



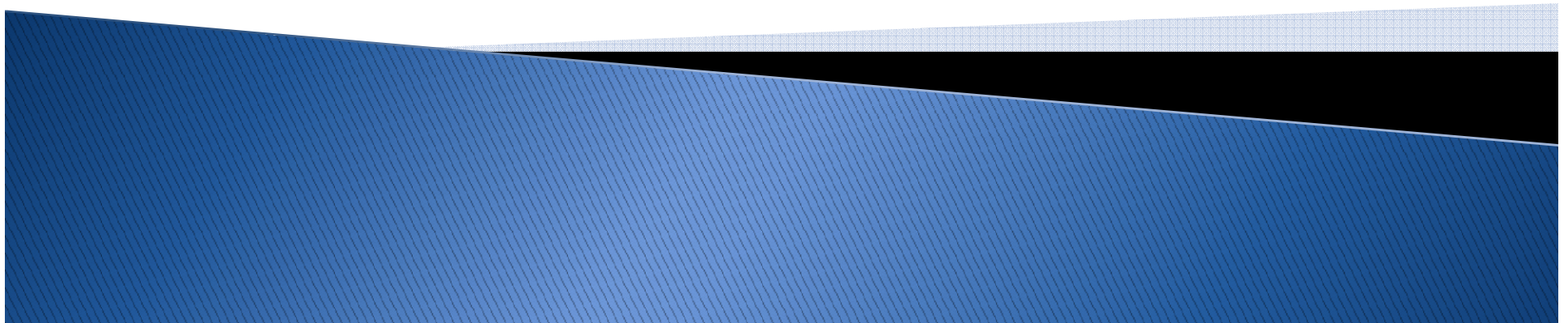
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# Investing Abroad

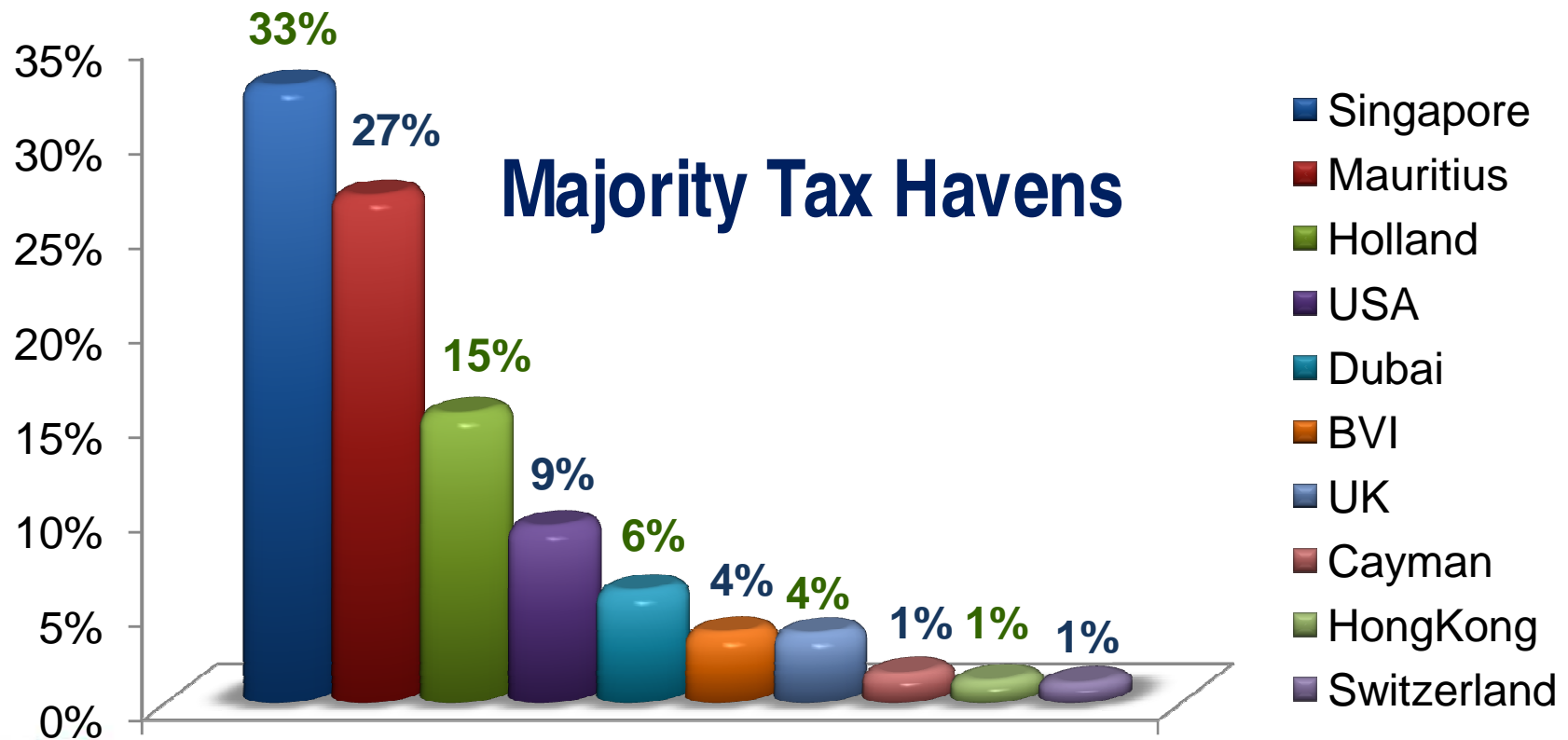
**-Anup P. Shah**

**WIRC's Regional Conference**

**8<sup>th</sup> December, 2013**



# Top ODI Destinations (2008-12)



# Two Modes of ODI

- ▶ **ODI up to 100% of Net Worth (*previously 400%*)**
- ▶ **Approach AD in Form ODI**
  - Not on Caution / ED / CIBIL/ Defaulter List
  - Route all transactions through One Branch of AD
- ▶ **Comply with R. 7 in case of ODI in FSS**

## Auto Route

- ▶ If conditions not satisfied
- ▶ **Mandatory for ODI by :**
  - Sole Prop. / URF
  - Trusts / Societies
- ▶ Apply to RBI in Form ODI
- ▶ **Factors considered**
  - Viability of JV/ WOS
  - External Trade Contribution
  - Track record of Parties
  - Experience & Expertise of Indian Party in that line

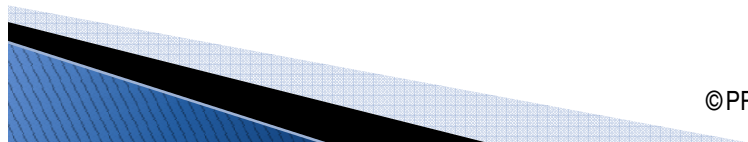
## Approval Route

# Selection of Indian Entity for ODI



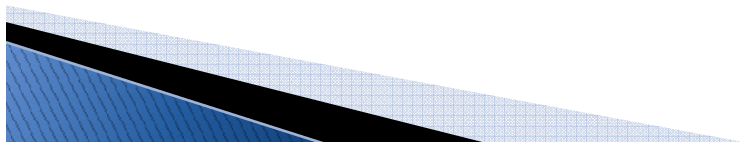
# Eligible Entities

Entity	Auto Route	Approval Route	No Provision
Company – Listed / Unlisted	✓		
Reg. Partnership Firm	✓		
Individuals	✓		
Sole Proprietary		✓	
Trust / Society		✓	
LLP			?
AOP			?
HUF			?



