**MLI Modifications: Kenya-South Africa**

*Editor’s Note: This summary is based on the MLI positions submitted to the Depositary upon the deposit of the ratification instruments by Kenya and South Africa, and does not constitute business, legal, tax, or other professional advice or services. It is intended only to provide a general guide*. *In applying the MLI provisions to this treaty, researchers should ensure they review other relevant MLI sources. Please see the Bloomberg Tax* [*MLI Watch*](https://www.bloomberglaw.com/product/tax/page/MLI_watch) *page for further research.*

**Date this Agreement is Modified by the MLI (Enters into Force):** May 1, 2025

**MLI instrument of ratification deposited (Kenya):** January 8, 2025

**MLI instrument of ratification deposited (South Africa):** September 30, 2022

**MLI effective date, withholding taxes (Kenya and South Africa):** January 1, 2026

**MLI effective date, all other taxes (Kenya and South Africa):**Taxable periods beginning on or after November 1, 2025.

**Transparent Entities (MLI Article 3)**

According to MLI Art. 3(6), the provision on fiscally transparent entities in MLI Art. 3(1) applies and supersedes the provisions of this Agreement to the extent of incompatibility (i.e. MLI Art. 3(1) is added to this Agreement).

In addition, MLI Art. 3(2), which modifies the application of the provisions related to methods for the elimination of double taxation, applies to this Agreement.

**Dual Resident Entities (MLI Article 4)**

According to MLI Art. 4(2), the provision on dual resident entities in MLI Art. 4(1) replaces Art. 4(3) of this Agreement.

**Purpose of a Covered Tax Agreement (MLI Article 6)**

*[Note: The OECD MLI Matching Database has indicated a possible notification mismatch which requires confirmation as to whether both jurisdictions have identified the same preamble language. The following discussion assumes there is no mismatch, i.e., that both jurisdictions have notified the same preamble language under MLI Art. 6(5). If there is a mismatch, the text of MLI Art. 6(1) is added to the existing preamble language.]*

According to MLI Art. 6(2), to meet the minimum standard, the text of MLI Art. 6(1), indicating the intent to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements, replaces the notified preamble language of this Agreement. The optional preamble language of MLI Art. 6(3) does not apply.

**Prevention of Treaty Abuse (MLI Article 7)**

According to MLI Art. 7(2), to meet the minimum standard, the Principal Purpose Test (PPT) provision of MLI Art. 7(1), that denies benefits that would otherwise be provided where the principal purpose or one of the principal purposes of any arrangement or transaction was to obtain those benefits, applies and supersedes the provisions of this Agreement to the extent of incompatibility (i.e., the PPT provision is added to this Agreement). The optional additional language of MLI Art. 7(4) does not apply. The Simplified Limitation on Benefits Provision (S-LOB) does not apply.

**Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property (MLI Article 9)**

According to MLI Art. 9(8), the optional provision of MLI Art. 9(4) that allows gains derived by a resident of one Jurisdiction from shares or comparable interests deriving more than 50% of their value from immovable property in the other Jurisdiction at any time during a 365 day period preceding the sale to be taxed in that other Jurisdiction, applies and supersedes the existing provisions of this Agreement to the extent of incompatibility (i.e., MLI Art. 9(4) is added to this Agreement).

**Application of Tax Agreements to Restrict a Party’s Right to Tax its Own Residents (MLI Article 11)**

According to MLI Art. 11(2), the “saving clause” provision of MLI Art. 11(1) applies and supersedes the provisions of this Agreement to the extent of incompatibility (i.e., MLI Art. 11(1) is added to this Agreement).

**Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions (MLI Article 13)**

According to MLI Art. 13(5)(a), Option A under MLI Art. 13(2), which preserves the specific activity exemptions only if the specific activity or, where there is a combination of such activities, the overall activity, is of a preparatory or auxiliary character applies, changing the application of Art. 5(4) of this Agreement.

According to MLI Art. 13(5)(b), the anti-fragmentation rule of MLI Art. 13(4) applies, changing the application of Art. 5(4) of this Agreement without replacing it.

**Definition of a Person Closely Related to an Enterprise (MLI Article 15)**

The definition of a person closely related to an enterprise in MLI Art. 15(1) applies for the purposes of Art. 5(4) of this Agreement (as modified by the anti-fragmentation rule of MLI Art. 13(4)).

**Mutual Agreement Procedure (MLI Article 16)**

The first sentence of MLI Art. 16(1), providing that a person may present a case to the competent authority of either jurisdiction, does not apply as both Kenya and South Africa intend to meet the minimum standard through other measures.

The remaining provisions of this Agreement relating to dispute resolution are retained as they are considered consistent in content with the provisions of MLI Art. 16(1)(second sentence), MLI Art. 16(2), and MLI Art. 16(3), and meet the minimum standard.

**Corresponding Adjustments (MLI Article 17)**

According to MLI Art. 17(2), MLI Art. 17(1), providing that a Jurisdiction will make a corresponding adjustment where the other Jurisdiction makes an adjustment that reflects the arm's length profit, replaces Art. 9(2) of this Agreement.