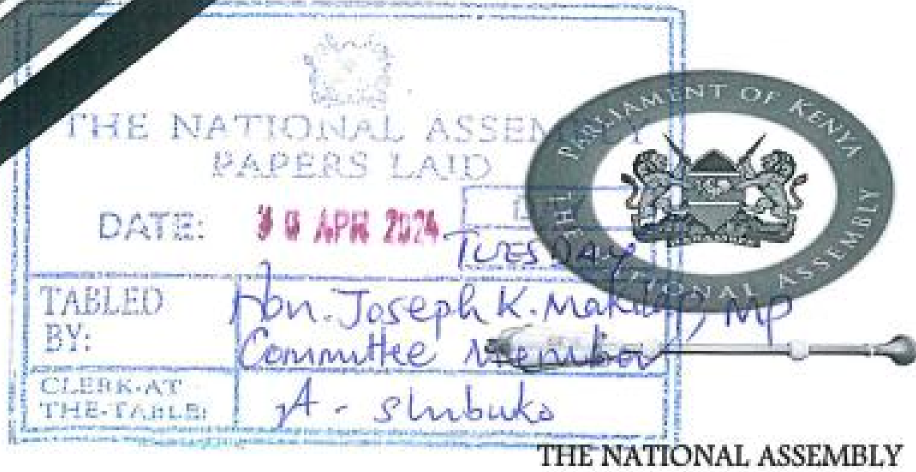

Approved SNA 30/4/24

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPORT ON:

CONSIDERATION OF THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING

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LIST OF ABBREVIATIONS AND ACRONYMS

CGT	Capital Gains Tax
CTA	Covered Tax Agreement
DTA	Double Taxation
EAC	East Africa Community
GLOBE	Global Anti-Base Erosion
IIR	Income Inclusion Rule
KEPSA	Kenya Private Sector Alliance
LOB	Limitation on Benefits
MAP	Mutual Agreement Procedure
MBTA	Mandatory Binding Treaty Arbitration
MLI	Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting
MNE	Multinational Enterprises
OECD	Organization for Economic Cooperation and Development
PE	Permanent Establishment
PPT	Principle Purpose Test
PWC	PriceWaterhouseCoopers
STTR	Subject to Tax Rule
UTPR	Undertaxed Payments Rule
WHT	Withholding tax

ANNEXURES

Annexure 1: Adoption Schedule

Annexure 2: Minutes

Annexure 3: The Memorandum on the Multilateral Convention To Implement Tax Treaty-Related Measures To Prevent Base Erosion And Profit Shifting (MLI)

CHAIRPERSON'S FOREWORD

The Cabinet Secretary, Ministry of National Treasury and Economic Planning, submitted a memorandum to the National Assembly dated 21st March 2023 regarding the ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The memorandum and text of the Convention were committed to the Departmental Committee on Finance and National Planning for processing.

The primary objective of the MLI is to fight against BEPS by modifying existing DTAs to implement four tax treaty related measures developed by the BEPS Project. The MLI ensures that there will be swift, coordinated, efficient, and consistent implementation of BEPS measures which will ensure that existing DTAs are interpreted to eliminate double taxation without creating opportunities for non-taxation or reduced taxation.

The MLI was developed as BEPS Action 15 which called for the development of a comprehensive multilateral instrument that would modify existing bilateral Agreements for the Avoidance of Double Taxation (DTAs) to swiftly implement the tax treaty related measures that were developed as part of the BEPS-Project.

Kenya signed the MLI on 26th November 2019 at the headquarters of the OECD in Paris, France. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) was approved by Kenya during a Cabinet meeting held on 21st March 2023.

Pursuant to the provisions of Article 118 (1)(b) of the Constitution on public participation and section 8(3) of the Treaty-Making and Ratification Act, Cap. 4D, the Committee placed advertisements in two local dailies of nationwide circulation, requesting submissions of memoranda on the subject. The Committee received memoranda in support of the MLI.

In considering the Convention, the Committee held meetings with the National Treasury, the Kenya Revenue Authority (KRA), and at least eleven (11) state and non-state actors who lauded the government for approving the MLI noting the central role the convention plays in providing a level playground for business while ensuring multinationals pay the right share of taxes to the host country.

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Convention. The Committee further wishes to commend the following institutions for submitting their views on the Convention: the National Treasury and Economic Planning, the Law Society of Kenya, PWC Kenya, Bowmans LLP, Anjarwala & Khanna, PKF, RSM (Eastern Africa), Ernst & Young, Okoa Uchumi, and KEPSA among others.

Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made invaluable contributions towards the preparation and production of this report.

It is my pleasure to report that the Departmental Committee on Finance and National Planning has considered the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting and pursuant to the provisions of Standing Order 199(6), wishes to report to the House with the recommendation that the House **APPROVES** the ratification of the Convention with **reservations to Articles 5 and 16.**

On behalf of the Departmental Committee on Finance and National Planning and pursuant to the provisions of Standing Order 199(6), it is my singular honour to present to this House the Report of the Committee on its consideration of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

HON. CPA. KURIA KIMANI, M.P.
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

CHAPTER ONE

1 PREFACE

1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE

1. The Departmental Committee on Finance and National Planning is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is as follows:

    a) *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations, and estimates of the assigned ministries and departments;*
    b) *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
    c) *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
    d) *To study and review all legislation referred to it;*
    e) *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
    f) *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
    g) *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
    h) *To examine treaties, agreements, and conventions;*
    i) *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
    j) *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
    k) *To examine any questions raised by Members on a matter within its mandate.*

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.

3. In executing its mandate, the Committee oversees the following Ministries/Departments:

    I. The National Treasury.
    II. State Department for Economic Planning.
    III. The Commission on Revenue Allocation (CRA)
    IV. Office of the Controller of Budget

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House on 27th October 2022 and comprises the following Members:

5.

Chairperson
Hon. CPA. Kuria Kimani, MP
Molo Constituency
UDA Party

Vice-Chairperson
Hon. (Amb.) Benjamin Langat, CBS, MP
Ainamoi Constituency
UDA Party

Hon. (Dr.)Adan Keynan, MP
Eldas Constituency
Jubilee Party

Hon Andrew Okuome, MP
Karachuonyo Constituency
ODM Party

Hon. David Mboni, MP
Kitui Rural Constituency
Wiper Party

Hon. Joseph Oyula, MP
Butula Constituency
ODM Party

Hon. Joseph Kipkoros Makilap, MP
Baringo North Constituency
UDA Party

Hon. Umul Ker Kassim, MP
Mandera County
UDM Party

Hon. CPA Julius Rutto, MP
Kesses Constituency
UDA Party

Hon. (Dr.) Shadrack Ithinji, MP
South Imenti Constituency
Jubilee Party

Hon. Paul Biego, MP
Chesumei Constituency
UDA Party

Hon. Joseph Munyoro, MP
Kigumo Constituency
UDA Party

Hon. (Dr.) John Ariko, MP
Turkana South Constituency
ODM Party

Hon. Mohamed Machele, MP
Mvita Constituency
ODM Party

Hon. George Sunkuya, MP
Kajiado West Constituency
UDA Party

1.4 COMMITTEE SECRETARIAT

6. The Committee is facilitated by the following staff:

Mr. Benjamin Magut
Principal Clerk Assistant II /Head of Secretariat

Ms. Jennifer Ndeto
Deputy Director Legal Services

Mr. Benson Kamande
Clerk Assistant III

Mr. Salem Lorot
Legal Counsel I

Ms. Winfred Kilonzo
Clerk Assistant III

Mr. George Ndenjeshe
Fiscal Analyst III

Mr. Andrew Jumanne Shangarai
Principal Serjeant-At-Arms

Mr. Benson Muthuri
Assistant Serjeant-At-Arms

Ms. Nelly W. Ondieki
Research Officer III

Ms. Peninah Naisiae
Legal Counsel II

Mr. James Macharia
Media Relations Officer

Ms. Joyce Wachera
Hansard Reporter III

Mr. Chelang'a Maiyo
Research Officer I

Mr. Mwangi Muchiri
Audio Officer

CHAPTER TWO

2 MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING

2.1 BACKGROUND

7. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) was developed in 2015 as a Base Erosion and Profit Shifting (BEPS) action 15 which calls for the development of a comprehensive multilateral instrument to modify existing bilateral agreements for the avoidance of Double Taxation (DTAs). Further, in response to the tax avoidance strategies, the G20, the Organization for Economic Cooperation and Development (OECD), advanced & developing countries and regional tax bodies have been working to develop new rules and processes to strengthen the international tax system and to tackle tax avoidance.

8. Governments lose substantial corporate tax revenue because of aggressive international tax planning that has the effect of artificially shifting profits to locations where they are subject to non-taxation or reduced taxation.

9. The Cabinet held its 3rd Cabinet meeting on 21st March 2023. The Cabinet Secretary for the National Treasury and Economic Planning presented a Cabinet Memorandum (CAB (23) (45) jointly submitted with the Cabinet Secretary for Foreign & Diaspora Affairs and the Attorney General. The Memorandum sought approval for the ratification of the Multilateral Convention to Implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting (the MLI).

10. During the Cabinet meeting, it was noted that Kenya signed the MLI on 26th November 2019, and the Cabinet approved the ratification of the MLI. Further, the Cabinet directed the Cabinet Secretaries for the National Treasury and Economic Planning and Diaspora Affairs and the Attorney-General to take the appropriate action.

2.2 OUTLINE OF THE CONVENTION

11. The MLI has **39 articles** in total

CTAs

12. **Article 2** of the MLI provides for the **interpretation of terms** which includes "*Covered Tax Agreement or CTA*" to mean an agreement for the avoidance of double taxation with respect to income tax in force between two or more parties or jurisdictions. Kenya provides a list of countries with which it has entered into with other countries on CTA and whose agreements will be covered by the MLI. Save for the provisions of Article 2, the MLI under Article 1 modifies all CTAs.

Transparent Entities

13. In addition, **Article 3** of the MLI provides for **transparent entities** where it states that a party may reserve the right for the entirety of Article 3 on transparent entities not to apply to its CTAs. A party that does not make a reservation shall notify the depositary of whether each of its CTAs contains a provision that addresses whether income is derived by or through an entity and is treated as fiscally transparent under either contracting jurisdiction tax laws and that is not subject to a reservation.

Dual Resident Entities

14. **Article 4** provides for **dual resident entities** whereby a legal person other than an individual is a resident of more than one Contracting Jurisdiction. The competent authorities of either Contracting Jurisdiction shall through mutual agreement determine the residence of which such person is for a Covered Tax Agreement. This determination shall only apply to instances where the Covered Tax Agreement does not contain provisions for dual resident entities. Additionally, a party may reserve the right for the entirety of Article 4 not to apply to its CTAs. However, this provision shall not apply in instances where the CTAs specifically address the residence of companies participating in dual-listed company arrangements.

Application of Methods for Elimination of Double Taxation

15. **Article 5** provides **three options** for the application of methods for the elimination of double taxation. A party that chooses not to apply any of the options may reserve the right for the entirety of Article 5 not to apply with respect to any of its CTAs.

Purpose of a Covered Tax Agreement

16. **Article 6** provides for the inclusion or modification of the preamble of existing CTAs with the following words "*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 jurisdictions).*"

17. In addition, a party with CTAs may choose to include in its respective preambles *"Desiring to further develop their economic relationship and to enhance their cooperation in tax matters"*. A party may choose to reserve the right by not modifying or including the above words in its CTAs' preamble if the preamble already provides for the intent of the Contracting Jurisdictions to eliminate double taxation without creating opportunities for tax evasion or avoidance.

Prevention of Treaty Abuse

18. **Article 7** provides for the **prevention of treaty abuse** by denying a benefit under a Covered Tax Agreement that arises as one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit unless the granting of the benefit would be in accordance with the purpose of the Covered Tax Agreement.

19. A Party may choose to apply provisions of **"Simplified Limitation on Benefits Provision"** to its Covered Tax Agreement. These provisions apply in place of or in the absence of

provisions of a Covered Tax Agreement that would limit the benefits in the CTA only to the resident who qualifies for such benefits by meeting one or more tests.

Dividend Transfer Transactions

20. **Article 8** provides for provisions on **dividend transfer transactions** whereby provisions of a CTA exempting taxation on dividends paid by a company that is a resident of a Contracting Jurisdiction provided that the beneficial owner or recipient is a company is a resident of the other Contracting Jurisdiction and holds, owns or controls more than a certain amount of the capital or shares of the company paying the dividend for a period of a minimum 365 days.