# Shareholding : Firm or Co?

- ▶ **Should the Invst. be from an Indian Firm or Indian Co. or LLP?**
  - **Firm more advantageous taxwise:**
    - No DDT
    - No MAT
  - **LLP?**
    - LLP for Invst. Activities possible?



# ODI by Individual

Res. Ind. Setting up JV/WOS under LRS (5 Aug 2013)

Can invest alone or with another Ind. - If 4 Ind. from a Family then limit \$75,000 \* 4?

Every Year?

Can it be to Mauritius?

Only Operating Co. no Step down sub allowed

No W/o is allowed in case of Disinvestments



# Type of Business





# Type of Activity of JV / WOS

## Activity

- Any Activity Except Two
- RE Business & Banking

## RE Business

- Buying / Selling of Land / TDR
- Excl'd Construction / Devlp.

## Banking / FSS

- Banking allowed for Banks
- Separate Regs. For FSS

## Restrictions like FDI

- Trading / Gambling / Agro / Tobacco Mfg?



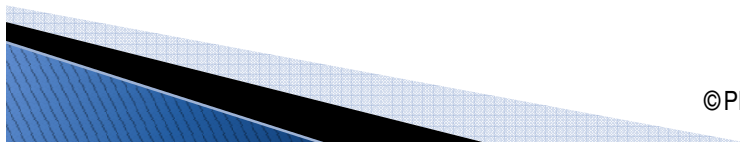
# Financial Commitment



# Change in Limits

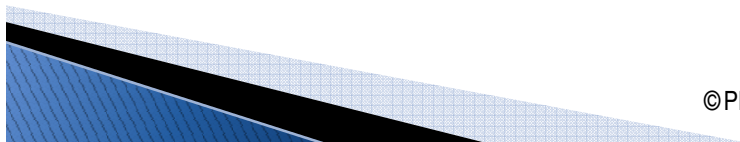
## ▶ Up to 100% of Net Worth

- **Changed from 400% to 100% wef 14.08.13**
- **Financial Commitment is 100%**
  - **Fin. Commitment covers Eq . + CCPS / RPS + Loans + Guarantees to JV / WOS**
  - **If Two Indian Parties invest together then aggregate limits of NW applicable**
  - **What about Inter se limits?**



# Net Worth

- ▶ **ODI: Financial Commitment = 100% of NW(400%)**
  - **NW**= Paid-up Capital + Free Reserves
  - Paid-up Capital : Equity + Preference
  - **'Free Reserves' – Meaning?**
    - Not defined in FEMA Regs.
    - Different Acts use a Different meaning
  - **If after ODI NW of IndCo drops / deteriorates /merger?**
    - Limits to be reckoned as on date of Investment and not to be monitored post-investment.

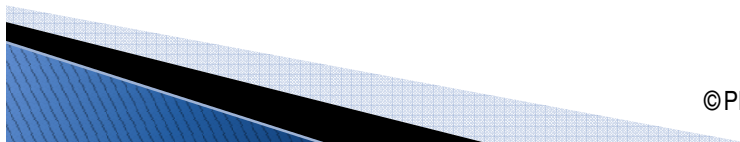


# Net Worth

- ▶ **ODI made in JV / WOS under 400% Limit**
  - **Further investment to be made now in existing Co.**
    - **Limit is 100% or 400%?**
    - **Would earlier investments be counted towards 100%?**
  - **Drawing on HoldCo / Subco Networth – But no Double Counting**
    - **Only for Companies – Not for Firms**

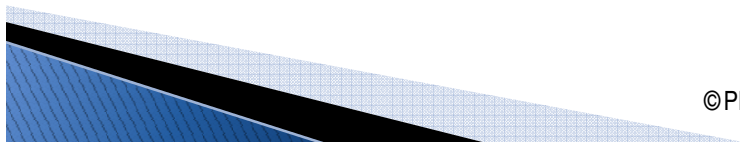


**Firm's Networth not available for Company**



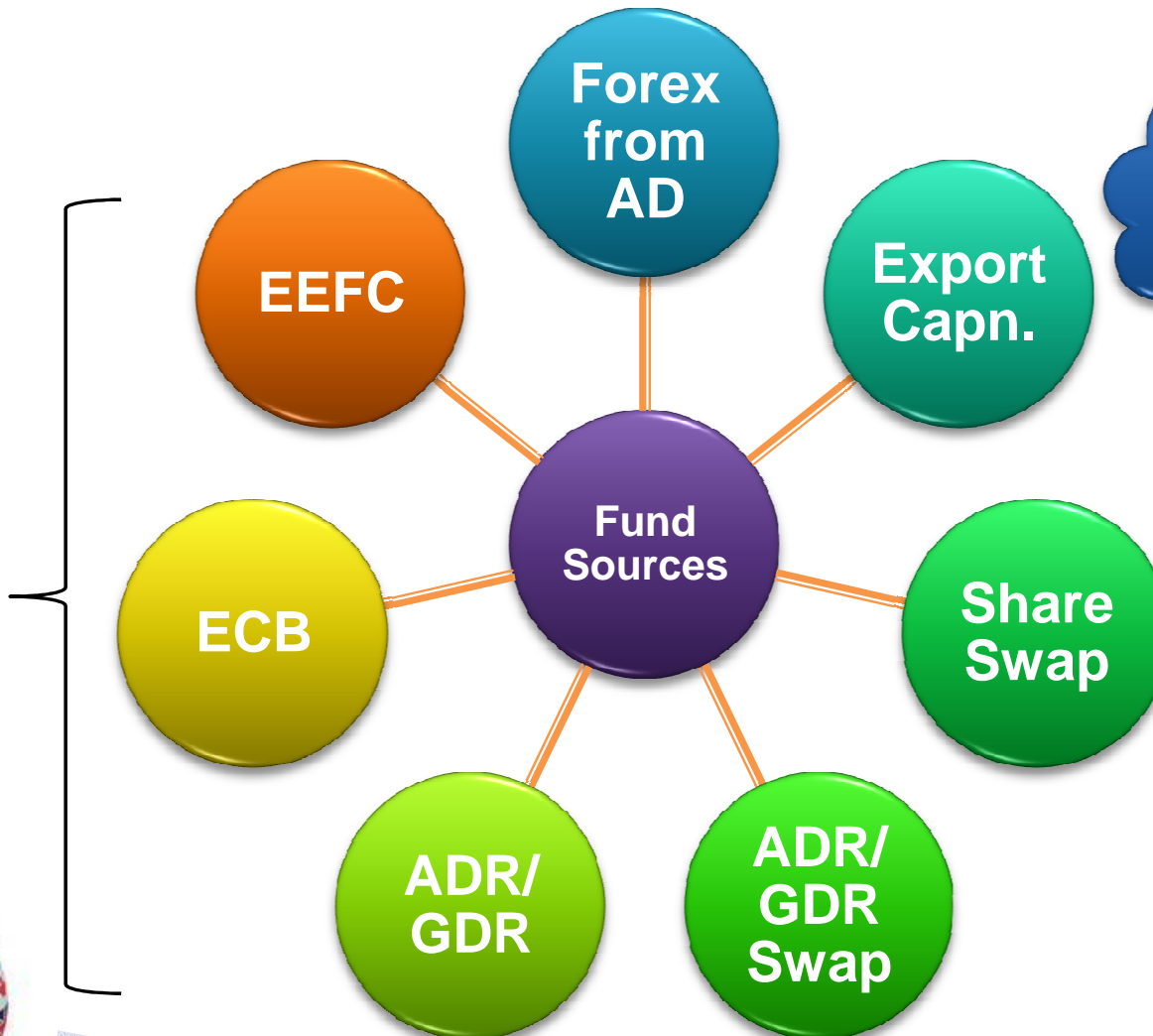
# Automatic Route Invst.

