Tax Justice Network Africa,

Jaflo Limited, Block 3 - 106 Brookside Drive, Westlands,

P.O. Box 25112 - 00100 Nairobi – Kenya,

24th July 2023.

S. Njoroge,

Clerk of the National Assembly,

P.O. Box 41842-00100,

NAIROBI.

Dear Sir,

RE: CIVIL SOCIETY SUBMISSIONS ON THE MULTILATERAL CONVENTION (MLI) TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING

This submission is made by the Tax Justice Network African and the East African Tax and Governance Network in this joint memorandum to the National Assembly's Departmental Committee on Finance and National Planning, herein attached to this correspondence.

Thank you for your consideration.

Yours sincerely,

Chenai Mukumba on behalf of Tax Justice Network Africa

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MLI Article	Current Position	Recommendation	Rationale for Recommendation
Article 2	Covered Tax Agreements include: Canada, Denmark, France, Germany, India, Iran, Italy, Korea, Mauritius, Norway, Qatar, Seychelles, South Africa, Sweden, UAE, UK, Zambia	The designation of all of Kenya's tax treaties as Covered Tax Agreements (CTA) is a welcome move.	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.
Article 3	Kenya has not made any reservations under Article 3 para 5 of the MLI as such Article 3 will apply.	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.	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.
Article 4	Kenya has not made any reservations under Article 4(3)(b) through (d) of the MLI. As such Article 4 will apply.	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.	Article 4 implements recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). It deals with the tie-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.
Article 5	Kenya has reserved the right for Article 5 to not apply to CTAs	It is recommended that this Article is adopted.	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 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 country to tax. It is recommended that either of the options is adopted with a strong preference for Option C.

Article 6	Kenya has not made any reservations under Article 6(4)	The adoption of this Article is welcome.	Article 6 implements recommendations outlined 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.
Article 7	Kenya has opted to apply the Simplified Limitation of Benefits Provision.	This is welcome move.	Article 7 implements recommendations outlined in the BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). There are three options 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.
Article 8	Kenya has apply the rule on dividend transfer transactions to all CTAs	This is a welcome move	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 thus 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.
Article 9	Kenya has opted to apply the anti-abuse provisions taxation of capital gains from the alienation of shares or interests of land rich entities	This is a welcome move	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

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			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 da period for testing if an entity is land rich and curbs this type of abuse. It is thus important to adopt these measures.
Article 10	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	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 con 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.

			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.
Article 11	Kenya has also not made any reservations under article 11 para 3 of the MLI. It thus preserves the right of a country to tax its own residents.	This is a welcome move	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 resident except with respect to certain treaty provisions. It is thus welcome for developing countries to adopt this Article.
Article 12	Kenya has implemented Article 12 on the Artificial Avoidance of PE	This is a welcome move.	Article 12 implements recommendations outlined in the BEPS Action 7 (Preventing the Artificial Avoidance of Permanent

	status through Commissionaire Arrangements.		Establishment Status). The establishment of a PE results in a taxable presence. Companies can however interpose agency arrangement s to artificially avoid creating a PE in order to prevent host countries from taxing those business profits. 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.
Article 13	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.	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

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			auxiliary character or Option B 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 stat to decide that a fixed place of business for auxiliary activities to be deemed to create a PE.
Article 14	Kenya has adopted Article 14(1) on the splitting-up of Contracts	This is a welcome move.	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 time 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.
Article 15	Kenya's position on Article 15 has not been included in the memorandum	Include a provision on Article 15	
Article 16	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	This is a welcome move.	Article 16 implements recommendations outlined in the BEPS Action 14 (Making Dispute Resolution Mechanisms More Effective). This Article aims to improve tax treaty based dispute resolution so that tax treaties can be resolved in a timely fashion. It is thus a welcome move to adopt Article 16.

	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. 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. 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. Kenya has made a notification pursuant to article 16(6)(c)(i) of the MLI, that Sweden and Zambia does 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		

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	accordance with the Covered Tax Agreement. 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 setting out that any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions. 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. 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..		
Article 17	Kenya has adopted article 17 of the MLI without reservation. As such, all Covered Tax Agreements require the tax administration of a jurisdiction to	This is a welcome move	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

	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.		it ensures that transfer pricing corresponding adjustments prevent double taxation.
Article 18 - 26	Kenya has chosen not to apply part V	This is welcome	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

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