21. A party may reserve the right for non-application of Article 8 in its entirety to its CTA or to the extent that its CTAs contain a minimum holding period, a minimum holding period shorter than 365 days or a minimum holding period longer than 365 days.

Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

22. **Article 8** provides that **gains** derived by a resident of a Contracting Jurisdiction from the alienation of shares in an entity **may be taxed** by the other Contracting Jurisdiction provided that the shares were derived more than a certain part of their value from immovable property situated in that other Contracting Jurisdiction. This shall apply if the value threshold was obtained at any time during the 365 days preceding the alienation and comparable interests and interests in a partnership or trust not covered in the CTA.

23. Further, it provides that with respect to CTAs' gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, interests in a partnership or trust, may be taxed by the other Contracting Jurisdiction if, at any time during the 365 days, the shares or interests derived more than 50% of the value directly or indirectly from immovable property located in the other Contracting Jurisdiction.

Anti-abuse Rule for Permanent Establishment Situated in Third Jurisdictions

24. **Article 10** provides for the limitation of benefits of a CTA where an enterprise of a Contracting Jurisdiction to a CTA derives income from the other Contracting Jurisdiction and the first Contracting Jurisdiction treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction and the profits attributable to that permanent establishment are exempt from tax in the first Contracting Jurisdiction.

25. The limitation of benefits shall only apply to any item of income on which the tax in the third jurisdiction is **less than 60%** of the tax that would be imposed on the first Contracting Jurisdiction if the permanent establishment were situated in the first Contracting Jurisdiction. In such a case, Article 10 provides that any such income shall remain taxable according to the domestic law of the other Contracting Jurisdiction notwithstanding any provisions of the CTA.

26. However, the above limitation of benefits shall not apply to any income derived from the other Contracting Jurisdiction in connection with the active conduct of a business carried on through the permanent establishment.

27. Benefits denied may still be granted by the other Contracting Jurisdiction if the resident makes a request and the competent authority of the other Contracting Jurisdiction consults its counterpart in the Contracting Jurisdiction before granting or denying the request.

Application of Tax Agreements to Restrict a Party's Right to Tax its Residents

28. **Article 11** provides that a CTA shall not affect the taxation by Contracting Jurisdiction of its residents except with respect to the benefits granted under the provisions of the CTA.

Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies

29. **Article 12** provides for the artificial avoidance of permanent establishment status through commissionaire arrangements.

30. This is a strategy where an enterprise uses a person acting in a Contracting Jurisdiction to a CTA to habitually conclude contracts or habitually play the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise where the contracts are:
    (a) in the name of the enterprise; or
    (b) for the transfer of 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
    (c) for the provision of services by that enterprise

    the enterprise shall be deemed to have a permanent establishment in that Contracting Jurisdiction in respect of any activities that the person undertakes for the enterprise.

31. However, the above-mentioned provisions shall not apply where the person undertakes as an independent agent and acts for the enterprise in the ordinary course of that business.

Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions

32. **Article 13** addresses the artificial avoidance of PE status through the specific activity exemptions such as warehousing or purchasing goods included in Article 5(4) of the OECD Model Tax Convention. Only genuine preparatory or auxiliary activities will be excluded from the definition of permanent establishment. In addition, related entities will be prevented from fragmenting their activities to qualify for this exclusion.

Splitting-up of Contracts

33. **Article 14** provides for the determination of whether a period referred to in a CTA has exceeded the period after which specific projects or activities shall constitute a permanent establishment where—
    (a) an enterprise of a Contracting Jurisdiction carries on activities in the other Contracting Jurisdiction at a place constituting a building site, construction project, installation project, or other specific project identified in the relevant provision of the CTA or carries on consultancy activities in connection with such a place and such activities in the aggregate exceed 30 days without exceeding the period referred to in the relevant provision of the CTA; and

(b) connected activities are carried on in that other Contracting Jurisdiction at the same building site, construction or installation project, or other place identified in the CTA during different periods each exceeding 30 days by one or more enterprises closely related to the first mentioned enterprise,

the different periods shall be added to the aggregate period during which the first mentioned enterprise has carried out activities at that site.

Definition of a Person Closely Related to an Enterprise

34. **Article 15** provides that a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. A person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or in the case of a company, more than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Mutual Agreement Procedure

35. **Article 16** provides that where a person considers that the actions of one or both of the Contracting jurisdictions result or will result in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

Corresponding Adjustments

36. **Article 17** provides that if one Contracting Jurisdiction taxes the profits of an enterprise that other Contracting Jurisdiction has already taxed, and these profits would have been different if the companies were independent, then the other Contracting Jurisdiction must adjust its tax accordingly. This adjustment should consider the terms of the CTA and require consultation between the competent tax authorities of both Contracting Jurisdictions.

37. This provision applies where a Contracting Jurisdiction does not have a provision mandating it to adjust the tax amount charged on the profits of an enterprise within that jurisdiction if the other Contracting Jurisdiction includes those profits in its enterprise's profits and taxes them accordingly. This adjustment is necessary when the profits included would have been different had the two enterprises been independent.

The choice to Apply PART VI

38. **Article 18** provides that a party may choose to apply the part on arbitration with respect to its Covered Tax Agreement and shall notify the Depositary accordingly. The arbitration shall only apply to two Contracting Jurisdiction with respect to a CTA where the two have made such a notification.

Further Articles

39. The following are further articles of the Convention:
  - Article 19-26 provides for provisions on arbitration procedures.
  - Article 27 provides for the provision of signature and ratification, acceptance, or approval.
  - Article 28 provides for provisions that require reservations as outlined above.
  - Article 29 provides for provisions that require notifications as outlined above.
  - Article 30 provides for subsequent modification of CTAs.
  - Article 31 provides for the conference of the Parties.
  - Article 32 provides for interpretation and implementation.
  - Article 33 provides for provisions on amendments.
  - Article 34 provides for provisions on entry into force.
  - Article 35 provides for provisions on entry into effect.
  - Article 36 provides for provisions on entry into effect of Part VI on arbitration.
  - Article 37 provides for withdrawal.
  - Article 38 provides for provisions in relation to protocols.
  - Article 39 provides for provisions for depositary.

CHAPTER THREE

3 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE CONVENTION

3.1 LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

40. Article 118 (1)(b) of the Constitution provides that:

    "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees."

41. Section 8(3) of the Treaty-Making and Ratification Act (Cap 4D) provides that:

    "The relevant parliamentary committee shall, during its consideration of the Treaty, ensure public participation in the ratification process in accordance with laid down parliamentary procedures."

3.2 MEMORANDA RECEIVED ON THE CONVENTION

42. Pursuant to the aforementioned provisions of law, the Clerk of the National Assembly placed an advertisement in the print media inviting the public to submit memoranda by way of written statements on the Convention. Further, the Clerk of the National Assembly vide letter Ref. No NA/DDC/F&NP/2024/024 dated 20th February 2024 invited key stakeholders to submit views on the Agreement and attend a public participation forum on 27th February 2024 and 28th February 2024 respectively.

43. The Committee received memoranda from the following institutions:
    (a) The National Treasury and Economic Planning
    (b) Kenya Revenue Authority
    (c) The Law Society of Kenya
    (d) PWC Kenya
    (e) Bowmans LLP
    (f) Anjarwala & Khanna
    (g) PKF
    (h) RSM (Eastern Africa)
    (i) Ernst & Young
    (j) Okoa Uchumi
    (k) KEPSA

3.3 MEETING WITH THE CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC PLANNING

44. The Cabinet Secretary for National Treasury and Economic Planning, Prof. Njuguna Ndung'u, CBS, appeared before the Committee on 27th February 2024 and made the following submissions.

    I. Over the last ten years, there has been growing concern about the use of tax avoidance strategies by multinational enterprises that exploit gaps and

mismatches in international tax rules to shift profits to low or no-tax jurisdictions where there is little or no economic activity. These strategies are referred to as Base Erosion and Profit Shifting (BEPS).

II. In response to these concerns, the G20 and the OECD, together with many advanced and developing countries and regional tax bodies, have been working to develop new rules and processes to strengthen the international tax system and tackle tax avoidance. This group of countries is referred to as the Inclusive Framework on BEPS, of which Kenya became a member in January 2017.

III. The Inclusive Framework brings together over 140 countries and jurisdictions to collaborate on the implementation of the BEPS Package. This has allowed Kenya to work on an equal footing with other countries to tackle tax avoidance by developing recommendations that are aimed at realigning taxation with the location where economic activity takes place and value is created.

IV. The Inclusive Framework developed the BEPS Project to address BEPS issues in a coordinated and comprehensive manner and to provide countries with domestic and international instruments that will better align taxing rights with economic activity. The outcome of the Project was the development of the BEPS Action Plan in September 2013 which set out 15 Actions to address BEPS comprehensively.

V. The MLI was developed as BEPS Action 15 which called for the development of a comprehensive multilateral instrument that would modify existing bilateral Agreements for the Avoidance of Double Taxation (DTAs) to swiftly implement the tax treaty related measures that were developed as part of the BEPS Project.

VI. Work on the MLI started in February 2015, which was followed by its adoption in November 2016 and was consequently opened for signature in December 2016. A signing ceremony was held on 7th June 2017 during which 67 countries signed the MLI.

VII. Kenya signed the MLI on 26th November 2019, at the headquarters of the OECD in Paris. The signature was effected by Professor Judi Wakhungu, Ambassador of the Republic of Kenya to France, who was vested with full powers to sign on behalf of the Government.

VIII. As of February 2024, 102 jurisdictions have signed the MLI while 85 have ratified it.

IX. International tax laws have not always kept pace with the frequent developments in the world's business environment and this creates opportunities for these gaps to be exploited. As of the year 2014, the OECD reported that the global revenue losses from BEPS were conservatively estimated at US $100 billion to US $240 billion annually.

X. Taxation is a critical source of revenue for all governments, in particular for developing countries where revenue mobilization efforts produce far less tax revenue as compared to developed countries. BEPS results in little or no overall corporate tax being paid, ultimately weakening the integrity of the tax system.

This impacts governments directly because tax revenues are reduced hence essential services are not adequately provided.

XI. The primary objective of the MLI is to fight against BEPS by modifying existing DTAs in order to implement four tax treaty related measures developed by the BEPS Project. The MLI ensures that there will be swift, coordinated, efficient and consistent implementation of BEPS measures which will ensure that existing DTAs are interpreted to eliminate double taxation without creating opportunities for non-taxation or reduced taxation.

XII. The four BEPS Actions which are related to DTAs and will be implemented by the MLI are:

(a) Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*): Hybrid mismatch arrangements are used in aggressive tax planning to exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation.

(b) Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*): This Action introduces anti-abuse provisions to existing DTAs which will counter treaty shopping. Treaty shopping involves strategies through which a person who is not a resident of either Contracting State attempts to obtain benefits that a DTA concluded between two States grants only to residents of those States.

(c) Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment (PE) Status*): This Action provides changes to the definition of permanent establishment under DTAs to address strategies used to avoid having a taxable presence in a jurisdiction.

(d) Action 14 (*Making Dispute Resolution Mechanism More Effective*): This Action seeks to improve the resolution of tax-related disputes arising under DTAs.

XIII. DTAs which entered into force before the work on BEPS started contain loopholes that multinational enterprises have been exploiting to shift profits out of the countries where the economic activity took place. The MLI is an important instrument because it saves countries from the burden of bilaterally re-negotiating each of their existing DTAs to cure a lot of the issues that lead to erosion of the tax base. If undertaken on a treaty-by-treaty basis, the number of treaties in effect would make such a process very lengthy.

XIV. Kenya has bilateral DTAs in force with the following countries.

1. Canada
2. Denmark
3. France
4. Germany
5. India
6. Iran
7. Norway
8. Korea
9. Qatar.
10. United Kingdom
11. South Africa
12. Sweden
13. United Arab Emirates
14. Seychelles
15. Zambia

XV. The MLI therefore allows Kenya to update the provisions of Kenya's DTAs in an efficient and time-saving manner. It also makes it possible to pursue the

domestication of the changes to all the DTAs at once since it will form part of Kenya's domestic law. The MLI is a flexible instrument that will modify existing DTAs in line with Kenya's policy preferences.