- ▶ Up to 100% (*previously 400%*) of NW as per Last Audited B/S
  - If substantial addition to NW during current year:
    - Out of profits till date
    - Out of fresh issue of shares
  - Options?
    - RBI Permission
    - Change A/c Year – get Audited
    - Additional Investment next year



# Funding Sources

100%  
Limit  
NA –  
Can  
invest  
upto  
400%  
of NW

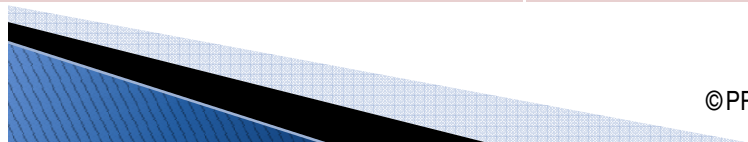


• Auto route  
• Approval if O/s > limit



# Financial Commitment

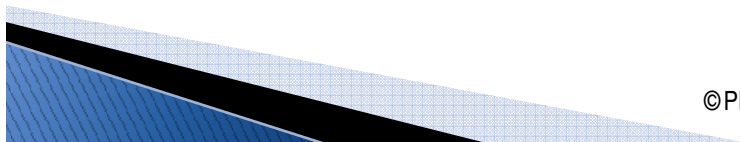
Type of Investment	Condition
Equity / CCPS	--
RPS / OCPS / Loan/ Guarantee	Auto if Eq. / CCPS investment
	Approval if no Eq. / CCPS
Guarantee by Indco / Promoter/ Group / Sister / Associate Co. to JV / WOS	100% Ceiling + No Open-ended Guarantee + Reporting + Norms for Guarantees by Banks
Guarantee to 1 <sup>st</sup> level Step-down Sub of JV / WOS	<ul style="list-style-type: none"> <li>• Auto Route</li> <li>• Within 100% limit of Indian Party</li> <li>• Direct Sub can be Op Co or SPV / IHC</li> </ul>





# Financial Commitment

Type of Investment	Condition
Guarantee to 2 <sup>nd</sup> level Step-down Sub of JV / WOS	<ul style="list-style-type: none"> <li>• Approval Route</li> <li>• Indco directly / indirectly holds <math>\geq 51\%</math> stake in 2<sup>nd</sup> Generation Step-down Sub</li> </ul>
Charge on assets of Indco / Group Co. for loan to JV / WOS	RBI Approval + 100% Limit + NOC from Indian Lenders of Indco / Group Co.
Invocation of Performance Guarantee > 100% Limit	Prior RBI approval before effecting excess remittance



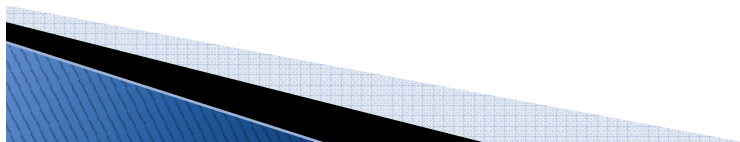
# Acquisition of ForCo.



# Takeover of Foreign Companies

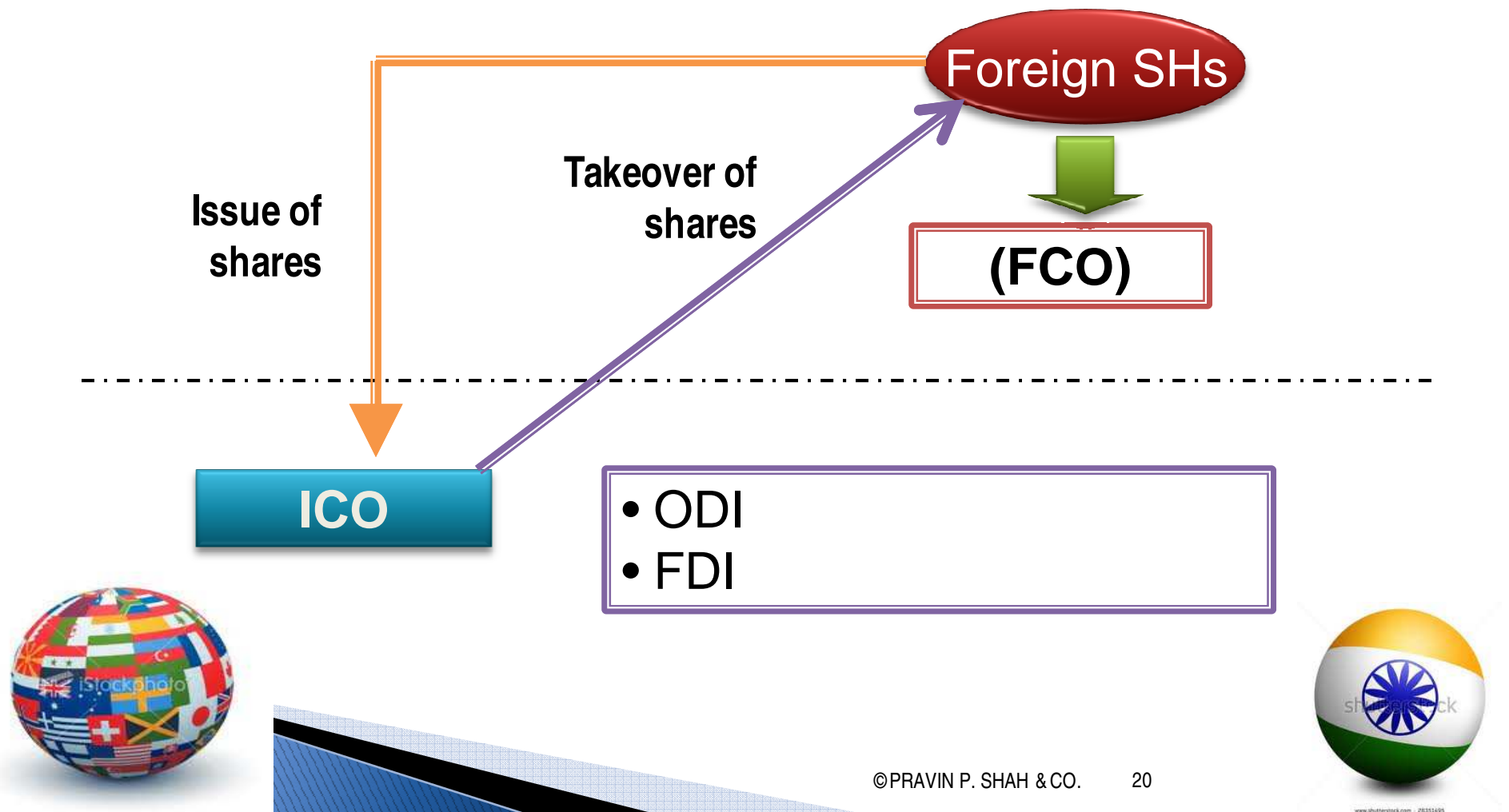
- **FEMA Regulations**

- Up to 100% (***previously 400%***) of Networth of lco.
- ECBs can be used for acquisition
- Valuation of existing FCo. – Irrespective of Amount – No specific method
  - If ODI > \$5m = Valn. by MB / Foreign Invst. Banker
  - If ODI < \$5m = Valn. by CA / CPA?
  -



