kenya Singapore treaty.	debated provisions in the negotiation of tax treaties. The source countries in turn heavily rely on these provisions to be able to get better provisions in other terms or to attract certain kind of investments from different states depending on the circumstances. MFN provisions such as these, are problematic for a number of reasons: 1) The MFN is one sided and allows Singapore to benefit from treaty negotiations between Kenya and another country without regard for the special situations or circumstances that lead to a certain result in a treaty with another party.	

		2) Singapore, on the other hand is under no similar obligation and as such the MFN treatment would result in the abolition of the principle of reciprocity which forms the backbone of bilateral agreements. Singapore therefore becomes a kind of 'free-rider' in all future treaties, benefiting even where it is not intended to. 3) The result of the MFN for Kenya is that it is not at liberty to negotiate any rates with third countries without constantly thinking about its effects to this treaty. This may be difficult to guarantee since Kenya is negotiating more	

		treaties as time goes by. Other than the difficulty in ensuring the historical information is retained by all the different teams or departments negotiating the treaties; it will greatly limit the extent to which Kenya can negotiate the terms of future treaties. 4) Having an MFN clause indicates that Kenya may consider having similar MFN clauses in its other tax treaties. The likely result is that every state that Kenya negotiates treaties with will demand MFN clauses on the assumption that this is an indication of Kenya's tax treaty policy. It may also	

		possibly influence other states with which Kenya has already concluded treaties with to request that their treaties be re-opened with a view of also getting an MFN clause and obtaining a benefit from any treaty that will ever be negotiated by Kenya. It is our view that there is sufficient reciprocity in the draft treaty by having the non-discrimination clause in Article 24. An MFN provision only goes to tilt the balance against Kenya in a manner that is extremely unfair. Having an MFN clause in an international bilateral treaty, especially a one-sided one of this nature, is a clear indication of a bad treaty with Kenya being the weaker party in this negotiation.	