XVI. Under the Convention, jurisdictions are allowed to make reservations and notifications in line with their policy preferences. Notifications indicate the provisions of the MLI that a jurisdiction intends to adopt while reservations indicate the provisions which it does not intend to adopt.

XVII. In this regard, Kenya intends to adopt the following notifications and reservations:

Article	Kenya's Position	Rationale
Article 2 Agreements Covered by the Convention	**Notification** Kenya wishes the following Agreements to be covered by the Convention: Canada, Denmark, France, Germany, India, Iran, Italy, Korea, Mauritius, Norway, Qatar, Seychelles, South Africa, Sweden, United Arab Emirates, United Kingdom, and Zambia.	The MLI provisions will update the Articles in the listed DTAs and allow Kenya to appropriate the benefits of the MLI where both Contracting Jurisdictions have adopted the same provisions (matching).
Article 3 Transparent Entities	**Notification** Kenya chooses to apply the provision that provides for taxation of Fiscally Transparent Entities (FTEs).	The provision will prevent double non-taxation or reduced taxation caused by the mismatch of rules.
Article 4 Dual Resident Entities	**Notification** Kenya chooses to apply the tie-breaker test that denies treaty benefits where the entity's residence cannot be determined.	This provision will ensure that companies make their tax residence clear and prevent abuse of the tax treaty.
Article 5 Application of Methods for Elimination of Double Taxation	**Reservation** Kenya wishes to place a reservation for the entirety of this Article not to apply with respect to all of its Covered Tax Agreements (CTAs).	Kenya's domestic law as well as DTAs apply the credit method for the elimination of double taxation instead of the exemption method and therefore no update is necessary.
Article 6 Purpose of a Covered Tax Agreement	**Notification** Kenya chooses to adopt the full preamble language in all its CTAs.	This provision will allow the DTA to be interpreted in a way that eliminates treaty shopping, double taxation, and double non-taxation.

Article 7 Prevention of Treaty Abuse	**Notification** Kenya chooses to apply the Simplified Limitation on Benefits (SLOB) provision to all CTAs as a supplement to the Principal Purpose Test (PPT).	The SLOB provision is more objective than the PPT and provides clear parameters that must be met for treaty benefits to accrue.
Article 8 Dividend Transfer Transactions	**Notification** Kenya chooses to apply this provision which requires that a minimum shareholding period be satisfied for a company to be entitled to a reduced rate on dividends from a subsidiary.	The time and value thresholds introduced by the provision will ensure that there is no abuse intended to obtain the lower rate.
Article 9 Capital Gains from Alienation of Shares or Interests of Entities Deriving Their Value Principally from Immovable Property	**Notification** Kenya chooses to apply this provision which addresses situations in which assets are contributed to an entity shortly before the sale of shares to dilute the proportion of the value of the entity that is derived from immovable property.	Kenya chooses to adopt the time and value thresholds to tax gains derived from immovable property to prevent treaty abuse.
Article 10 Anti-Abuse Rule for Permanent Establishments Situated in Third Jurisdictions	**Notification** None of the CTAs contain existing provisions that deny or limit benefits available to an enterprise of a Contracting Jurisdiction where there is the risk of double non-taxation.	Kenya chooses to adopt the provision to preserve its taxing rights where the income is exempt in the other Contracting Jurisdiction and subject to reduced taxation in a third jurisdiction to avoid double non-taxation.
Article 11 Application of Tax Agreements to Restrict a Party's Right to Tax Its Own Residents	**Notification** None of the CTAs contain an existing savings clause which preserves the right of a contracting jurisdiction to tax its own residents.	Kenya chooses to adopt this provision to ensure that her right to tax her residents is not restricted.
Article 12 Artificial Avoidance of Permanent Establishment (PE) Status Through Commissionaire Arrangements and Similar Strategies	**Notification** Kenya chooses to adopt the provision that expands the PE definition to capture commissionaire arrangements by multinational enterprises.	This will ensure a PE is created where value is created in Kenya and allow taxation of the resulting profits.

Article 13 Artificial Avoidance of PE Status Through the Specific Activity Exemptions	**Notification** Kenya chooses to apply the option which ensures that the proviso applies to the entire paragraph on exemptions.	This ensures that the PE exemption provisions only apply to preparation and auxiliary activities.
Article 14 Splitting Up of Contracts	**Notification** Kenya chooses to adopt this provision which addresses situations where multinational enterprises (MNEs) split up contracts to avoid the creation of a PE.	This will prevent MNEs from avoiding the PE time threshold required to create a PE.
Article 15 Definition of a Person Closely Related to an Enterprise	No notification is needed for this Article. Kenya adopts this definition in its DTAs	N/A
Article 16 Mutual Agreement Procedure (MAP)	**Reservation** Kenya wishes to place a reservation against the provision to file a MAP case in either of the Contracting States. Instead, the taxpayer will be allowed to file the case where he or she is resident, and that State will notify the other.	Kenya wishes to adopt the provision which guides taxpayers to file MAP cases where they are resident since this resident State can give unilateral relief.
Article 17 Corresponding Adjustments	**Notification** Kenya wishes to adopt the provision allowing the Contracting Jurisdiction too make adjustments where transfer pricing adjustments are done.	The provision prevents double taxation.
Part VI Arbitration (Articles 18-26)	**Notification** Kenya chooses not to apply Part VI	Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.
Part VII Final Provisions	These are explanatory Articles. No notifications are required.	These Articles do not require notification or reservation.
Article 35 Entry into Effect	**Notification** Kenya wishes to adopt the entry into effect provision of the MLI.	The MLI will enter into effect in Kenya when the internal processes are done.

45. Approval of the ratification of the MLI will put in place measures to curb abuse of DTAs, enhance clarity on taxation of partnerships to ensure there is no evasion of taxes, make dispute resolution mechanisms more effective, and broaden the tax base by ensuring that multinational enterprises do not avoid taxation on their activities in the country, through avoidance of permanent establishment status.

46. In addition, ratification of the MLI will improve Kenya's efforts to improve resource mobilisation for enhanced financing of public servies and other development needs. In particular, the MLI measures will enhance protection of Kenya's tax base especially given Kenya's high reliance on corporate income tax revenues in comparison with the more developed countries.

47. The MLI is by far a more prudent option than pursuing bilateral renegotiation of Kenya's existing DTAs which would be a lengthy, expensive and protracted process. Furthermore, many of Kenya's existing DTA partners have expressed their intention not to pursue this option due to the sheer size of their DTA network.

Financial implications

48. Over and above the costs of the regular legislative proposals, no costs are anticipated for the Government of Kenya.

Legal implications

49. Upon ratification, the MLI will form part of Kenya's domestic law.

3.4 ARTICLE BY ARTICLE CONSIDERATION OF PUBLIC SUBMISSIONS

3.4.1 Article 2

PWC Kenya

50. PWC Kenya appeared before the Committee on 27th February, 2024 made the following submissions on Article 2.

I. Kenya has notified 17 DTAs: Canada, Denmark, France, Germany, India, Iran, Italy, Korea, Mauritius, Norway, Qatar, Seychelles, South Africa, Sweden, United Arab Emirates, United Kingdom, Zambia.

II. Kenya has included DTAs that are signed but not ratified/in force— Italy and Mauritius. In this case, other signed DTAs that are not ratified should also be included in the list of notifications. These include China, EAC, Kuwait and Netherlands.

III. Kenya should avoid having to re-negotiate bilateral agreements that are already signed and ensure it meets the minimum BEPS standards.

Anjarwalla & Khanna LLP

51. Anjarwalla Khanna LLP appeared before the Committee on 27th February, 2024 and made the following submissions on Article 2.

I. Kenya has a total of seventeen (17) Covered Tax Agreements. Out of the 17, three (3) are yet to come into force while the other fourteen (14) are already in force.

II. By recognising the Covered Tax Agreements, Kenya clarifies the existing bilateral tax treaties and identifies the countries with which Kenya will modify the bilateral treaties without having to renegotiate each of them in alignment with the MLI mechanism.

III. The table below breaks down the covered agreements and their implication on Kenya's notification.

Agreement	Position
Germany	Germany has not notified the depositary on its agreement with Kenya.
Iran	Iran does not appear on the list of signatories and parties to the MLI
Italy	Kenya is not listed as one of the covered agreements, and the agreement has not entered into force despite having been signed on 15 October 1979.
Mauritius	Mauritius has not included it in its notification.
Norway	Norway has not included Kenya in its notification.
United Arab Emirates	There is a mismatch between the agreements notified by Kenya and UAE. Kenya's notification pertains to an original agreement signed on 22 February 2017 whereas the UAE's notification is dated 17 July 2012.
United Kingdom	There is a notification mismatch in relation to the dates of entry into force of the agreements. Kenya makes a notification on the original agreement which came into force on 30 September 1977 whereas the United Kingdom makes a notification on the original instrument and an amending instrument that came into force on 30 September 1977.
Zambia	Zambia does not appear on the list of signatories and parties to the MLI.

Bowmans LLP

52. Bowmans LLP appeared appeared before the Committee on 27th February, 2024 made the following submissions in relations to Article 2.

I. Kenya should amend its proposed list of Double Taxation Agreements that it seeks to have covered by the provisions of the Multilateral Convention to Prevent Base Erosion and Profit Shifting to include the Double Taxation Agreement with Korea.

II. Further, Kenya should expedite negotiations outside of the Multilateral Convention to Prevent Base Erosion and Profit Shifting to ensure that the Double Taxation Agreements with Germany, Iran, and Zambia comply with the minimum standard requirements.

Justification

I. Korea already ratified the Multilateral Convention to Prevent Base Erosion and Profit Shifting on 13 May 2020 and included the Double Taxation Agreement with Kenya as forming part of its agreements that it wants covered by the Convention.

II. On the other hand, Germany ratified the Convention on 18 December 2020 but did not include the Kenya-Germany Double Taxation Agreement as among the agreements it seeks to modify through the Convention. Accordingly, any modifications can only be achieved outside the Convention.

III. As of 22 February 2024, Zambia and Iran are not signatories to the MLI. Accordingly, it may be quicker and more efficient to modify the two Double Taxation Agreements outside of the Convention.

Kenya Private Sector Alliance (KEPSA)

53. Kenya Private Sector Alliance (KEPSA) before the Committee on 27th February, 2024 and proposed that Kenya should reserve the right to exclude specific taxes and tax regimes deemed essential for economic stability from the Convention's scope. This is to maintain the predictability and stability of Kenya's tax system and safeguard tax regimes critical for national development and investment attraction.

PKF Consulting

54. PKF appeared appeared before the Committee on 27th February, 2024 made the following submissions in relations to Article 2.

I. Kenya should consider including into the list of DTAs to be covered by the Convention agreements that have been signed but not yet entered into force. The inclusion of the above DTAs in the list of DTAs to be covered by the MLI will provide for their expeditious modification in line with the BEPS project measures and ensure that the DTAs are in line with the MLI by the time they are entered into force.

II. DTAs that have been signed but not yet in force have been included for consideration in the subsequent Articles and it would therefore be prudent to have them included under Article 2.

Okoa Uchumi

55. Okoa Uchumi submitted as follows—

(i) The designation of all of Kenya's tax treaties as Covered Tax Agreements (CTA) is a welcome move.

(ii) Given that the MLI seeks to address BEPS issues, it is imperative that as many agreements as possible are covered. It should be noted however that both bilateral

treaty partners will need to identify a treaty as a CTA in order for treaties to be modified.

Ernst & Young LLP

56. Ernst & Young LLP appeared appeared before the Committee on 27th February, 2024 made the following submissions in relations to Article 2.

    I. Kenya should update the notification under Article 22 to include to the list of covered agreements, double taxation agreements that have been signed but are not yet in force. The agreements that are signed but not yet in force include those with China, Italy, Kuwait, Mauritius and Netherlands.

    II. Upon signing the MLI on 26 November 2019, Kenya provided a provisional list of expected reservations and notifications for 17 covered tax agreements.

    III. The covered tax agreements listed in the provisional list include 15 active double tax agreements and 2 signed agreements not yet in force i.e. Italy and Mauritius.

    IV. The provisional list should be updated to include the following double tax agreements before deposit of the instrument of ratification, acceptance or approval: China, Kuwait, and Netherlands. This will promote consistency by ensuring all signed double taxation agreements are covered by the convention.

RSM (Eastern Africa)

57. RSM (Eastern Africa) appeared appeared before the Committee on 28th February, 2024 made the following submissions in relations to Article 2.