# Takeover of Foreign Companies

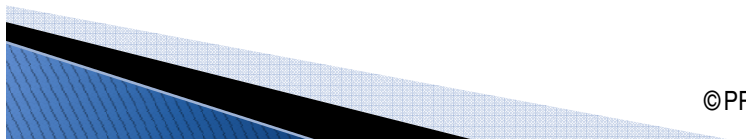
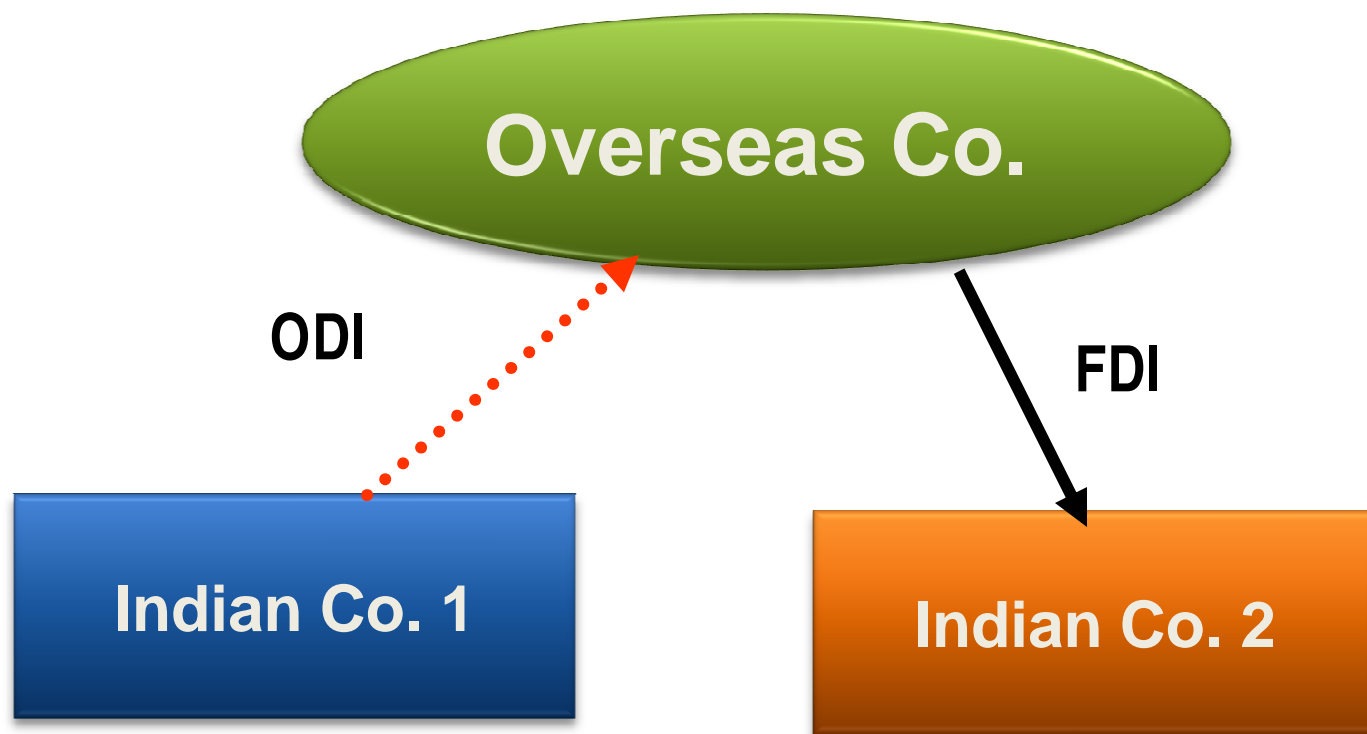
## ► Acquisition by Stock Swap



# Round Tripping



# Round-tripping

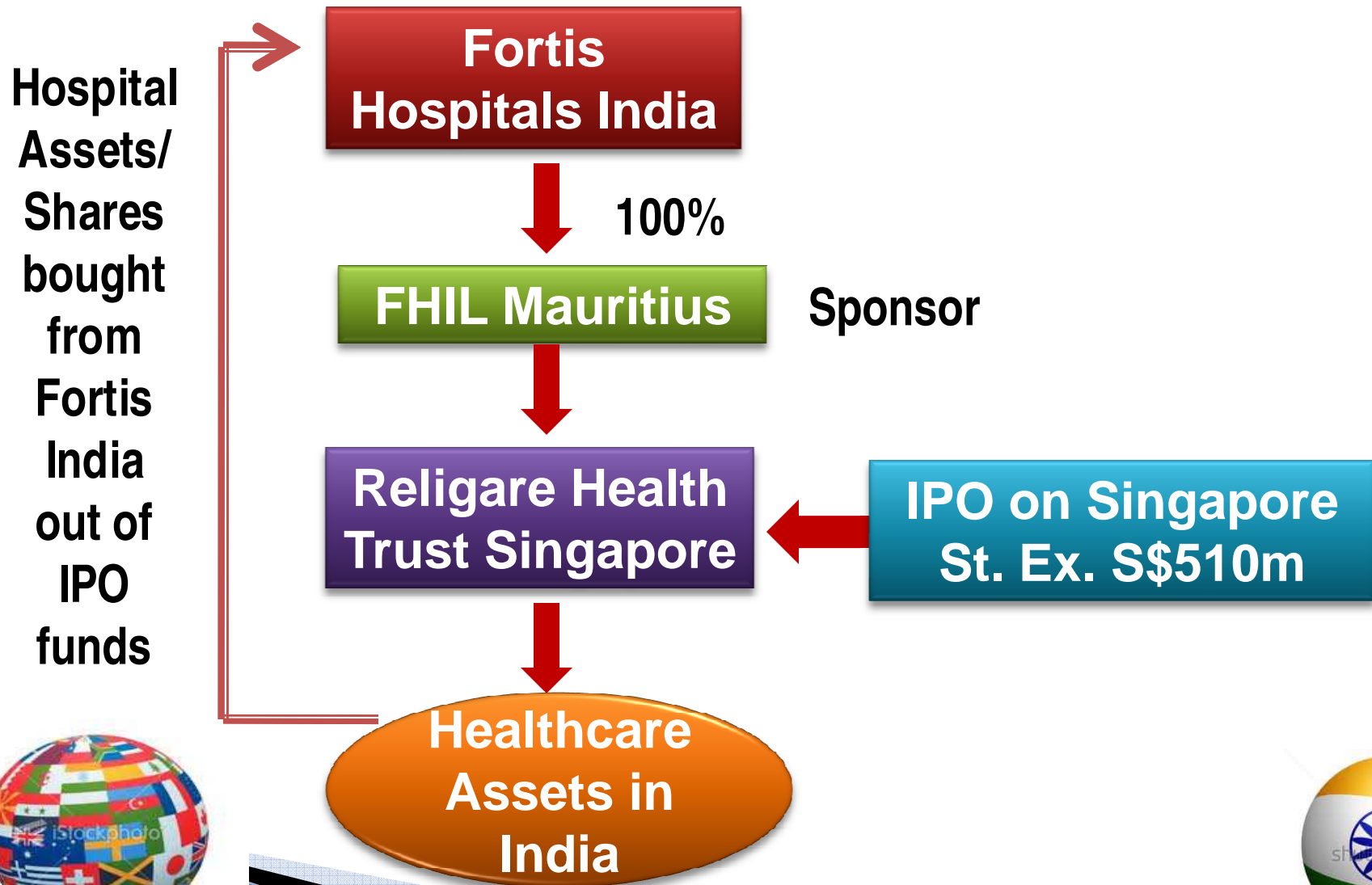


# Round - tripping

- **No Definition / Provision under FEMA**
  - Indian ODI rerouted to India as FDI through tax havens
  - Invst. In Mauritius contains a Clause on Round-tripping
  - Example
  - Legal in several Countries: Very common in China
- **IT Dept.:**
  - 8 cases of large FDI in small unknown Real Estate Cos. all from Singapore - Round-tripping suspected



