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Tax & Exchange Control ALERT

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Salient features of the Kenya- Singapore bilateral investment treaty

The Kenya-Singapore Bilateral Investment Treaty (BIT) came into force on 20 August 2023, five years after it was signed in 2018.

Kenya remains a strategic partner of Singapore's in Sub-Saharan Africa (SSA). It is the largest economy in the East Africa Community (EAC), serves as the gateway to broader East and Central Africa and is a primary entryway to the EAC market of over 500 million consumers. The coming into force of the BIT provides investors from Singapore legal protection for their investments into Kenya, and also the possibility to tap into the African Continental Free Trade Area (AfCFTA) providing access not just to the EAC but the rest of the AfCFTA market.

This alert outlines the salient features that are critical for an investor and their investments in Kenya or in Singapore. As such we highlight who are considered investors and what are investments under the BIT, the nature of the protection afforded by the BIT, and the exceptions to the BIT.

Who is protected?

The BIT covers natural persons and enterprise as investors from a contracting state (i.e. Singapore).

Article 1 defines an investor to be either an enterprise of a party or a natural person who is a citizen of that party that has made an investment. An enterprise is defined as any entity constituted under applicable law and includes privately owned companies, government-owned or government-controlled corporations, trusts, partnerships and joint ventures, or a branch of such an investor.

Consequently, only citizens or enterprises owned by citizens or governments of either contracting party may benefit under the BIT.

Importantly, as outlined in Article 23, a party may deny benefits under the BIT to an enterprise where it is established that the enterprise is owned or controlled by persons of another state, or of the denying party and has no substantive business operations in the territory of the other contracting state.



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What is protected?

Article 2 of the BIT provides that the BIT applies to all investments made by investors of one party in the territory of another party. As such the BIT applies to investments made by investors in either territory whether before or after the entry into force of the BIT. The BIT defines an investment as any kind of asset, owned or controlled, directly or indirectly by an investor. The BIT further qualifies that such an asset must have the hallmarks of an investment i.e. commitment of capital, expectation of gain or profit and the assumption of risk.

The BIT outlines that investment may take the form of shares and any other form of equity in an enterprise, debentures, loans and other debt instruments, futures, and options. It also entails construction, production and other similar contracts including claims to money or to any contractual performance arising therefrom. The BIT also covers

intellectual property rights, goodwill and property in any form including related property rights such as leases, mortgages, liens and pledges.

Worthy of mention is that the BIT qualifies that investments protected are those made by investors as defined in the BIT and as discussed above. Moreover, the BIT outlines that the investments protected are those which relate to a business activity and do not relate to assets of a personal nature.

What are the protections granted under the BIT?

Qualifying investors from Singapore to Kenya (and *vice versa*) of qualifying investments are guaranteed protection against measures that breach any of the substantive guarantees and/or commitments provided for under the BIT. Article 1 defines a measure to mean any measure by a contracting party, whether in the form of a law, regulation, rule, procedure, decision,

administrative action, or any other form, and includes measures that are taken by the central, regional, or local governments and authorities, or statutory bodies. These guarantees and/or commitments are:

- Fair and equitable treatment
- Full protection and security
- Most-favoured nation status
- Guarantee against unlawful expropriation
- Compensation of losses
- Transfers relating to investments

Some of the reciprocal protections and rights granted under the BIT to qualifying investors and their qualifying investments includes the controversial fair and equitable treatment principle (albeit refined), full protection and security, non-discriminatory treatment through the most-favoured nation obligations, protection from unlawful expropriation and access to

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international investment arbitration in the event of a dispute between the investor and host government. We highlight some of the key protections in this section.

Fair and equitable treatment (FET):

The BIT requires both parties to accord to investors and investments fair and equitable treatment. The BIT clarifies that FET treatment does not require treatment in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens and does not create additional substantive rights.

Full protection and security:

The BIT requires each party to take such measures as may be reasonably necessary to ensure the protection and security of the investments. This obligation on the state is usually understood as the obligation for the host state to adopt all reasonable

measures to physically protect assets and property from threats or attacks which may target investors or foreigners.

Protection from discriminatory treatment:

The BIT obliges parties to comply with the most-favoured nation treatment obligation with respect to the management, conduct, operation and sale or other disposition of the investments. The BIT outlines that each party shall accord to investments of investors of the other party treatment no less favourable than that it accords, in like circumstances to investments of any other non-contracting party. The most-favoured nation obligation is also reflected in the agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income between Kenya and Singapore. The double taxation agreement, however, is yet to come into force.

In general investments parlance, like circumstances cover those investors who are in a situation similar to that of the impugned investor. This is in respect to the test in *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006)¹, which outlined that discrimination occurs where similar businesses are treated differently for no justifiable reason. The BIT outlines that the determination of like circumstance considers the totality of the circumstances, including the sector of investment, the aim of the impugned measure and the basis of the distinguishing treatment. Discrimination is unjustified if no reasons or insufficient reasons are given for the discrimination or where the reasons fronted are arbitrary and capricious.

¹ In this arbitration, Saluka claimed that the Czech Republic acted discriminatorily in relation to Saluka and its investment in a manner inconsistent with the Czech Republic's obligations under the BIT between the Netherlands and the Czech Republic. The tribunal outlined a test to determine discrimination i.e. similar businesses treated differently for no justifiable reason. Award details are available at: <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>

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Protection from unlawful

expropriation: The BIT prohibits any party from nationalising, expropriating, whether directly or indirectly, the investments of investors of the other party unless such a measure is qualified. The BIT outlines that expropriation may be lawful where: it is taken on a non-discriminatory basis; where it is for a public purpose; in accordance with due process of law; and upon payment of compensation.