    I. Remove item 7 (Italy) and 9 (Mauritius) from the list of agreements that the Convention applies to or add all agreements that have been signed but are not in force as follows:

Country	Date signed
China	21/09/2017
EAC	30/11/2010
Italy	03/03/2016
Kuwait	12/11/2013
Mauritius	16/10/2019
Netherlands	22/07/2015

Justification

I. Article 2(1)(a)(i) of the MLI provides:

> *"(a) The term "Covered Tax Agreement" means an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are also covered); (i) that is in force between two or more:..."*

II. This provides, in mandatory terms, that an agreement needs to be in force, in order for the Convention to apply. Therefore, the agreements with Italy and Mauritius need to be excluded, given that they are not in force.

III. Alternative to the above, all agreements that have been signed, but are not yet in force, should be included as Covered Tax Agreements.

IV. These agreements have been negotiated and signed; therefore, there may be limited opportunities to modify or re-negotiate these agreements. Including them within the ambit of the MLI will ensure that the agreements will comply with the Convention, should they come into force.

V. Under the proposed List of Reservation and Notification, only two(2) out of the six(6) agreements that Kenya has signed but are not yet in force have been included. No reason or justification is provided to exclude the other four agreements.

COMMITTEE OBSERVATIONS

58. The Committee considered the proposals by the stakeholders on Article 2 of the Agreement and made the following observations—

(a) Article 2 of the MLI provides for the interpretation of terms which include "Covered Tax Agreement" or CTA which means an agreement for the avoidance of double taxation with respect to income tax in force between two or more parties or jurisdictions or territories which are parties to an agreement and with respect to which each Party has made a notification to the Depositary listing the agreement;

(b) The import of Article 2 of the MLI is that the MLI provisions will apply in respect of the listed DTAs and Kenya will benefit from the benefits of the provisions where both Contracting Jurisdictions have adopted the same provisions;

(c) Kenya has notified 17 CTAs, namely, Canada, Denmark, France, Germany, India, Iran, Italy, Korea, Mauritius, Norway, Qatar, Seychelles, South Africa, Sweden, United Arab Emirates, United Kingdom and Zambia;

(d) The stakeholders' submissions dwell on the notifications on CTAs but do not express any reservations on the text of Article 2 of the MLI.

3.4.2 Article 3

Bowmans LLP

59. Bowmans LLP submitted that the provision should be adopted for all the Double Taxation Agreements proposed to be covered by the Convention as proposed.

Justification

Hybrid mismatches have for a long time led to a loss of tax revenues to governments.

Kenya Private Sector Alliance (KEPSA)

60. KEPSA proposed that Kenya should reserve the right to treat entities by its domestic law regarding transparency and taxation. This is to maintain the stability and predictability of Kenya's tax system, ensure that entities operating within its jurisdiction are taxed in accordance with local legislation and economic policy. In addition, despite the Convention's provisions, Kenya may reserve the right to treat certain transparent entities

as residents for tax purposes, depending on their control and management location. This is to prevent hybrid mismatch arrangements that exploit differences in the tax treatment of entities across jurisdictions, ensuring tax fairness.

Okoa Uchumi

61. Okoa Uchumi submitted as follows—
    (i) Kenya has not made any reservations under Article 3 paragraph 5 of the MLI as such Article 3 will apply.

    (ii) This is a welcome move. It should however be noted that the application of this Article will be subject to the agreement of corresponding tax treaty partners.

    (iii) Article 3 implements recommendations outlined in BEPS Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements) and BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). It addresses the issue of a mismatch in the tax treatment of hybrid entities and avoids double taxation or double non-taxation. It is imperative that source countries protect their tax base where entities are treated as taxable in one jurisdiction and non-taxable in another.

COMMITTEE OBSERVATIONS

62. The Committee considered the proposals by the stakeholders on Article 3 of the Agreement and made the following observations—

    (a) Kenya has made a notification to apply the provision;

    (b) Article 3 of the MLI provides for the taxation of Fiscally Transparent Entities (FTEs) and this will prevent double non-taxation or reduced taxation caused by mismatch of rules.

3.4.3 Article 4

Bowmans LLP

63. Bowmans LLP submitted that Kenya should reserve the right for the entirety of article 4 not to apply to all the Double Taxation Agreements that it seeks covered by the Convention so that this article 4 does not apply to the agreements it intends to be covered by the Convention.

Justification

I. The Mutual Agreement Procedure process between countries takes considerable amount of time to resolve. In the meantime, an entity that is dual resident would not be able to benefit from the provisions of the Double Taxation Agreement which would negate the entire purpose of having the Double Taxation Agreement in the first place.

II. The Double Taxation Agreements in force between Kenya and various countries provide various options for resolving issues of dual residency by holding that such an impasse shall be determined by for example, the place of effective management (e.g. the Kenya-France Double Taxation Agreement).

III. Therefore, Kenya should endeavour to amend the Double Taxation Agreements that is has specific issues with their wording regarding the specific clause instead of subjecting all Double Taxation Agreements to the Mutual Agreement Procedure in a bit to resolve a dual residency dispute.

Kenya Private Sector Alliance (KEPSA)

64. KEPSA submitted the following—

I. Kenya should reserve the right to apply domestic law to resolve cases of dual resident entities. This is to ensure that tax residency is determined in a manner that is consistent with Kenya's economic interests and administrative practices.

II. Provisions should be inserted allowing Kenya to set its own rules on interest deductibility to prevent base erosion. Adapt interest deduction rules considering Kenya's development financing needs and investment climate. This is to retain control over an essential aspect of corporate taxation and to safeguard against aggressive tax planning strategies.

PKF Consulting

65. PKF submitted as follows—

I. Kenya should consider adopting the provisions for the determination of the tax residency of a person other than an individual that have been provided under Paragraph 1 of Article 4 of the MLI, modified with the reservation under paragraph 3(e) of Article 4 of the MLI. This modification provides for replacement of the last sentence of Article 4(1) with the following text.

II. Therefore, the adopted Paragraph 4(1) of Article 4 should read as:

"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 endeavor to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, 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 an agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement"

III. The effect of this modification is that it will ensure competent authorities of the contracting jurisdictions will not be permitted to agree to grant any relief or exemption from tax provided by the Covered Tax Agreement unless they are able to agree on the Contracting Jurisdiction of which the person described in paragraph shall be deemed to be a resident for the purposes of the Covered Tax Agreement.

Okoa Uchumi

66. Okoa Uchumi submitted as follows—

(i) Kenya has not made any reservations under Article 4(3) (b) through (d) of the MLI. As such Article 4 will apply.

(ii) The implementation of Article 4 in all Kenyan treaties is a welcome move. It will however depend on whether the other contracting states make a notification with respect of a provision in the CTA.

(iii) Article 4 implements Recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inapproriate Circumstances), it deals with the e-breaker rules for dual-resident entities and allows for the determination of residency by mutual agreement procedures. The adoption of this Article prevents the manipulation of tie breaker rules for tax avoidance.

COMMITTEE OBSERVATIONS

67. The Committtee considered the proposals by the stakeholders on Article 4 of the Agreement and made the following observations—

I. Article 4 of the MLI provides dual resident entities and contains a tie breaker rule for determining the tax residence of companies which are deemed to be resident of more than one jurisdiction under domestic provisions. It provides that the competent authorities of the Contracting Jurisdictions shall determine a sole jurisdiction of residence by mutual agreement having regard to that company's place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. Where an agreement cannot be reached, the company shall only be entitled to treaty benefits to the extent that the competent authorities of the Contracting Jurisdictions are in agreement;

II. Kenya has made a notification on Article 4 and chooses to apply the tie-breaker test;

III. This provision will ensure that companies make their tax residence clear and prevent abuse of the tax treaty.

3.4.4 Article 5

Bowmans LLP

68. Bowmans LLP agreed with the Kenya's reservation on Article 5.

Justification

I. The overriding goal of Article 5 of the Convention is to ensure that jurisdictions relieve double taxation by crediting foreign tax against domestic tax rather than exempting foreign income from domestic tax.

II. A reason for Kenya not to adopt Article 5 would be that in almost all its treaties, Kenya applies the credit method in relieving double taxation with respect to income of its residents. Case example of this is that withholding tax withheld by other countries on interest and royalty income earned by Kenyan residents is available as a credit against tax payable in Kenya on such interest and royalty income.

Kenya Private Sector Alliance (KEPSA)

69. KEPSA made the following submissions:

I. Kenya should reserve the right to apply its methods for eliminating double taxation more suited to its tax system. This is to avoid the imposition of methods that may not be compatible with Kenya's existing tax policies, ensuring a balanced and fair approach to tax administration.

II. Additionally, Kenya should reserve the right to continue applying the credit method to eliminate double taxation. This is to preserve the current tax credit system, which provides clarity and certainty to both domestic and foreign investors, and to retain the flexibility to incentivize certain economic activities.

III. Kenya should reserve the right to define a Services Permanent Establishment (PE) based on the duration and nature of activities carried out by foreign entities within its territory. This is to adapt the international PE standards to Kenya's economic context, ensuring that significant economic activities conducted within its jurisdiction are subject to taxation.

IV. Kenya should reserve the right not to apply the switch-over clause, allowing it to continue using the exemption method to foreign income where this is critical to its investment policy. This is to prevent disruption to established investment structures and provide investors with certainty regarding the tax treatment of foreign income, thereby preserving Kenya as a stable investment destination.

V. Further, Kenya may seek modifications to ensure that its tax incentive programs, designed to attract foreign investment, do not fall foul of BEPS Action 5 but remain competitive.This is to balance between adhering to international standards and maintaining attractive investment incentives.

VI. Further, the scope of capital gains taxable in Kenya should be narrowed to only those from real property within Kenyan borders. This will ensure that Kenya retains the right to tax gains from transferring immovable property located within its jurisdiction, which is a significant source of tax revenue.

Okoa Uchumi

70. Okoa Uchumi submitted as follows—

I. Kenya has reserved the right for Article 5 to not apply to CTAs.

II. It is recommended that this Article is adopted.

III. Article 5 implements recommendations outlined in the BEPS Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements). Article 5 addresses double non-taxation that arises when a CTA exempts foreign income from taxation in the jurisdiction in the jurisdiction of residence where the other corresponding treaty partner also does not tax this income. It proposes either: *Option A:* the denial of an exemption and the application of tax credit.

Option B: the denial of an exemption for dividends treated as deductible in the payer jurisdiction with the allowance of a tax credit for any tax paid attributable to that income.

Option C: the use of the full credit method based on Article 23B of the OECD Model Tax Convention on all types of income that the treaty allows the other contry to tax.

IV. It is recommended that either of the option is adopted with a strong preference for Option C.

RSM (Eastern Africa)

71. RSM (Eastern Africa) made the following submissions.

I. Pursuant to Article 5(10) of the Convention, Kenya considers that its Covered Tax Agreements contain the provisions described in Article 5, Paragraphs 2,3,4,5 and 6.

II. The provisions of Article 5(2) to 5(6) appear in all existing treaties that Kenya has, as summarised in the table below. Therefore the reservation contradicts existing agreements, creating lacunae.

Agreement	Article in Agreement
Canada	14(1) and 14(2)
Denmark	25(2)(a), 25(2)(b) and 25(3)
France	22(2)(b)
Germany	23(1) and 23(2)(a)
India	25
Iran	23(1), 23(2)(a) and 23(2)(b)
Italy	23(1)
Korea	23(1) and 23(2)
Mauritius	19(2)(a) and 19(2)(b)
Norway	25(2)(a), 25(2)(b) and 25(3)
Qatar	23
Seychelles	23(1)
South Africa	23(a) and 23(b)
Sweden	22(2) and 22(3)
UAE	24
UK	26(1)(b) and 26(3)(b)
Zambia	16(2) and 16(3)

III. Kenya should not reserve the right for Article not to apply with respect to all of its Covered Tax Agreement. The principal objective of a Double Taxation Agreement is to limit instances of double taxation on incomes.

IV. The provisions of Article 5(2) to 5(6) are critical in creating certainty and transparency and limit instance of double taxation or double non-taxation. Additionally, the provisions will prevent cases of over-claiming tax reliefs.