# Foreign Listing – Business Trust





# Financial Services Sector



# ODI in Financial Sector

- **R.7(1) & 6(1) of FEMA 120/2004 :**
  - **What is Financial Services Sector (FSS) – Not Defined**
    - **WOS / JV for Com. Brokers abroad / Trading in Overseas Com. Exchange = FSS and requires FMC clearance**
    - **Is Investment in Stock Exchange / Commodity Exchange / AMC / Insurance Broker an FSS activity?**
    - **Rely on NBFC Directions, Inbound Regs. & CFDIP?**
    - **Why not define such an important term?**



# ODI in FSS – 4 Conditions

**Registered in India**

- Regulatory Authority
- For FS activities

**Net Profit from FS activities**

- In Preceding 3 FYs

**Approvals Obtained**

- Indian Regulator
- Foreign Regulator

**Prudential Norms**

- Capital Adequacy
- Prescribed by Indian Regulator

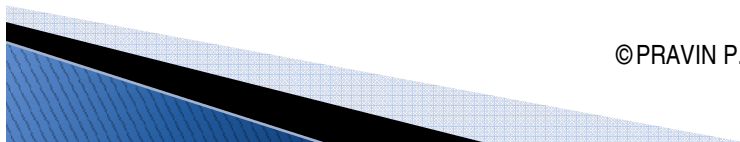


# ODI in Financial Sector



# ODI by NBFCs – Addl. Directions

- **Invst. in Branch / WOS/ JV/LO abroad**
  - Require prior Approval of RBI's NBFC Dept.
- **General Conditions for ODI by NBFCs:**
  - No ODI in non-financial sectors
  - Not in activities prohibited under FEMA / in sectoral funds
  - ODI in entities whose core activity is regulated by FS regulator
  - No multi-layer or cross-jurisdictional structures
  - Only single intermediate Holdco – contrary to FEMA
  - Sub / JV not a Shell Co. – must have significant assets / operations
  - Sub / JV not a vehicle for raising funds for investing in India : No Round Tripping



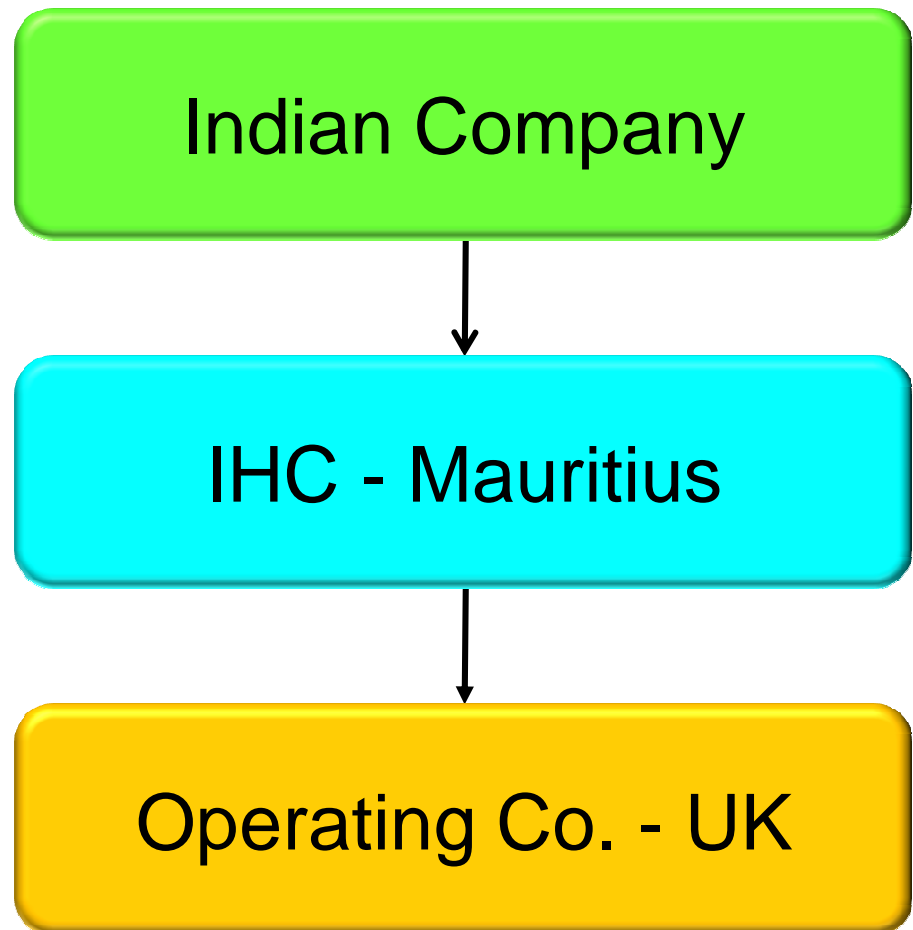
# Use of IHC / RHC



# Use of IHC / RHC

**IHC may be used for ODI**

- Cyprus, Mauritius, Dubai, Singapore, Netherlands
- Can also use a RHC in country of Operating Co
- Mere Holding Co or Op-cum-Holding Co?
- Tata Motors – IHC in UK



# Use of IHC / RHC

## ▶ Multi-layer Structure Factors :

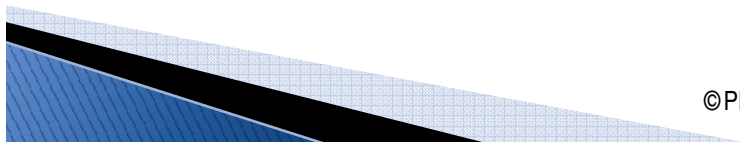
### ◦ RBI's View

- FEMA Regs.: SPV permitted if not on ED / Caution / CIBIL List
- RBI frowns upon Multi-layer structures – No express provision
- Prefers Single Level SPV
- Dy. Governor's Speech: Need for a clear policy in this respect
  - Multi-layer structures create opacity but are tax beneficial

### ◦ Companies Bill 2012

- Max. 2 layers of Investment Cos.
- Applicable even to Investment NBFCs / Pvt Cos.
- NA if IndCo. **acquires** ForCo which has 2+ Invst. Sub. as per foreign