Pursuant to the BIT, an action or a series of actions do not constitute expropriation unless it interferes with a tangible or intangible property right. Further, a determination of an indirect expropriation requires a case-by-case, fact-based inquiry that considers, the economic impact, the extent and the character of the actions.

The BIT outlines that any lawful expropriation shall be accompanied by the payment of prompt, adequate and effective compensation which

shall be equivalent to the fair market value of the investment. The fair market value shall be assessed before the expropriation or before the impending expropriation became public knowledge. Moreover, such compensation shall be effectively realisable, freely usable and freely transferrable.

Qualifying investor: Protected investors shall not include non-citizens of either party and may not include an enterprise owned or controlled by non-citizens or an enterprise with no substantive business operations in a contracting party.

Regulated measures: The BIT does not extend to subsidies or grants provided by a party including government supported loans, guarantees and insurance and to any conditions attached to the receipt or continued receipt of such subsidies or grants. Moreover, a party may enact measures to promote small- and medium-sized enterprises and infant industries in its territory.

Like treatment: The BIT does not grant investors and investments benefits of any treatment, preference or privilege resulting from any existing or future customs union or free trade area, any existing bilateral investment agreement or any arrangement aimed to promote regional cooperation.

Access to international investment arbitration for investors who allege breach of the BIT by contracting state

Chapter III of the BIT provides for the settlement of disputes between a contracting party and an investor concerning breaches of the BIT which cause loss or damage to the investor or the investment.

As a first port of call, the BIT outlines that the disputing parties shall initially seek to resolve the dispute by consultations and negotiations. The disputing investor may also submit the dispute to a competent court or an administrative tribunal for determination. This signals the exhaustion of local remedies element under the BIT.

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Where the dispute is not resolved by these local remedies within 12 months of initiation of consultations, the disputing party may submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID) under the ICSID Convention, the Rules of Procedure for Arbitration Proceedings, and the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID.

Notably, the dispute may only be submitted to ICSID within three years of the disputing party being aware of the breach or when they should have reasonably been aware of the breach.

Exceptions to the BIT

Article 26 provides that the BIT shall not be construed to prevent the adoption or enforcement of measures that include the following, provided that such measures are not

applied in a manner that is arbitrary or an unjustifiable discrimination against the other contracting party or its investors:

- Measures necessary to protect public morals or to maintain public order.
- Measures necessary to protect human, animal, or plant life or health.
- Measures necessary to secure compliance with laws and regulations which are not inconsistent with the BIT including those relating to the prevention of deceptive and fraudulent practices and the protection of privacy of individuals.
- Measures imposed for the protection of national treasures of artistic, historic, or archaeological value.
- Measures relating to the conservation of exhaustible natural resources.



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2018 - 2023
ranked our Tax & Exchange Control
practice in **Band 1: Tax**.

Emil Brincker ranked by
Chambers Global 2003 - 2023
in **Band 1: Tax**.

Gerhard Badenhorst was awarded
an individual spotlight table ranking in
Chambers Global 2022 - 2023 for
Tax: Indirect Tax.

Stephan Spamer ranked by
Chambers Global 2019-2023
in **Band 3: Tax**.

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Conclusion

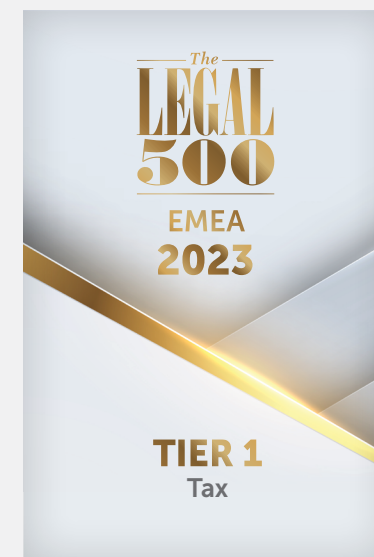
The salient features outlined above go to show the benefits that investors will reap from the Kenya-Singapore BIT. These include protection of investments from unjustified discrimination (i.e. the fair and equitable treatment standard, full protection and security and most-favoured nation status) and unlawful expropriation. Over and above outlining the dispute settlement regime in the BIT, this alert has outlined the exceptions to the BIT that an investor should look out for before making an investment in Kenya or Singapore under the BIT.

It is expected that the coming into force of the BIT will significantly boost volumes of trade between both countries and further deepen the breadth of investments. It remains to

be seen when the double taxation agreement will be ratified as this will go a long way in fulfilling the objectives of the BIT.

The BIT shall remain in force for a period of 10 years after its entry into force and shall continue operating unless terminated by a contracting party at the end of the initial 10 years. A contracting party that wishes to terminate the BIT must give the other contracting party one year's advance notice in writing and the notice shall become effective one year after it has been received by the other contracting party.

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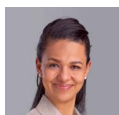
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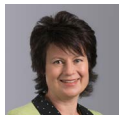
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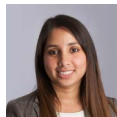
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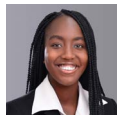
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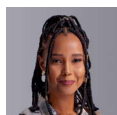
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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