COMMITTEE OBSERVATIONS

72. The Committtee considered the proposals by the stakeholders on Article 5 of the Agreement and made the following observations:

I. Kenya has expressed its intention to place a reservation for the entirety of Article 5 of the MLI not to apply with respect to all of its Covered Tax Agreements (CTAs);

II. Kenya's domestic law as well as DTAs apply the credit method for elimination of double taxation instead of the exemption method.

3.4.5 Article 6

Bowmans LLP

73. Bowmans LLP agreed with Kenya's notification on Article 6. Kenya confirmed that all its Double Taxation Agreements intended to be covered by the Convention contain the mandatory provision on intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation.
74. Kenya also proposed to include in the preambles of its Double Taxation Agreements intended to be covered by the Convention, the provision on the desire to develop an economic relationship or enhance cooperation in tax matters.

Justification
The preamble emphasizes that tax treaties are not intended to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements.

Kenya Private Sector Alliance (KEPSA)

75. KEPSA noted that, Kenya should affirm its commitment to the minimum standards but reserve the right to apply these in a manner that best fits its domestic tax policy objectives.

76. This is to confirm Kenya's stance against tax evasion and avoidance while ensuring that its application of the MLI's minimum standards does not undermine its ability to attract and retain investment.

Okoa Uchumi

77. Okoa Uchumi submitted as follows—

I. Kenya has not made any reservations under Article 6(4). The adoption of this Article is welcome.
II. Article 6 implements recommendations outline in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). The preamble language that reiterates the commitment to not creating opportunities for treaty

shopping through the avoidance or evasion of tax is welcome. This Article is a minimum standard that cannot be opted out of.

COMMITTEE OBSERVATIONS

78. The Committtee considered the proposals by the stakeholders on Article 6 of the Agreement and made the following observations:

I. Article 6 of the MLI provides that a CTA shall be modified to include the following preamble text:

"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 jurisdictions)"

II. Kenya has made a notification on Article 6 of the MLI and chooses to adopt the full preamble language in all its CTAs;

III. The provision will allow the DTAs to be interpreted in a way that eliminates treaty shopping, doule taxation, and double non-taxation.

3.4.6 Article 7

The Law Society of Kenya (LSK)

79. The Law Society of Kenya made the following submissions.

I. The Simplified LOB can simplify tax administration by providing clear rules on who is entitled to treaty benefits. However, there have been counterargument against simplified LOB that this process decentralizes the principal-purpose test, which increases the risk of the asymmetrical application of the provision.

II. If it does increase the risk of a non-standard application, there will be a greater impact felt on multinational companies, which may discourage their expansion/exploration in the country.

III. The simplified LOB could make it more difficult for foreign companies to invest in the country, as they may be unsure of whether they will be entitled to treaty benefits. Specifically, those tax payers who do not amount to "qualified persons" under paragraph 9 and their activities do not qualify as "active conduct of a business" under paragraph 10(a).

IV. In summary, it could restrict access to tax treaties for some companies, further discouraging investment.

V. Implementing the Simplified LOB while at the same time other contracting parties to the Covered Tax Agreements with Kenya have opted for another regime of preventing treaty abuse, the simplified LOB may not be included in tax treaties signed by Kenya. Only the PPT will apply in this case.

Recommendation

I. Conduct a thorough impact assessment. Kenya should carefully analyse the potential economic, administrative, and legal impacts of adopting the Simplified LOB across the 17 Covered Tax Agreements.

II. This should include consultations with stakeholders like businesses, tax professionals, and civil society.

III. Unless Kenya attains a uniform accord with all its partner states in the Covered Tax Agreements, Kenya will have to shoulder and prepare for both the principal-purpose (PPT) of a transaction as well as a combination of PPT and Simplified Limitation of Benefits (Simplified LOB).

Bowmans LLP

80. Bowmans LLP agreed with Kenya's position on Article 7. Further, considering the proposed adoption of the simplified Limitation on Benefits provisions, the provisions of section 41 (2) of the Income Tax Act should be deleted. The simplified Limitation on Benefits provision is more extensive in determining which persons would be entitled to the treaty benefits as compared to the current provisions of section 41 (2) of the Income Tax Act that are relied upon by Kenya to limit the benefits of a treaty.

Justification
The Simplified Limitation on Benefits provision is more extensive in determining which persons would be entitled to the treaty benefits as compared to the current provisions of section 41(2) of the Income Tax Act that are relied upon by Kenya to limit the benefits of a treaty.

Okoa Uchumi

81. Okoa Uchumi submitted the following—

I. Kenya has opted to apply the Simplified Limitation of Benefits Provision. This is a welcome move.

II. Article 7 implements recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). There are three activities for preventing treaty shopping and other abusive arrangements. One is to use a combination of a Limitation on Benefits provision together with a Principal Purpose test. The second is the use of a Principal Purpose test alone. And the third is a Limitation on Benefits rule with rules that are aimed at curbing conduit financing agreements. The adoption of the Simplified Limitation on Benefits rule is welcome.

KEPSA

82. KEPSA made the following submissions:

I. Kenya should reserve the right to apply a more detailed Limitation on Benefits clause in place of the Principal Purpose Test (PPT). This is to provide greater clarity to taxpayers and to avoid the potential for subjective interpretation of treaty abuse.

II. Additionally, Kenya should reserve the right to apply a domestic anti-abuse rule in conjunction with or in place of the PPT. A domestic anti-abuse rule tailored to Kenya's context can provide more clarity and certainty, thus shielding local businesses from the negative impacts of aggressive tax planning by international entities.

III. Further, Kenya should modify the application of the PPT to allow for a more objective 'Simplified Limitation on Benefits' (SLOB) provision to be used in its stead. The subjective nature of the PPT can lead to uncertainty and disputes over the intent of transactions, potentially discouraging investment. The SLOB provision is more transparent and can provide greater certainty to businesses operating in Kenya.

IV. A provision should be inserted ensuring a transparent and objective process for granting treaty benefits. This is to avoid uncertainty and disputes over treaty entitlements, enhancing Kenya's investment climate.

V. Kenya should reserve the right to adopt and apply Controlled Foreign Companies (CFC) rules that align with its economic and fiscal interests. By maintaining flexibility in its CFC rules, Kenya can target and curb profit shifting while providing certainty to multinationals operating within its jurisdiction.

VI. Kenya should reserve the right to define a Permanent Establishment (PE) in a manner that reflects its economic reality and development goals. Reservation allows Kenya to tailor the PE threshold to suit its economic environment, encouraging foreign direct investment by providing clarity and certainty. This will enhance Kenya's attractiveness as an investment destination by aligning tax obligations with on-the-ground business operations, thus encouraging foreign entities to establish or expand their presence.

COMMITTEE OBSERVATIONS

83. The Committtee considered the proposals by the stakeholders on Article 7 of the Agreement and made the following observations:

I. Article 7 of the MLI provides for application of Simplified Limitation on Benefits (LOB) provision as well as Principal Purpose Test (PPT);

II. Kenya has made a notification on Article 7 of the MLI and chooses to apply the Simplified Limitation on Benefits (SLOB) provision to all CTAs as a supplement to the Principal Purpose Test (PPT); and

III. The SLOB provision is more objective than the PPT and provides clear parameters that must be met in order for treaty benefits to accrue.

3.4.7 Article 8

Bowmans LLP

84. Bowmans LLP submitted that Kenya proposed to make a reservation for the entirety of Article 8 not to apply to its Double Taxation Agreements with Canada, Denmark, Italy,

Norway, and Sweden. This is because such Double Taxation Agreements already prescribe for a minimum holding period shorter than a 365-day period e.g. Double Taxation Agreement with Canada provides for a 180-day holding period.

85. Bowmans LLP agreed with the proposal to adopt article 8 and the reservations made. However, Kenya should withdraw the reservation made with respect to the agreement with Canada.

Justification
Canada ratified the Convention on 01 December 2019 and did not make a reservation regarding article 8. Accordingly, Kenya making a reservation would effectively block the entry into force of the provision whose overriding goal is to strengthen anti-abuse provisions.

Okoa Uchumi

86. Okoa Uchumi submitted as follows—

I. Kenya has applied the rule on dividend transfer transactions to all CTAs. This is a welcome move

II. Article 8 implements recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). Treaties generally will provide concessional rates on non-portfolio dividends paid to non-residents. Taxpayers can abuse these concessions by increasing shareholdings just before dividends are paid in order to obtain concessional tax rates. This Article introduces anti-abuse rules that require a minimum holding period (365 days) before access to these concessional rates. The adoption of this anti-abuse Article is welcome.

COMMITTEE OBSERVATIONS

87. The Committtee considered the proposals by the stakeholders on Article 8 of the Agreement and made the following observations:

I. Article 8 of the MLI specifies anti-abuse rules for benefits provided to dividend transfer transactions consisting of exempting or limiting the tax rate on dividends paid by a company resident of a Contracting Jurisdiction to a beneficial owner or recipient that is resident of the other Contracting Jurisdiction, provided certain ownership requirements which need to be met throughout a 365-day period that includes the day of payment of the dividend are met. The 365-day holding period will apply in place or in the absence of a minimum holding period contained in the provisions described above;

II. Kenya has made a notification on Article 8 of the MLI and chooses to apply the provision; and

III. The time and value thresholds introduced by the provision will ensure that there is no abuse intended to obtain the lower rate.

3.4.8 Article 9

PWC Kenya

88. PWC submitted as follows—

I. The Article introduces additional criteria of "365 days minimum holding period" in case of gains arising from alienation of shares or other participation rights if such shares or rights derive more than 50% of their value from immovable property situated in the source jurisdiction.

II. Kenya has opted to apply minimum holding period threshold along with minimum value derivation criterion of 50%. The said provision should apply to CTA only if other CTA partner has chosen to apply the said provision.

III. There is a conflict between domestic and DTA/MLI threshold. Domestic threshold should be raised from 20% to 50% based on international best practice.

Bowmans LLP

89. Bowmans LLP agreed with the proposal to adopt the provision.

Justification

I. The proposed provision would ensure that the gains derived by a resident of a contracting state from the transfer of shares which derive their value from immovable property situated in the other contracting state are only subject to CGT if the immovable property threshold of fifty per cent (50%) is achieved.

II. However, it is noteworthy that under the Income Tax Act, a gain arising from an offshore transfer of shares is subject to tax in Kenya if the shares derive 20% or more their value from immovable property situated in Kenya.

III. The provision in the Convention sets the threshold at 50%. Therefore, the different thresholds in the Kenyan Income Tax Act and in the Convention may see entities that are residents of states without a Double Taxation Agreement with Kenya prejudiced since they are more likely to achieve the 20% threshold than it is for entities resident in countries that Kenya has a Double Taxation Agreement with to achieve the 50% threshold. The threshold in the Kenya Income Tax Act should be raised to 50% to ensure conformity.

Okoa Uchumi

90. Okoa Uchumi submitted that—

I. Kenya has opted to apply the anti-abuse provisions on taxation of capital gains from the alienation of shares or interests of land rich entities. This is a welcome move.

II. Article 9 implements recommendations outlined in the BEPS Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*). Tax treaties typically preserve the source countries right to tax capital gains attributable to real property in their jurisdictions. Foreign entities avoid taxation of capital gains by co-contributing other assets to a land rich entity so that is no longer land rich. Article 9 introduces a (365 days) period of testing if an entity is land rich and curbs this type of abuse. It is thus important to adopt these measures.

PKF Consulting

91. PKF submitted that—

I. Kenya has adopted to apply Article 9(4) of the MLI. Pursuant to Article 9(8) of the MLI, Kenya has however considered the DTAs between Kenya and Canada, France, Germany, India, Iran, Italy and Korea to contain provisions to deal capital gains from alienation of shares.

II. Kenya should consider adopting Article 9(4) on all existing DTAs as provided below:

> *"For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction 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 (real property) situated in that other contracting jurisdiction."*

III. This is because the above mentioned DTAs do not meet all the conditions provided by Article 9(4). For instance, Article 13(1)(b) of Kenya-France DTA provides as follows:

> *"Gains from the alienation of shares or other rights in a company, a trust or a comparable institution, the assets or property of which consists more than 50% of their value of or derive more than 50% of their value, directly or indirectly through the imposition of one or more companies, trusts or comparable institutions, from immovable property referred to in Article 6 and situated in a contracting state or of rights connected with such immovable property may be taxed in that state..."*

IV. The above Article 9(4) is deficient to the extent that it does not provide for a testing period e.g. 365 days preceding the alienation. This deficiency is common across all the aforementioned DTAs.