laws





# Exit Routes

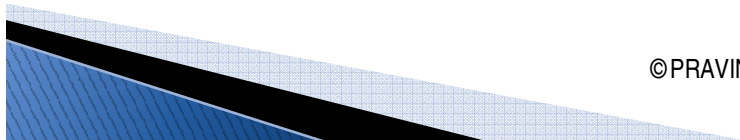


# Exit Options

**Sale of Shares**

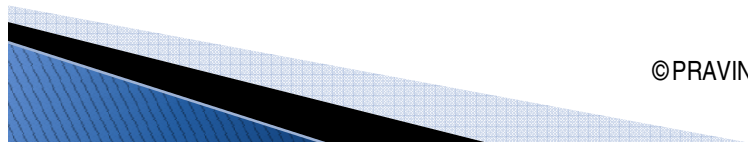
**Buyback of Shares**

**Voluntary Liquidation**



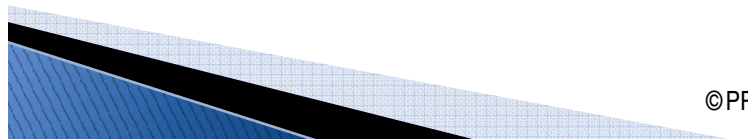
# Share Sale of JV/ WOS: No Write-off

Sale of listed JV / WOS thru St. Ex. to ForCo / Indian Party	Sale of Unlisted JV / WOS to Forco / Indian Party
<p>No Write-off</p> <ul style="list-style-type: none"> <li>• No O/S Div / Royalty / FTS / Commission from JV / WOS</li> <li>• JV / WOS in operation for 1 year</li> <li>• APR + Audited A/c for that yr filed with RBI</li> <li>• Indian Party not under investigation by CBI / ED/SEBI / IRDA, etc.</li> <li>• Report through AD in 30 days</li> <li>• Receive sale proceeds within 90 days of Date of Sale</li> </ul>	<p>No Write-off</p> <ul style="list-style-type: none"> <li>• Share Price &gt; FMV by CA / CPA based on Latest Audited A/c                             <ul style="list-style-type: none"> <li>• Only NAV / ECM and no DCF?</li> </ul> </li> <li>• Other Conditions same as that for Listed Co. Sale</li> <li>• What if one Indian Party buys from another – buy in Forex or in Rupees?</li> </ul>



# Share Sale of JV/ WOS: Write-off

Situation	Condition
JV / WOS Listed	Auto Route for w/off in all 4 cases
IndCo. is Listed in India + NW $\geq$ <b>Rs. 100 cr.</b>	Additional Conditions: <ul style="list-style-type: none"> <li>• No O/S Div / Royalty / FTS / Com. from JV / WOS</li> </ul>
IndCo. is Listed + NW $\leq$ <b>Rs. 100 cr.</b> but ODI $\leq$ <b>\$10m</b>	<ul style="list-style-type: none"> <li>• JV / WOS been in operation for 1 full year</li> <li>• APR + Audited Accounts for that Yr filed with RBI</li> </ul>
Unlisted Indian Party but ODI $\leq$ <b>\$10m</b>	<ul style="list-style-type: none"> <li>• Indian Party not under Investigation by CBI / ED/SEBI / IRDA, etc.</li> <li>• Report through AD in 30 days</li> <li>• Sale proceeds within 90 days of Date of Sale               <ul style="list-style-type: none"> <li>• For U/L: SPA or Share Transfer?</li> </ul> </li> </ul>



# Buyback / VL

## Buyback of Shares by JV/WOS

- No specific provision under FEMA
- Same as sale of Shs of JV / WOS?
- Check local laws
- Tax Implications :
  - No Deemed Dividend exemption  
∴ Dividend taxable
  - Balance taxable as Capital Gains in hands of Indian Party

## VL of JV/ WOS

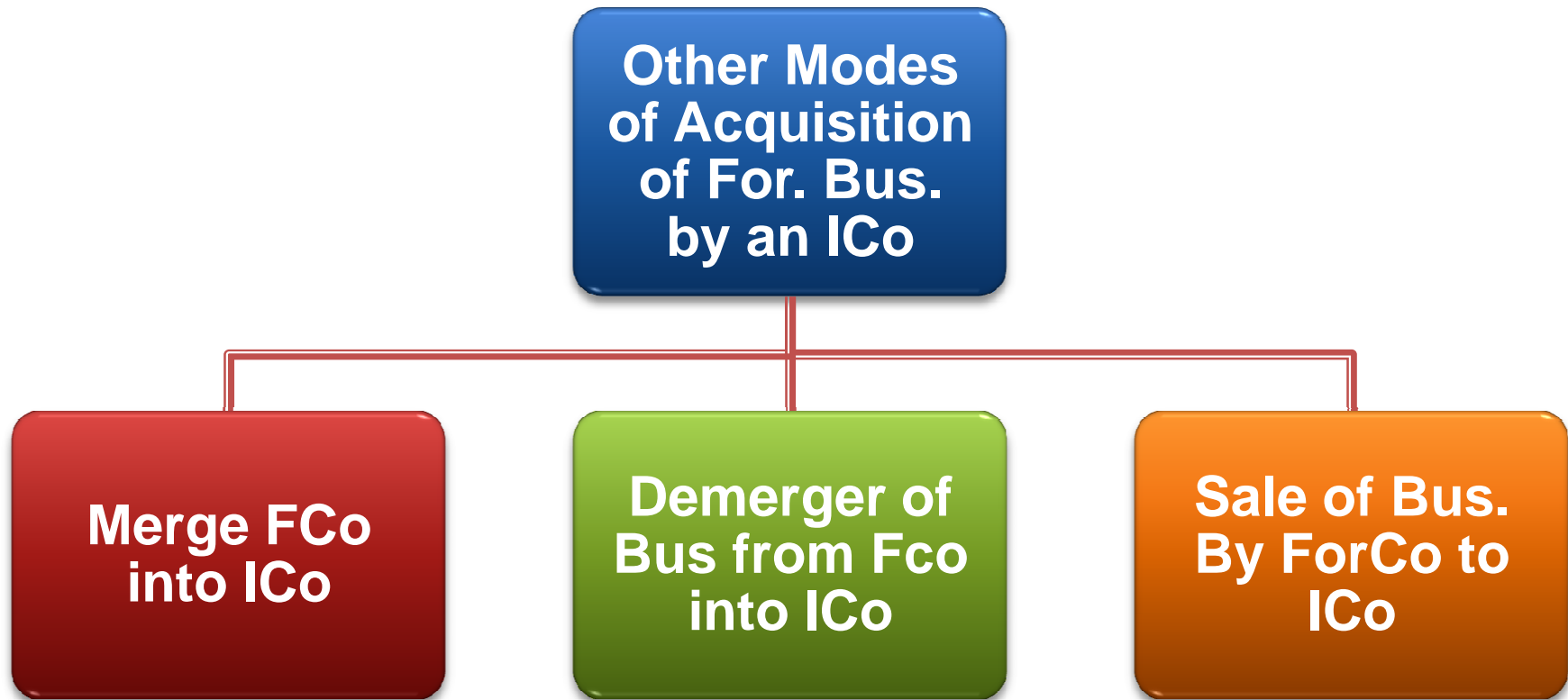
- Can VL of JV / WOS be done?
  - No specific permission for VL
  - However, Form ODI & FAQs covers VL / Winding-up
    - Sale Price  $\geq$  FMV certified by CA / CPA based on latest Audited A/c – How to comply?
- Tax implications of VL of Forco?
  - Ss.46(2) / 2(22)(c) apply?