V. The adoption of Article 9(4) in all the DTAs Kenya has signed with other jurisdictions will ensure that capital gains from the alienation of shares are taxed in the right jurisdiction.

COMMITTEE'S OBSERVATION

92. **The Committee considered the proposals by the stakeholders on Article 9 of the Agreement and made the following observations:**

I. Article 9 of the MLI entitles the state of source to tax capital gains from alienation of shares or interest deriving their value principally from immovable property situated in that state of source, where the value threshold is met at any time during the 365 days preceding alienation;

II. Kenya has made a notification on Article 9 of the MLI and chooses to apply this provision which addresses situations in which assets are contributed to an entity

shortly before the sale of shares in order to dilute the proportion of the value of the entity that is derived from immovable property; and

III. Kenya chooses to adopt the time and value thresholds to tax gains derived from immovable property to prevent treaty abuse.

3.4.9 Article 10

Bowmans LLP

93. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

Under this provision, treaty benefits will be denied where an entity that is a resident of one jurisdiction derives 'passive' income from the other jurisdiction through a permanent establishment located in a third jurisdiction which is not appropriately taxed.

KEPSA

94. KEPSA submitted that Kenya should reserve the right to apply its domestic tax rate on dividends if it is lower than the rate provided in the Convention. This reservation would ensure that Kenya remains competitive in attracting foreign investments by not increasing the tax burden on dividend income.

Okoa Uchumi

95. Okoa Uchumi submitted that—

I. Kenya has opted to adopt Article 10 of the MLI by introducing an anti-abuse rule for permanent establishments situated in third jurisdictions. This is a welcome move.

II. Article 10 implements recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). Ordinarily, tax treaties limit the amount of tax that can be imposed on income derived from one treaty jurisdiction by residents of the other treaty jurisdiction. Permanent Establishments can be established in a third low-tax jurisdiction. This creates an avenue for low or no tax on income where income is considered to be attributable to these low tax jurisdictions.

III. This anti-abuse rule denies treaty benefits where income is attributable to permanent establishments located in low tax countries if the tax in the third jurisdiction is less than 60% of the tax that would be imposed by the residence state. It is advisable to adopt this anti-abuse measure to protect the tax base.

COMMITTEE OBSERVATIONS

96. The Committee considered the proposals by the stakeholders on Article 10 of the Agreement and made the following observations:

   I. Article 10 of the MLI provides for anti-abuse rule for permanent establishments (PEs) situated in third jurisdictions. It provides that treaty benefits will be denied where an entity that is a resident of one country derives 'passive' income from the other country through a permanent establishment located in a third country, and that income is both exempt in the entity's home country and subject to reduced taxation in the third country (i.e. less than 60% of the tax that would be imposed in the residence state if the PEs were located there).

   II. Kenya has made a notification on the Article and chooses to adopt it for the following reasons:
      (a) None of the CTAs contain existing provisions that deny or limit benefits available to an enterprise of a Contracting Jurisdiction where there is risk of double non-taxation;

      (b) To preserve its taxing rights where the income is exempt in the other Contracting Jurisdiction and subject to reduced taxation in a third jurisdiction to avoid double non-taxation.

3.4.10 Article 11

Bowmans LLP

97. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

The provision respects the principle that a tax treaty will generally not restrict a jurisdiction's right to tax its own residents.

KEPSA

98. KEPSA submitted that Kenya should reserve the right to apply its domestic withholding tax rates on interest and royalty payments to non-residents. This reservation ensures that Kenya retains the ability to tax payments that significantly impact its tax base, providing tax certainty to investors while preserving the country's revenue from these sources.

Okoa Uchumi

99. Okoa Uchumi submitted as follows—

   I. Kenya has not made any reservations under Article 11 paragraph 3 of the MLI. It thus preserves the right of a country to tax its own residents. This is a welcome move.

   II. Article 11 implements recommendations outlined in the BEPS Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*). Some treaties limit a country's right to tax its own residents where they are interpreted as contrary to treaty provisions where they are deemed to amount to treat override. Article 11 contains a saving clause that clarifies that treaties do not restrict a country's right to tax its own residents except with respect to certain treaty provisions. It is thus welcome for developing countries to adopt this Article.

COMMITTEE OBSERVATIONS

100. The Committee considered the proposals by the stakeholders on Article 11 of the Agreement and observed that Kenya has made a notification on Article 11 of the MLI and chooses too adopt the provision for the following reasons:

(a) None of the CTAs contains an existing savings clause which preserves the right of a contracting jurisdiction to tax its own residents; and

(b) The provision will ensure that Kenya's right to tax her residents is not restricted.

3.4.11 Article 12

Bowmans LLP

101. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

The proposed provision will be beneficial in capturing more transactions that would otherwise not be captured by Kenya's permanent establishment provisions.

KEPSA

102. KEPSA submitted as follows —

I. Kenya should reserve the right to apply its domestic withholding tax rates on interest and royalty payments to non-residents. This reservation ensures that Kenya retains the ability to tax payments that significantly impact its tax base, providing tax certainty to investors while preserving the country's revenue from these sources.

II. Kenya should reserve the right to apply domestic laws to tax digital economy activities not adequately covered under the Convention. Given the significant growth of the digital economy, this reservation allows Kenya the flexibility to introduce and adapt taxation measures that ensure fair taxation of digital business activities and protect its tax base in this rapidly evolving sector.

Okoa Uchumi

103. Okoa Uchumi submitted the following:-

I. Kenya has implemented Article 12 on the Artificial Avoidance of PE status through Commissionaire Agreements. This is a welome move.

II. Article 12 implements recommendations outlined in the BEPS Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment Status*). The establishment of a PE results in a taxable presence. Companies can however interpose agency arrangements to artificially avoid creating a PE in order to prevent host countries from taxing those business profits.

III. Article 12 will ensure that a PE will be deemed to exist where an intermediary habitually concludes contracts or plays a principal role in concluding business

contracts. As such, developing countries should adopt this provision to protect its tax base.

COMMITTEE OBSERVATIONS

104. The Committee observed that Kenya has made a notification to adopt the provision for the following reasons:

I. The provision expands the PE definition to capture commissionaire arrangements by multinational enterprises; and

II. The provision will ensure a PE is created where value is created in Kenya and allow taxation of the resulting profits.

3.4.12 Article 13

Bowmans LLP

105. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision where Kenya has reserved the right of Option A not to apply to its Double Taxation Agreements with India, Norway, Qatar, South Africa, and Sweden. Accordingly, for those Double Taxation Agreements, the list of activities specified as not constituting a permanent establishment will continue to be in force.

106. However, Kenya has proposed that Option A for its other Double Taxation Agreements covered by the Convention that do not explicitly list specific activities as constituting a permanent establishment.

Justification

Once the Convention is in force, only genuine preparatory or auxiliary activities will be excluded from the definition of permanent establishment. Accordingly, Kenya will be able to tax any income generated by such permanent establishments that it would have otherwise not been able to tax.

RSM (Eastern Africa)

107. RSM (Eastern Africa) made the following submissions.

I. Pursuant to Article 13(7) of the Convention, Kenya should choose to apply option B under Article 13(1) and not option A.

II. Pursuant to Article 13(7), the proposed List of Reservation and Notification should include a list of Covered Tax Agreements which contain a provision described in paragraph (a) of paragraph 5, as well as the article and paragraph number of each such provision.

Agreement	Article in Agreement
Canada	5(3)
Denmark	5(3)
France	5(4)

Germany	5(3)
India	5(3)
Iran	5(4)
Italy	5(3)
Korea	5(4)
Mauritius	5(4)
Norway	5(3)
Qatar	5(4)
Seychelles	5(4)
South Africa	5(4)
Sweden	5(3)
UAE	5(4)
UK	5(3)
Zambia	5(3)

III. Pursuant to Article 13(6)(b), Kenya should reserve the right to paragraph (2) not to apply to its Covered Tax Agreement that explicitly state that a list of specific activities shall be deemed to constitute a permanent establishment only if each of the activities is of a preparatory or auxiliary character.

Justification

I. Option B allows for flexibility in the agreements by adopting the following provision which is not available in Option A.

"...,except to the extent that the relevant provisions of the Covered Tax Agreements provides explicitly that a specific activity shall be deemed not to constitute a permanent establishment provided that the activity is of a prepatory or auxiliary character;"

II. For example, consider Article 5(3) of the Kenya-UK Agreement. In addition, Article 13(3)(c) under Option B matces the expanded definition of permanent establishment introduced by the Finance Act, 2021. Under this, some activities are excluded from the ambit of permanent establishment only to the extent they are of a preparatory or auxiliary character.

III. Therefore, Option B is more consistent with Kenya's local tax legislation as well as some of the Double Tax Treaties Kenya has signed.

The Law Society of Kenya

108. The Law Society of Kenya made the following submission.

I. Article 13 of the Convention addresses the artificial avoidance of PE status through the specific activity exemptions such as warehousing or purchasing goods included in Article 5(4) of the OECD Model Tax Convention.

II. Article 13 can prevent companies from exploiting specific activity exemptions to avoid establishing a permanent establishment and paying corporate taxes in the state. This potentially increases tax revenue collection.

III. While it has the potential to increase tax revenue and improve administration, it could also create challenges for attracting foreign investment and may require careful implementation and monitoring.

IV. It is crucial for Kenya to carefully assess the potential benefits and drawbacks of adopting specific provisions within Article 13, considering their unique economic and tax landscape.

Recommendation

There is need to analyse the specific provisions chosen by other relevant states to provide valuable insights for making informed decisions about implementing the provision.

Okoa Uchumi

109. Okoa Uchumi submitted the following:-

I. Kenya has opted to apply Article 13 on the Artificial avoidance of permanent establishment status through the specific activity exemptions.This is a welcome move.

II. Article 13 implements recommendations outlined in the BEPS Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment Status*). Given that PE status can be avoided by fragmenting activities so that they fall within the preparatory and auxiliary activity exemption. This Article provides the use of Option A which inserts the requirement that all the specific activity exemptions must be of a preparatory or auxiliary character or Option B which which inserts the requirement that some but not all the specific activity exemptions must be of a preparatory or auxiliary character. Kenya has opted to adopt Option A, and this is commendable as it allows it as a host state to decide that a fixed place of business for auxiliary activities to be deemed to create a PE.

COMMITTEE OBSERVATIONS

110. The Committtee considered the proposals by the stakeholders on Article 13 of the Agreement and made the following observations:

I. Kenya has made a notification on Article 13 of the MLI and chooses to apply Option A which ensures that the proviso applies to the entire paragraph on exemptions; and

II. This will ensure that the PE exemption provisions only apply to preparation and auxiliary activities.

3.4.13 Article 14

Bowmans LLP

111. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

Most tax treaties include rules that deem building or construction projects that exceed a specified period (for example six (6) months) to constitute a permanent establishment. Related entities will be prevented from avoiding the application of the specified period by splitting building or construction-related contracts into several parts.

Okoa Uchumi

112. Okoa Uchumi submitted the following:-

I. Kenya has adopted Article 14(1) on the splitting-up of contracts. This is a welcome move.

II. Article 14 implements recommendations outlined in the BEPS Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment Status*). Most treaties deem a PE to exist in the case of building or construction projects that exceed a specified period. The rule can be circumvented by dividing contracts into several parts. Article 14 deals with this by deeming the existence of a PE where connected activities which are carried on by closely related persons at the same site or on the same project for a period exceeding 30 days. It aggregates the period to determine whether a PE exists. This is an important anti-abuse provision that should be adopted.

COMMITTEE OBSERVATIONS

113. The Committtee considered the proposals by the stakeholders on Article 14 of the Agreement and made the following observations :

I. Kenya has made a notification to adopt the provision since it addresses situations where multinational enterprises (MNEs) split up contracts to avoid the creation of a PE; and

II. The provision will prevent MNEs from avoiding the PE time threshold required to create a PE.

3.4.14 Article 15

KEPSA

114. KEPSA submitted that Kenya should reserve the right not to apply the MLI provisions that may conflict with Kenya's developmental goals or existing tax treaties until a comprehensive review is conducted. This is to maintain sovereignty over tax policy and

ensure that international agreements align with national interests and developmental objectives.

Okoa Uchumi

115. Okoa Uchumi submitted that Kenya's position on Article 15 has not been included in the memorandum. They proposed that a provision on Article 15 be included.

COMMITTEE OBSERVATION

The Committee observed that no notification is needed for this Article. However, Kenya adopts this definition in its DTAs.

3.4.15 Article 16

PWC Kenya

116. PWC noted that, Kenya has reserved its right for not adopting the modified MLI provisions on the basis that it will meet the minimum standard by allowing MAP access in the resident state and implementing bilateral notification or consultation process.

117. Taxpayers must present their request to the CA in their own Residence State. This is the only MAP aspect where Kenya has deviated slightly from the MAP standard, which would have been to permit taxpayers to present their cases to Competent Authorities. Therefore, there is need for clarity on the legal and administrative framework for MAP in Kenya within the domestic dispute resolution framework.

Anjarwalla & Khanna LLP

118. Anjarwalla & Khanna LLP submitted that the MLI intends to provide an additional remedy by allowing a Party to present a case to the competent authority of either Contracting Jurisdiction if such a party believes that its taxation is not in accordance with the Covered Tax Agreements. Kenya makes a reservation for the first sentence of Article 16(1) not to apply to its agreements. Kenya's reservation in this particular article has the effect of limiting/inhibiting taxpayers from having broad access to the mutual agreement procedure.

Bowmans LLP

119. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

The provisions will ensure the consistent and proper implementation of tax treaties, including the resolution of disputes regarding their interpretation or application. This will provide taxpayers with a more effective tax treaty-based dispute resolution procedure.

RSM (Eastern Africa)

120. RSM (Eastern Africa) made the following submissions:-.

I. Pursuant to Article 16(6)(a), Kenya considers that its Covered Tax Agreements contains provisions described in Articles 16(1), (2) and (3).

Agreement	Article in Agreement
Denmark	27
South Africa	25
Iran	25
Germany	25
Zambia	14
Mauritius	24
Qatar	24
India	27
France	24
Korea	25
Norway	27

Justification

Provision of Article 16(1) to 16(3) exist in almost all agreements that are in force as per the preceding table, and therefore there is no need to limit the application of Article 16 on these agreements.

Reservation

121. Pursuant to Article 16(5)(a) of the Convention, Kenya reserves the right for the first statement of Article 16(1) not to apply to the Covered Tax Agreements with the following countries: Italy, UAE, Canada, Seychelles, UK, and Sweden.

Justification

The reservation should only apply to instances where the provision of Article 16(1) to 16(3) differ from provisions of the existing agreements which include Italy, UAE, Canada, Seychelles, UK, and Sweden. For these agreements, Kenya should invoke the proposed reservation.

KEPSA

122. KEPSA submitted that Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

The Law Society of Kenya

123. LSK submitted as follows

I. Kenya's processes pose unnecessary administrative hurdles to achieve compliance, that is not commensurate to the value derived. Implementing and adhering to the MLI's MAP provisions might require additional resources and expertise from tax authorities, potentially increasing their workload.

II. There is the threat of increased delays in reaching a mutual agreement which, while the MLI aims to prevent abuse, there might be a risk of taxpayers using MAP procedures strategically to delay tax payments or avoid paying taxes altogether.

III. Despite this, these provisions streamline and harmonize MAP procedures across treaties, potentially leading to more efficient resolution of tax disputes.

IV. The effectiveness of the MAP provisions will also depend on how they are implemented and enforced by each country's tax authorities.

Recommendation

I. As has been done by choosing to be exempted from article 16(1) of the Convention, Kenya should further choose MLI MAP provisions strategically.

II. Additionally, there is need to amend section 11 of the High Court (Organization and Administration) Act to include a specific Tax Division which will deal with matters only arising from the Tax Appeal Tribunals as well as any tax legislation.

III. This will be in consonance with paragraph 5.1.6 of the MTRS 2024/2025-2026/2027 as well as paragraph 4.10 of the National Tax Policy all seeking to have the Judiciary establish a special tax court to deal with tax matters expediently.

IV. Kenya should also maintain flexibility when incorporating MAP provisions in order to adapt to evolving needs and challenges in international tax cooperation.

Okoa Uchumi

124. Okoa Uchumi made the following submissions.

I. Kenya has made reservations pursuant to Article 16(5) (a) for the first sentence of Article 16(1) of the MLI not to apply to its Covered Tax Agreements, on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS package by ensuring that under all of its Covered Tax Agreements, where a person considers that the actions of one or both of the contracting jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those contracting jurisdictions, that person may present the case to the competent authority of either contracting jurisdiction.

II. Kenya has made a notification of an existing provision of treaty in the tax treaties with Canada, Italy, the Seychelles, and the United Arab Emirates pursuant to Article 16(6)(b)(i) of the MLI. As a result, the cases must be presented within 3 years from the first notification of the Action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

III. Kenya has made a notification of an existing provision of the tax treaties of Denmark, France, India, Iran, Korea, Mauritius, Norway, Qatar, and South Africa pursuant to Article 16(6)(b)(ii) of the MLI. As a result, these treaties retain their time limits as they are within a specific time period that is at least 3 years from the first notification of the Action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

IV. Kenya has made a notification pursuant to Article 16(6)(c)(i) of the MLI, that Sweden and Zambia do not contain a provision described in Article 16(4)(b)(i) of the MLI. As a result, it includes the requirement for the competent authority to endeavour to resolve the case by mutual agreement with the competent authority of the other contracting jurisdiction, if the objection to it appears to be justified and if it is not itself able to arrive at a satisfactory solution, with a view to avoid taxation which is not in accordance with the Covered Tax Agreement.

V. Kenya has made a notification pursuant to Article 16(6)(c)(ii) of the MLI, that it considers that the tax treaties with Canada, Denmark, Germany, Italy, Norway, Qatar, Sweden, United Kingdom, and Zambia do not contain a provision described in Article 16(4)(b)(ii). As such, these treaties will include a provision settting out that any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions.

VI. Kenya has made a notification pursuant to Article 16(6)(d)(i) of the MLI, that it considers that the tax treaty with Zambia and Sweden does not contain a provision described in Article 16(4)(c)(i). As such, this treaty is modified by including the requirement for the competent authorities of the contracting jurisdictions to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement.

VII. Kenya has made a notification pursuant to Article 16(6)(d)(ii) of the MLI, that it considers that the tax treaties with Sweden, the United Arab Emirates and Zambia do not contain a provision described in Article 16(4)(c)(ii). As such, they will include the requirement that those countries consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement.

COMMITTEE OBSERVATIONS

125. **The Committtee considered the proposals by the stakeholders on Article 16 of the Agreement and made the following observations :**

I. Kenya wishes to place a reservation against the provision to file a MAP case in either of the Contracting States. Instead, the taxpayer will be allowed to file the case where he or she is resident, and that State will notify the other; and

II. Kenya wishes to adopt the provision which guides taxpayers to file MAP cases where they are resident since this resident State can give unilateral relief.

3.4.16 Article 17

Bowmans LLP

126. Bowmans LLP agreed with Kenya's proposal to adopt the proposed provision.

Justification

I. Transfer pricing adjustments can result in double taxation when one jurisdiction makes an adjustment to an entity's profits and the other jurisdiction does not make a compensating adjustment to the profits of the relevant related entity.

II. A jurisdiction will be required to make a downward adjustment to the profits of a resident entity, as a result of an upward adjustment by the other jurisdiction to the profits of an associated entity which is a resident of that other jurisdiction (provided both jurisdictions agree that the upward adjustment is justified).

RSM (Eastern Africa)

127. RSM (Eastern Africa) made the following submission.

I. Pursuant to Article 17(3)(a) of the Convention, Kenya reserves the right for the entirety of this Article 17 not to apply to the following Covered Tax Agreements that already contain a provision described in paragraph 2.

Other Contracting Jurisdiction	Provision
Canada	9(2)
France	9(2)
Iran	9(2)
Korea	9(2)
Mauritius	9(2)
Qatar	9(2)
Seychelles	9(2)
South Africa	9(2)
United Arabs Emirates	9(2)

II. Kenya chooses to adopt Article 17(1) for the following Covered Tax Agreements which do not contain the provisions described in Article 17(2): Denmark, Sweden, Germany, Italy, Zambia, UK, and Norway.

Justification

I. Ten (10) of Kenya's Covered Tax Agreements as listed in page 21 of the Proposed List of Reservation and Notification contain the provision described in Article 17(1) and 17(2) of the Convention. Consequently, Kenya should reserve the right for the entirety of this Article 17 not to apply to these DTAs given the fact that the DTA are self-sufficient in respect to the provision of Article 17 (that is, fully incorporates the provisions of Article 17).

II. However, seven (7) of Kenya's Covered Tax Agreements as listed in page 21 of the Proposed List of Reservation and Notification do not contain the provision described in Article 17(1) and (2) of the Convention. For purposes of these Agreements, Kenya should adopt the provisions of Article 17(1) and 17(2) of the Convention. Adopting Article 17 will bring about consistency and clarity in instances where corresponding adjustments are required.

III. Corresponding adjustments are vital in ensuring that the main objective of bilateral tax agreements, which is to prevent the double taxation of income. The provisions on corresponding adjustments are critical in enhancing tax certainty and investor confidence in Kenya's international tax framework.

Okoa Uchumi

127. Okoa Uchumi made the following submissions.

I. Kenya has adopted Article 17 of the MLI without reservation. As such, all Covered Tax Agreements require the tax administration of a jurisdiction to make a downward adjustment to the profits of a resident enterprise, to reflect a corresponding upward adjustment by the tax administration of the other jurisdiction to the profits of the other party (the associated enterprise) involved in the relevant transaction. This obligation only applies, however, where the upward adjustment reflects a true allocation of profits between the two enterprises in accordance with the arm's length principle. This is a welcome move.

II. Article 17 implements recommendations in the BEPS Action 14 (Making Dispute Resolution Mechanisms More Effective). The adoption of Article 17 is a welcome move as it ensures that transfer pricing corresponding adjustments prevent double taxation.

COMMITTEE OBSERVATION

128. **The Committee observed that Kenya has made a notification on the Article and chooses to adopt the provision which allows the Contracting Jurisdiction to make adjustments where transfer pricing adjustments are done. The provision prevents double taxation.**

3.4.17 Article 18

Anjarwalla & Khanna LLP

129. Kenya does not apply Part VI. However, the Kenya-Netherlands agreement has incorporated in Article 25 a similar arbitration provision to the one proposed by the BEPS MLI.

130. By adopting the mandatory binding arbitration, Kenya would effectively position itself as a country adopting international best practice in its dispute resolution mechanisms thus attracting investors and facilitating trade in the global economy. It worth noting the reservation made by Kenya under Part VI of the MLI Convention brings to the fore inconsistency in Kenya's tax policy approach towards dispute resolution. This is because while Kenya has elected to make reservation under Part VI of the Convention, a number of its Covered Tax Agreements such as that with Canada and Netherlands have provisions on arbitration as a mechanism for dispute resolution.

Bowmans LLP

131. Bowmans LLP did not agree with Kenya's position that Articles 18-26 do not apply to its Double Taxation Agreements

Justification

The provisions and the entirety of Part VI seek to address issues that have arisen in the past as a result of long-drawn-out MAPs that do not result in any progress being

undertaken to the detriment of the taxpayers. Kenya should adopt Part VI to provide for a mechanism to address such issues when they do arise.

KEPSA

132. KEPSA submitted that Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

Okoa Uchumi

133. Okoa Uchumi submitted that—

I. Kenya has chosen not to apply Part V of the MLI. This is welcome.

II. Articles 18 to 26 implement binding MAP arbitration, reflecting the commitment by some countries to provide for this in their bilateral tax treaties, as was noted in the BEPS Action 14 (Making Dispute Resolution Mechanisms More Effective) developing countries lack the capacity to engage in binding MAP arbitration and it is thus advisable to apply Part V.

COMMITTEE OBSERVATIONS

134. The Committtee considered the proposals by the stakeholders on Article 18 of the Agreement and made the following observations;-

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI; and

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.18 Article 19

KEPSA

135. KEPSA submitted that—

I. Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

II. Kenya should reserve the right to opt out of mandatory binding arbitration, favouring mutual agreement procedures that allow more flexibility and sovereignty in dispute resolution. This is to maintain control over resolving tax

disputes, ensure that outcomes are aligned with Kenya's legal framework and policy objectives.