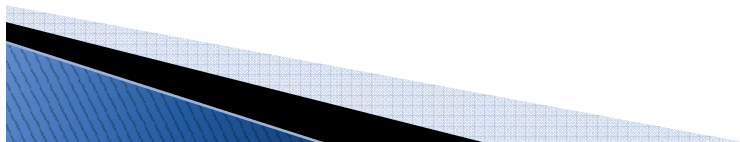
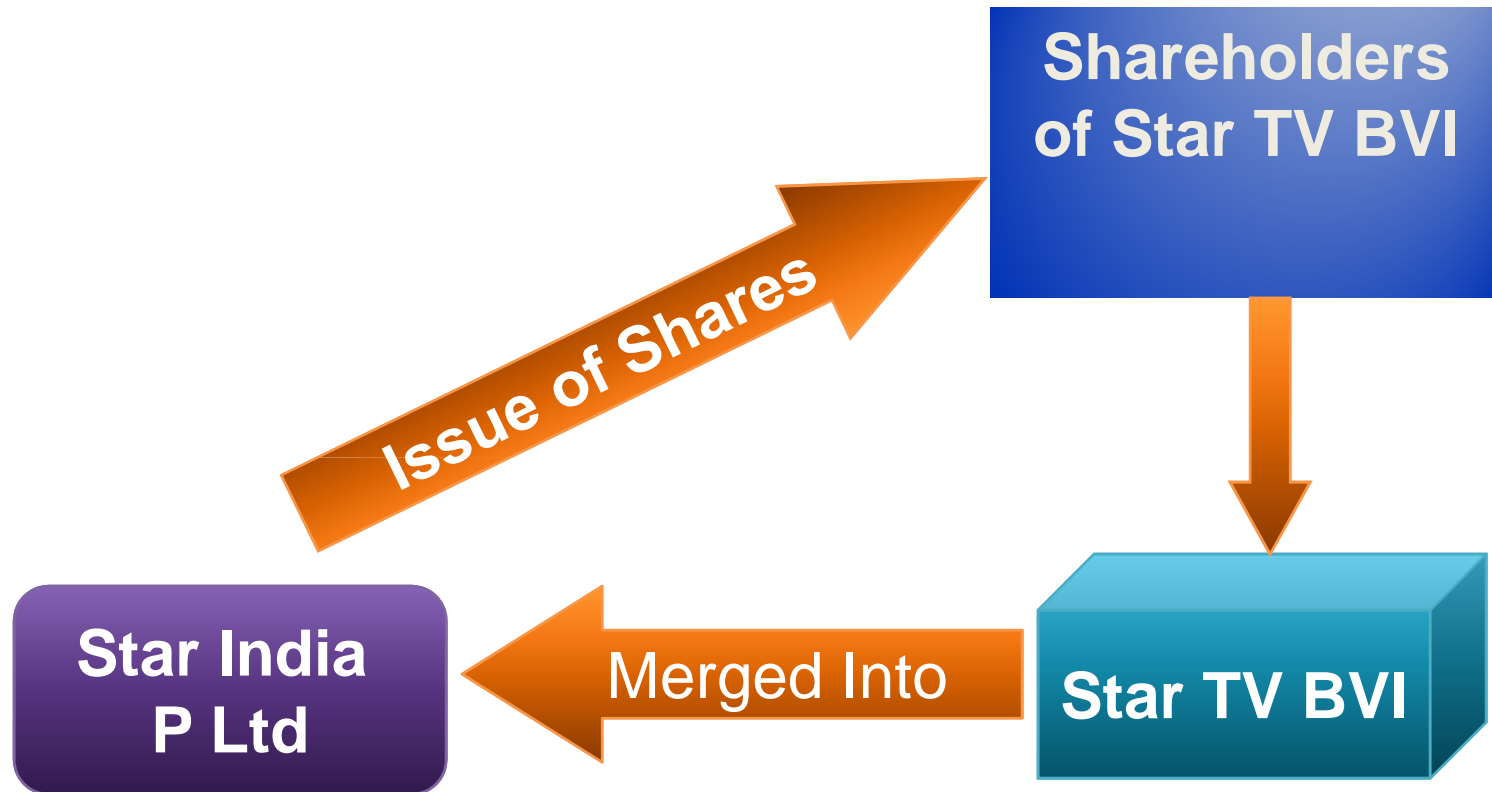
# Other Overseas Invsts.



# Acqn. of Overseas Business

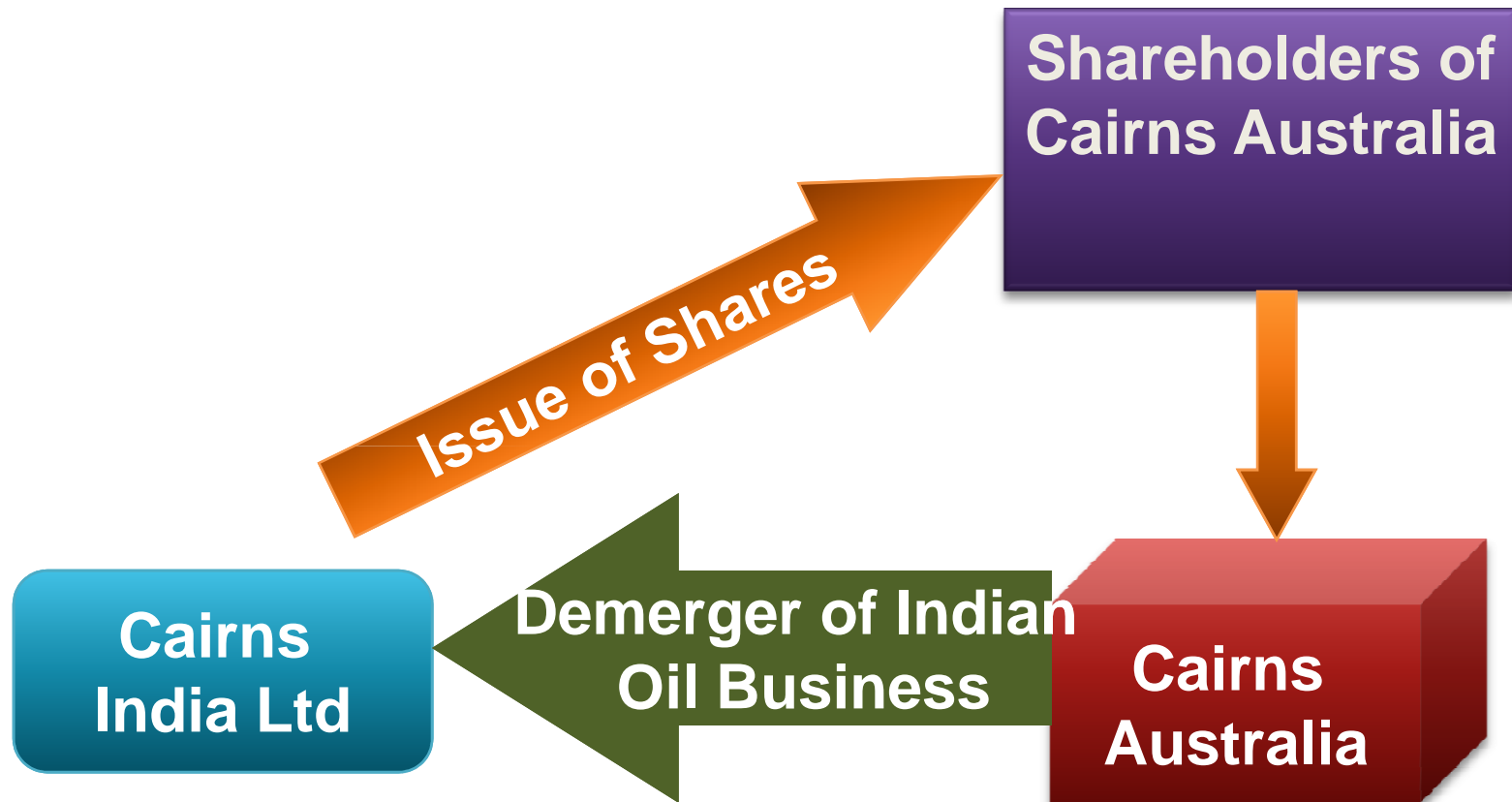


# ① Merger of ForCo into ICo.

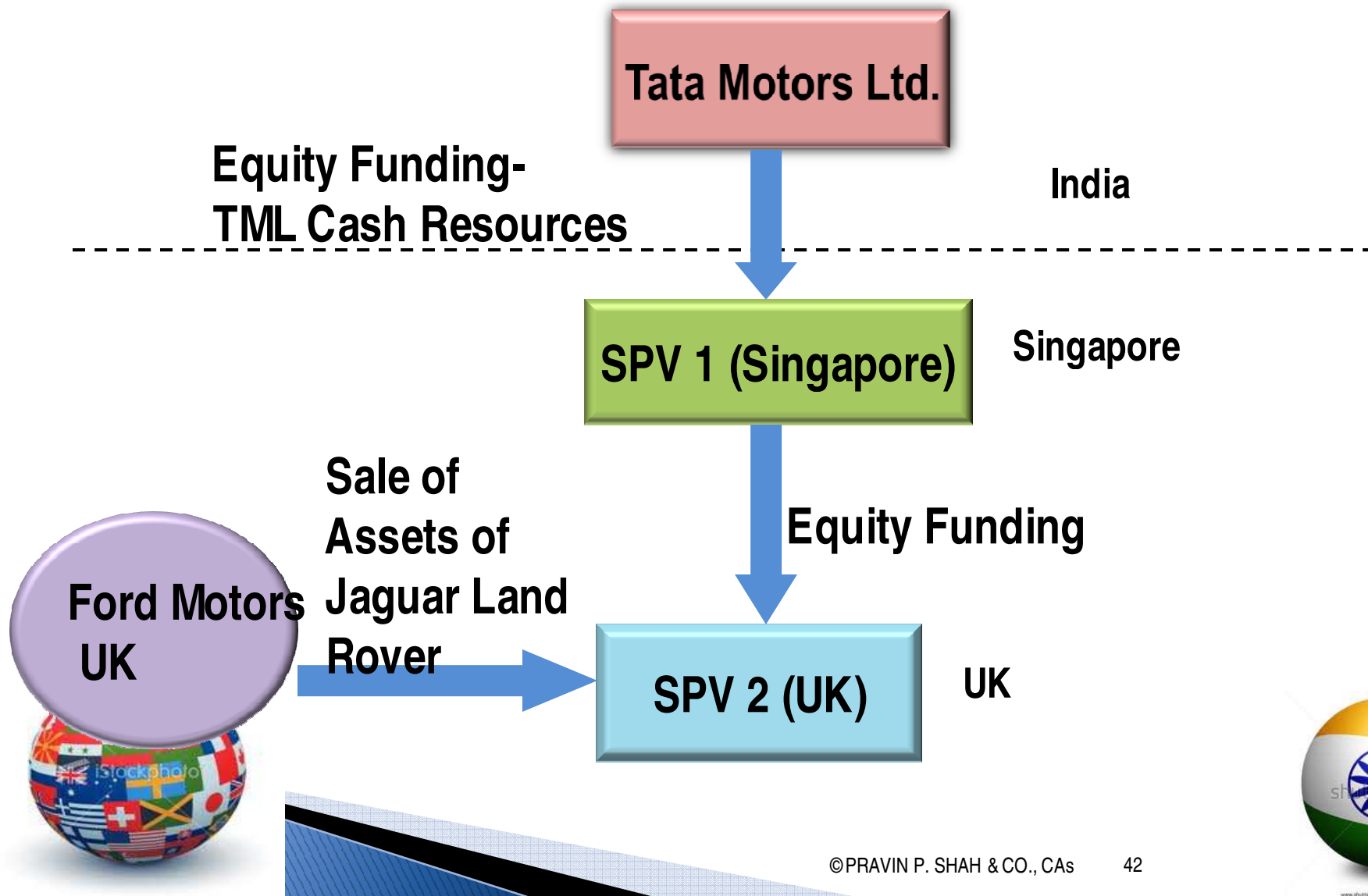




## ② Demerger from ForCo to ICo.



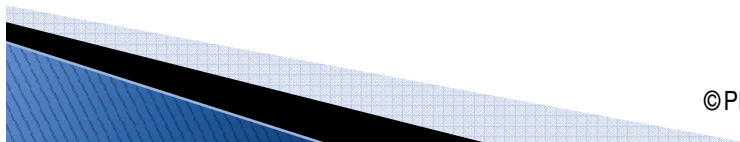
### ③ Sale of Assets to Indian Co.



# Acqn. of Overseas Business

## ▶ Regulations to be Considered

- **Company Law**
- **FEMA / FDI Policy**
- **Competition Law**
- **Income-tax**
- **Stamp Duty**
- **SEBI Permission if Indco is Listed**

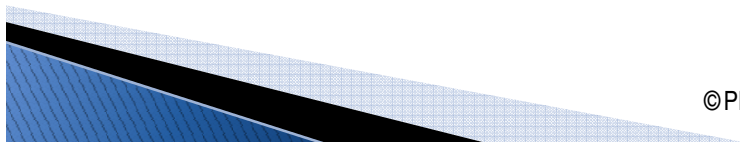


# Key Compliances

Requirement	Compliances	Remarks
Only One designated AD	<ul style="list-style-type: none"> <li>• 1 AD for all transactions for one JV / WOS</li> <li>• Can have different ADs for different JV / WOS</li> </ul>	<ul style="list-style-type: none"> <li>• 2 or more Promoters – one AD for both?</li> <li>• To switch ADs ?</li> </ul>
Obtain UIN	<ul style="list-style-type: none"> <li>• RBI Allots UIN for a JV / WOS</li> <li>• All invst. for one ODI -one UIN</li> <li>• Auto-generated email</li> <li>• Further invst. requires UIN</li> </ul>	<ul style="list-style-type: none"> <li>• UIN is a de facto Approval from RBI?</li> <li>• Non-receipt of UIN – what to do?</li> </ul>
Receive Certificates	Give evidence of Share Certificates / other doc. proof to AD in 6 mts.	Country does not issue Share Certificates? E.g., China

# Key Compliances

Requirement	Compliances	Remarks
Repatriate Dues	Repatriate all Dividend / Interest / Royalty / FTS within 60 days of falling due	RBI can extend period
File APR with AD	<ul style="list-style-type: none"> <li>• File APR based on Audited Accounts of preceding FY</li> <li>• By 30<sup>th</sup> June every year</li> </ul>	<ul style="list-style-type: none"> <li>• If Audit not reqd. abroad?</li> <li>• Indian Auditors to certify True &amp; Fair of JV/ WOS?</li> <li>• Unaudited A/c adopted &amp; ratified by BoD of IndCo</li> </ul>
File Form FLA with RBI	<ul style="list-style-type: none"> <li>• File with Dept of Statistics, RBI</li> <li>• By 15<sup>th</sup> July every year</li> </ul>	



# Lastly also Consider

## ▶ Tax

- DTAA on streams of Income
- C&M / PoEM of ForCo
- Thin Capitalisation Rules abroad
- CFC / PFIC Rules
- Transfer Pricing & S. 93

## ▶ Accounting

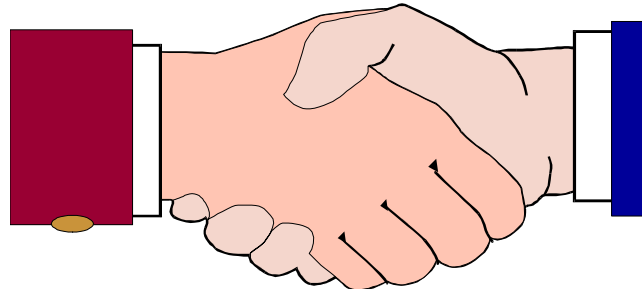
- Impairment Losses – Novellis / Corus
- Consolidation of Accounts

## ▶ Law

- Company Law

## International Legal System & Arbitration Rules





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# Thank You!