COMMITTEE OBSERVATIONS

136. The Committtee considered the proposals by the stakeholders on Article 19 of the Agreement and made the following observations;-

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI; and

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.19 Article 20

KEPSA

137. KEPSA submitted that, Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

COMMITTEE OBSERVATIONS

138. The Committtee considered the proposals by the stakeholders on Article 19 of the Agreement and made the following observations;-

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI; and

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.20 Article 21

KEPSA

139. KEPSA submitted as follows—

I. Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

II. Kenya should reserve the right to maintain or introduce tax incentives for sectors critical to its economic development. This reservation allows Kenya to use tax policy to promote strategic sectors, fostering economic growth and employment.

COMMITTEE OBSERVATIONS

140. The Committtee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.21 Article 22

KEPSA

141. KEPSA submitted as follows—

I. Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

II. Kenya should reserve the right to determine the criteria for identifying beneficial ownership in line with its domestic laws. Clarity on beneficial ownership criteria is essential for effectively implementing anti-abuse measures, providing certainty to investors and tax authorities alike.

III. Additionally, Kenya should reserve the right to maintain or introduce tax incentives to attract and retain investments. This is to ensure that Kenya continues to offer competitive tax incentives, critical for attracting FDI and maintaining economic growth, without being swayed by international pressure to conform to uniform standards.

COMMITTEE OBSERVATIONS

142. The Committtee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.22 Article 23

KEPSA

143. KEPSA submitted that Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

PKF Consulting

144. PKF submitted as follows—

I. Kenya should consider adopting Article 23(5) in relation to providing guidance on the arbitration process. Article 23(5) provides that competent authorities, prior to the start of the arbitration proceedings, shall ensure that each taxpayer involved in the case and their advisors agree in writing not to disclose any information received during the course of the arbitration proceedings from either competent authority or from the arbitration panel. A material breach of the agreement would result in the termination of the mutual agreement procedure and the arbitration proceedings.

II. The adoption of the above Article will ensure the confidentiality of the arbitration discussions as provided for in the Mutual Agreement Procedure.

COMMITTEE OBSERVATIONS

145. The Committee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.23 Article 24

KEPSA

146. KEPSA submitted that Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

COMMITTEE OBSERVATIONS

147. The Committtee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.24 Article 25

KEPSA

148. KEPSA submitted as follows—

I. Kenya should reserve the right to opt out of the mandatory binding arbitration mechanism. Binding arbitration may limit Kenya's flexibility in resolving tax disputes and could impose solutions that may not align with domestic policy objectives. Opting out allows for more tailored dispute resolution that respects Kenya's sovereignty.

II. Kenya should reserve the right to implement Mutual Agreement Procedure (MAP) per its internal administrative timelines and capacity. This is to ensure that tax disputes are resolved efficiently and in a manner that respects Kenya's administrative processes, thereby maintaining a stable tax environment.

III. Kenya should advocate for including provisions allowing alternative dispute resolution mechanisms in addition to MAP. Alternative dispute resolution mechanisms can offer a faster, less formal, and potentially less aggressive means of resolving tax disputes, contributing to a more tranquil business environment.

COMMITTEE OBSERVATIONS

149. The Committtee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.25 Article 26

KEPSA

150. KEPSA submitted the following—

I. Kenya should reserve the right not to apply the provisions related to mandatory binding arbitration. Mandatory arbitration may impede Kenya's ability to negotiate tax disputes bilaterally and could lead to outcomes that might not align with its economic and fiscal policies. The reservation would allow Kenya to maintain sovereignty over its tax dispute resolution processes.

II. Kenya should reserve the right to limit the exchange of information to what is foreseeably relevant and necessary for tax purposes, protecting taxpayer confidentiality. This is to ensure that information exchange aligns with Kenya's privacy standards and legal requirements, fostering taxpayer trust while adhering to international standards.

III. Kenya should reserve the right to tailor the automatic exchange of information agreements per its capacity, privacy laws, and international commitments. This is to balance the benefits of international cooperation with protecting taxpayer information and compliance with Kenya's data protection standards.

COMMITTEE OBSERVATIONS

151. The Committee considered the proposals by the stakeholders on Article 20 of the Agreement and made the following observations;

I. Mandatory binding arbitration under Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI;

II. Kenya has chosen not to apply Part VI of the MLI;

III. Kenya's policy position is not to adopt Mandatory Binding Arbitration provisions due to constraints of cost and capacity.

3.4.26 Article 27

KEPSA

152. KEPSA submitted that assistance should be limited in the collection of taxes covered by the treaty. This is to ensure that Kenya does not extend aid to taxes beyond the treaty's scope or that conflict with its domestic policies.

COMMITTEE'S OBSERVATION

153. The Committee observed that, the Article provides for signature and ratification, acceptance or approval of the Convention. Therefore, it doesn't require notification or reservation.

3.5 GENERAL PROPOSALS

3.5.1 KEPSA

154. KEPSA made the following general proposals on the Convention:

Notification of Tax Policy Changes

155. Kenya should notify all treaty partners of significant changes in its tax policy or administration that may affect the application of the Convention. This ensures transparency and predictability for investors about Kenya's tax regime, fostering an environment of trust and stability.

Special Considerations

156. Kenya should push for the inclusion of provisions that consider the unique challenges developing economies face in implementing BEPS measures. Recognizing the developmental stage and resource constraints, such provisions would allow for a more gradual and supportive implementation process, minimising disruption to local businesses.

Transparency and Reporting

157. Kenya reserves the right not to adopt any measures requiring public disclosure of taxpayer information beyond its legal requirements. This is to prevent unwarranted intrusion into taxpayers' affairs and ensure that international tax activism does not compromise Kenyan businesses' privacy and competitive position.

Withholding Taxes (WHT)

158. Kenya might reserve the right to apply its domestic WHT rates or specific treaty rates on payments such as dividends, interest, and royalties, even if higher than those in the Convention. Balances the need to attract foreign investment by securing adequate revenue from cross-border payments, ensuring tax fairness.

Application of the Convention

159. Kenya reserves the right to specify which taxes the MLI covers, particularly in light of new taxes or significant tax reforms. This is to ensure that Kenya can adapt its international tax agreements in response to domestic tax policy developments, such as introducing new taxes or significant reforms.

Scope of Covered Tax Agreements

160. Kenya reserves the right to apply its bilateral treaties whose provisions take precedent over the MLI. The tax treaties through bilateral negotiations may be outside the framework of the MLI. This is to maintain flexibility in addressing specific tax treaty issues directly with treaty partners, ensuring that agreements are tailored to Kenya's unique economic and tax contexts.

Withdrawal and Amendment Provisions

161. Secure explicit provisions for withdrawal or amendment to the conventions to allow Kenya to adapt to future economic and regulatory changes. It allows Kenya to respond to future challenges and protect its interests.

Minimum Standards

162. Kenya may propose adjustments or phased implementation of minimum standards to match its administrative capacity and legal framework. This is to ensure that adopting international standards is practical and reflects Kenya's capacity to enforce them.

Pillar Two - Global Anti-Base Erosion (GloBE) Rules

163. Specific reservations on the application of the Income Inclusion Rule (IIR) and the Undertaxed Payments Rule (UTPR). This is to protect Kenya's right to adopt or maintain tax policies conducive to its development goals and to manage the impact on inward investment.

Subject to Tax Rule (STTR)

164. Reservation to limit the application or scope of the STTR. This is to ensure that the STTR does not adversely affect Kenya's tax treaty network, particularly in developing country partnerships.

Subject to Tax Rule (Pillar Two)

165. Reserve the right to apply a higher than the minimum tax rate proposed under Pillar Two for specific sectors or transactions critical for Kenya's development goals. This is to leverage tax policy as a tool for economic development and to safeguard Kenya's revenue base from being undermined by global minimum tax rules.

Country-by-Country Reporting

166. Advocate for a lower threshold for reporting for MNEs operating in Kenya. This is to ensure transparency and access to information for effective taxation of large MNEs with significant activities in Kenya.

3.5.2 THE LAW SOCIETY OF KENYA

Amendment of CTA Provisions

167. It is worth noting that a Covered Tax Agreement will be amended only if both treaty partners share the same position on the provisions of the MLI. The agreed changes to a Covered Tax Agreement will enter into effect after the treaty partner has also ratified the MLI.

168. While this approach respects the sovereign right of each country to choose the MLI provisions the want to apply to their existing treaties, it may also defeat the goal of a more multilateral approach to tax treaty reform.

169. For example, Kenya intends to apply the Simplified Limitation on Benefits Provision while United Kingdom (a contracting state) elected to apply the PPT procedure. This would mean that the CTA provision between the two states cannot be amended, as both have exercised their sovereign authority but in differing capacities.The likely impact of this are as follows—

I. Slowing down progress as reaching consensus on MLI provisions can be time-consuming and complex, potentially slowing down the implementation of desired tax treaty reforms;

II. It also increases the potential for blocking as one country's disagreement on a specific provision can prevent the entire treaty from being amended, even if other provisions are uncontroversial;

III. Contracting Jurisdictions can choose to adopt different MLI provisions for different treaties, leading to some treaties being more comprehensively amended than others.

Recommendation

Even while undertaking public participation, the Committee should prioritize key provisions and focus on achieving agreement on the most crucial and widely supported MLI provisions to expedite progress, even if complete consensus is not reached on all aspects.

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

170. During the consideration of the Convention, the Committee observed as follows:

I. There has been growing concern about the use of tax avoidance strategies by multinational enterprises that exploit gaps and mismatches in international tax rules in order to shift profits to low or no tax jurisdictions where there is little or no economic activity. These strategies are referred to as Base Erosion and Profit Shifting (BEPS).

II. The MLI was developed as BEPS Action 15 which called for development of a comprehensive multilateral instrument that would modify existing bilateral Agreements for the Avoidance of Double Taxation (DTAs) in order to swiftly implement the tax treaty related measures that were developed as part of the BEPS Project.

III. Work on the MLI started in February 2015, which was followed by its adoption in November 2016 and was consequently opened for signature in December 2016. A signing ceremony was held on 7th June, 2017 during which 67 countries signed the MLI.

IV. Kenya signed the MLI on 26th November 2019, at the headquarters of the OECD in Paris, France.

V. The primary objective of the MLI is to fight against BEPS by modifying existing DTAs in order to implement four tax treaty related measures developed by the BEPS Project. The MLI ensures that there will be swift, coordinated, efficient and consistent implementation of BEPS measurres which will ensure that existing DTAs are interpreted to eliminate double taxation without creating opportunities for non-taxation or reduced taxation.

VI. The four BEPS Actions which are related to DTAs and will be implemented by the MLI are:

   (i) Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*): Hybrid mismatch arrangements are used in aggressive tax planning to exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation.

   (ii) Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*): This Action introduces anti-abuse provisions to existing DTAs which will counter treaty shopping. Treaty shoppin involves strategies through which a person who is not resident of either Contracting State attempts to obtain benefits that a DTA concluded between two State grants only to residents of those States.

   (iii) Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment (PE) Status*): This Action provides changes to the definition

of permanent establishment under DTAs to address strategies used to avoid having a taxable presence in a jurisdiction.

(iv) Action 14 (*Making Dispute Resolution Mechanism More Effective*): This Action seeks to improve the resolution of tax-related disputes arising under DTAs.

VII. The MLI provisions will update the Articles in Kenya's DTAs and allow Kenya to appropriate the benefits of the MLI where both Contracting Jurisdictions have adopted the same provisions (matching).

VIII. Kenya has expressed its intention to place a reservation for the entirety of Article 5 of the MLI not to apply with respect to all of its Covered Tax Agreements (CTAs) since Kenya's domestic law as well as DTAs apply the credit method for elimination of double taxation instead of the exemption method.

IX. Kenya places a reservation against the provision to file a Mutual Agreement Procedure (MAP) case in either of the Contracting States. Instead, the taxpayer will be allowed to file the case where he is resident, and that State will notify the other. This is also because the resident State can give unilateral relief.

X. Kenya's chooses not to apply Part VI of the MLI which contains provisions on Mandatory Binding Arbitration. This is due to constraints of cost and capacity.

XI. The Convention is aligned to the Constitution. Further, the reservation to Articles 5 and 16 of the Convention do not negate the Constitution.

CHAPTER FIVE

5 COMMITTEE RECOMMENDATION

171. The Committee recommends that pursuant to Section 8 of the Treaty-Making and Ratification Act, Cap. 4D, the House adopts and approves the ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting (MLI) with reservations to Articles 5 and 16.

SIGNED...DATE 30th April, 2024

HON. CPA KURIA KIMANI, MP
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING