



The Institute of  
Chartered  
Accountants of  
India

# INTERVIEW OF MULTILATERAL INSTRUMENT

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2020



# OECD/G20 BEPS PROJECT

What is BEPS?

BEPS refers to **tax avoidance strategies** that exploit gaps & mismatches in tax rules to **artificially shift profits to low or no-tax jurisdictions**

OECD/G20 BEPS Project

15 Action Plans

Action 1: Digital Economy

## COHERENCE

- Action 2: Hybrid Mismatch Arrangements
- Action 3: CFC Rules
- Action 4: Interest deductions
- Action 5: Harmful Tax Practices

## SUBSTANCE

- Action 6: Preventing tax treaty abuse
- Action 7: Avoidance of PE status
- Action 8 to 10: Aligning Transfer Pricing outcomes with

## TRANSPARENCY

- Action 11: Measuring & monitoring BEPS
- Action 12: Mandatory disclosure rules
- Action 13: CbCR & Master File

Action 15: Multilateral Instrument signed of over 100 countries (incl. India) for development of MLI

# CONCEPT OF MLI

## What is MLI?

- ❑ MLI is a **multilateral convention** to be applied alongside existing bilateral treaties **modifying** their application
- ❑ **MLI is not an amending protocol** which will directly amend text of the treaty
- ❑ **MLI is not an à-la-carte instrument**
- ❑ Lex Posterior Derogat Legi Priori - Applies by virtue of 'later in time' rule

## Action Plans covered

Action 2 – Hybrid mismatch arrangements

Action 6 – Prevention of Treaty abuse (**Minimum Standard**)

Action 7 – Avoidance of Permanent Establishment status

Action 14 – Improving dispute resolution (**Minimum Standard**)

## Why MLI ?

- ❑ MLI is an **outcome of OECD/G20 BEPS Project**
- ❑ Single instrument facilitating **modification** of existing + 3000 tax treaties in a **synchronised & consistent manner**
- ❑ Flexibility in respect of coverage and application of MLI provisions
- ❑ Clarity & Transparency – tools & guidance

Negotiation,  
One  
Signature,  
One  
Definition



# IMPORTANT CONCEPTS



Entry into Force



Entry into Effect



Covered Tax Agreement



Compatibility Clauses

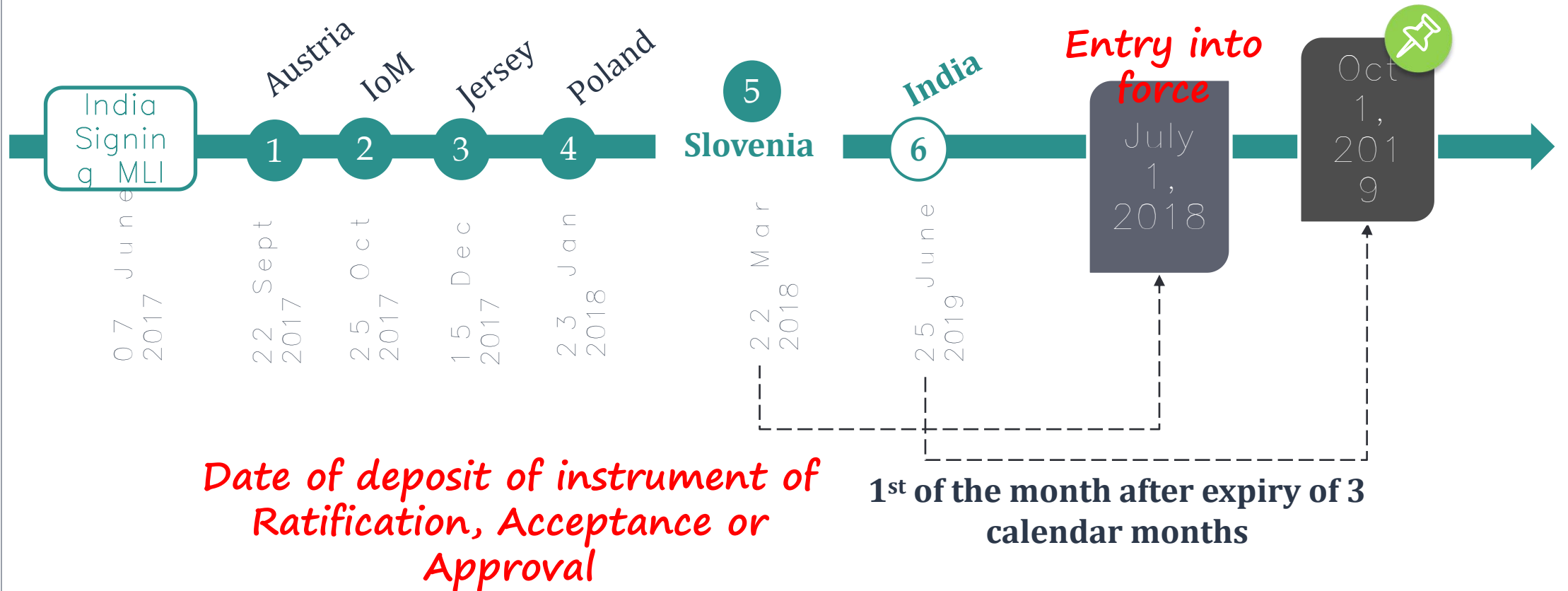


Reservations



Notifications

# ENTRY INTO FORCE – Art. 34



MLI in force under international public laws → July 1, 2018

Entry into force for 1<sup>st</sup> five states → July 1, 2018



# ENTRY INTO EFFECT –

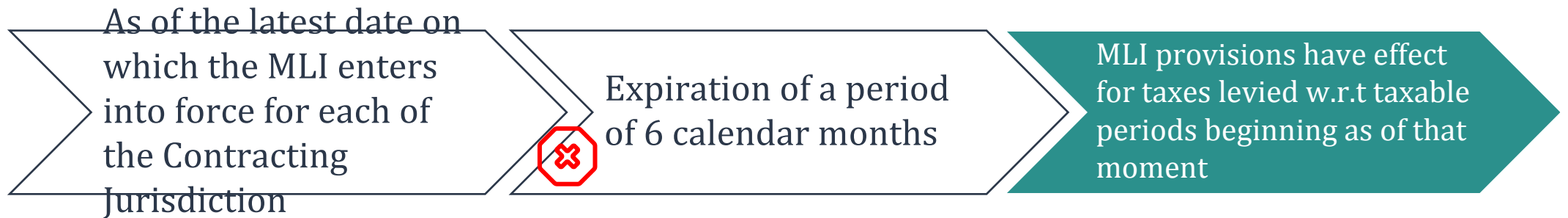
each Party  
BUT  
Multiple EIE depending on

- ❑ w.r.t taxes withheld at source



\* *India has opted for “taxable period” in place of “calendar year”*

- ❑ w.r.t. all other taxes



❌ **If other Contracting Jurisdiction has made reservation under Art 37(5)(a)**

*“As of 30 days after the date of receipt by the Depository of the latest notification by Contracting Jurisdiction making the reservation under Art. 35(7) that it has completed its internal procedures for the EIE of MLI”*

# Illustration: Determining 'EIF' and 'EIE'

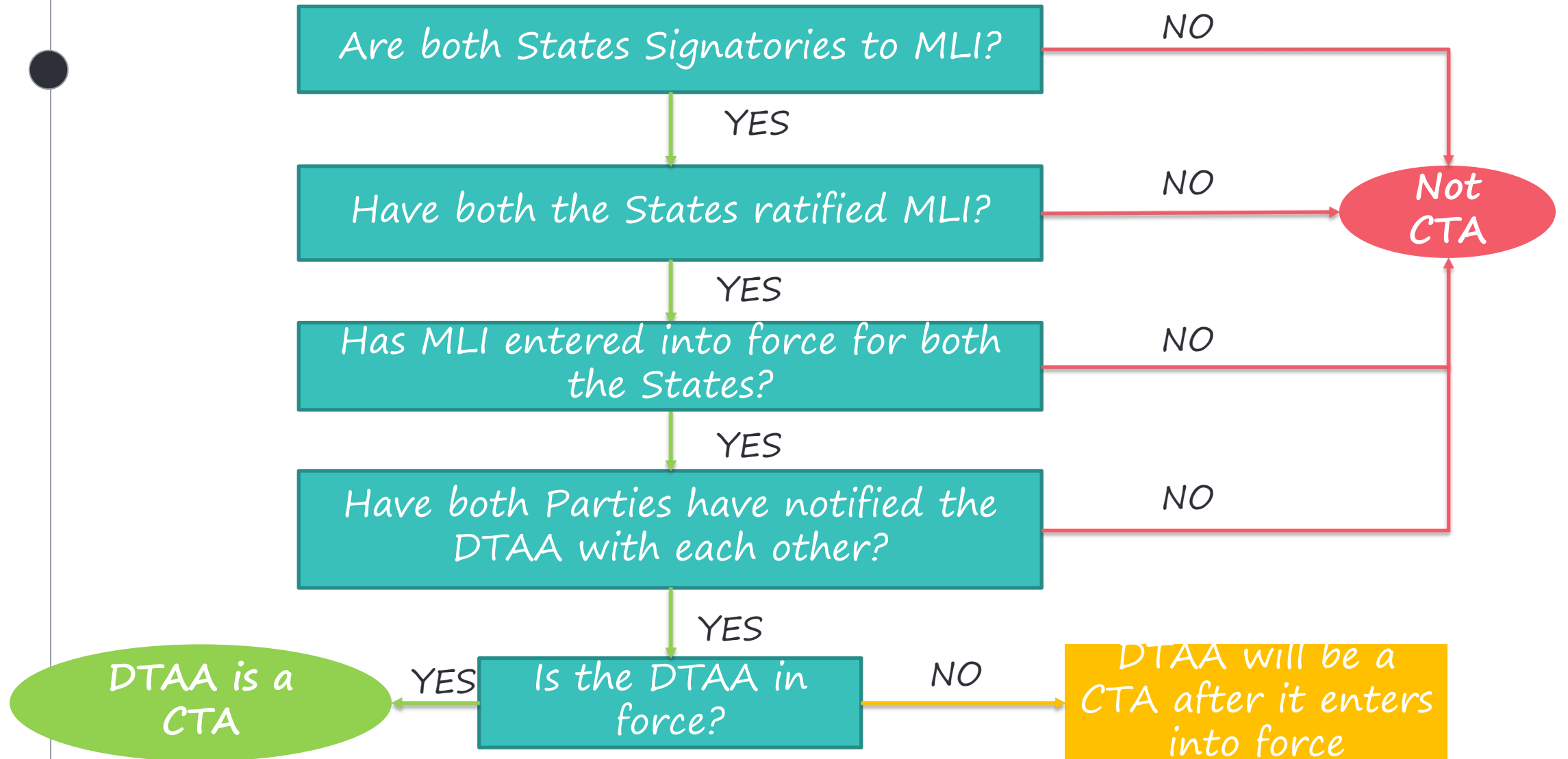
Sr. No.	Jurisdiction	Ratification instrument deposited	Entry into Force	Relevant date to determine EIE (Latest of EIFs)	Entry into Effect in India	
					Withholding Tax	Other Tax
	India	25-06-2019	01-10-2019			
1	Australia	26-09-2018	01-01-2019	01-10-2019	01-04-2020	01-04-2020
2	Austria	22-09-2017	01-07-2018	01-10-2019	01-04-2020	01-04-2020
3	Canada	29-08-2019	01-12-2019	01-12-2019	01-04-2020	01-04-2021
4	Denmark	30-09-2019	01-01-2020	01-01-2020	01-04-2020	01-04-2021
5	France	26-09-2018	01-01-2019	01-10-2019	01-04-2020	01-04-2020
6	Georgia	29-03-2019	01-07-2019	01-10-2019	01-04-2020	01-04-2020
7	Iceland	26-09-2019	01-01-2020	01-01-2020	01-04-2020	01-04-2021
8	Ireland	29-01-2019	01-05-2019	01-10-2019	01-04-2020	01-04-2020
9	Netherlands	29-03-2019	01-07-2019	01-10-2019	01-04-2020	01-04-2020
10	Singapore	21-12-2018	01-04-2019	01-10-2019	01-04-2020	01-04-2020
11	Slovenia	22-03-2018	01-07-2019	01-10-2019	01-04-2020	01-04-2020
12	UAE	29-05-2019	01-09-2019	01-10-2019	01-04-2020	01-04-2020
13	UK	29-06-2018	01-10-2018	01-10-2019	01-04-2020	01-04-2020
14	Portugal	28-02-2020	01-06-2020	01-06-2020	01-04-2021	01-04-2021
15	Saudi Arabia	23-01-2020	01-05-2020	01-05-2020	01-04-2021	01-04-2021

# Illustration: Determining 'EIF' and 'EIE'

Sr. No.	Jurisdiction	Ratification instrument deposited	Entry into Force	Relevant date to determine EIE	Entry into Effect in India	
					Withholding Tax	Other Tax
	India	25-06-2019	01-10-2019			
16	 Russia	18-06-2019	01-10-2019	The notification of completion of internal procedures for EIE of MLI has not been received by the Depository from Russia	-	-
17	 Sweden	22-06-2018	01-10-2018	The notification of completion of internal procedures for EIE of MLI has not been received by the Depository from Sweden	-	-




# Art. 2



(cont'd...)

MLI Matching Database beta  
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Select jurisdictions: **India** **United Arab Emirates** [Read the Disclaimer](#)




Status as of 28 February 2020

	India	United Arab Emirates	
Signature MLI	07-06-2017	27-06-2018	<a href="#">Jump to entry into effect MLI</a>
Ratification instrument deposited	25-06-2019	29-05-2019	
Mock-up date of ratification			
Status of List	Definitive	Definitive	
Synthesised text published by India	<a href="#">Synthesised text published by India</a>		
Synthesised text published by United Arab Emirates	Not available yet		
Article 2   Covered Tax Agreement	The agreement would be a 'Covered Tax Agreement'.		

MLI Matching Database beta  
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Select jurisdictions: **India** **Greece** [Read the Disclaimer](#)



Status as of 28 February 2020

	India	Greece	
Signature MLI	07-06-2017	07-06-2017	<a href="#">Jump to entry into effect MLI</a>
Ratification instrument deposited	25-06-2019		
Mock-up date of ratification			
Status of List	Definitive	Provisional	
Synthesised text published by India	Not available yet		
Synthesised text published by Greece	Not available yet		
Article 2   Covered Tax Agreement	The agreement would be a 'Covered Tax Agreement'.		

# COVERED TAX AGREEMENT (cont'd...)

MLI Matching Database beta © OECD 2017-20	Select jurisdictions:	<u>India</u>	<u>Germany</u>	<a href="#">Read the Disclaimer</a>
	Status as of 28 February 2020	India	Germany	<a href="#">Jump to entry into effect MLI</a>
	Signature MLI	07-06-2017	07-06-2017	
	Ratification instrument deposited	25-06-2019		
	Mock-up date of ratification			
	Status of List	Definitive	Provisional	
Synthesised text	published by India			
	published by Germany			
Article 2   Covered Tax Agreement		The agreement would not be a 'Covered Tax Agreement' because Germany has not included it in its notification.		

MLI Matching Database beta © OECD 2017-20	Select jurisdictions:	<u>India</u>	<u>Switzerland</u>	<a href="#">Read the Disclaimer</a>
	Status as of 28 February 2020	India	Switzerland	<a href="#">Jump to entry into effect MLI</a>
	Signature MLI	07-06-2017	07-06-2017	
	Ratification instrument deposited	25-06-2019	29-08-2019	
	Mock-up date of ratification			
	Status of List	Definitive	Definitive	
Synthesised text	published by India			
	published by Switzerland			
Article 2   Covered Tax Agreement		The agreement would not be a 'Covered Tax Agreement' because Switzerland has not included it in its notification.		

# COVERED TAX AGREEMENT - ART. 2

- (cont'd...)

India has notified 93 tax treaties	
DTAAs with countries not notified by India	China, Marshall Islands, etc.
<b>28</b> countries whose DTAA are notified by India are not signatories to the MLI	Brazil, Philippines, Thailand, <b>USA</b> , etc.
<b>5</b> countries have not notified DTAA with India in their list	Germany, Hong Kong, Mauritius, Oman, Switzerland
<b>26</b> countries have not ratified MLI as on March 31, 2020	Greece, South Africa, Spain, Turkey, etc.
MLI has not EIF for <b>4</b> countries as on 01-04-2020	Cyprus, Portugal, Saudi Arabia, Uruguay
<u>Out of the balance 30 countries</u> , EIE of MLI with <b>2</b> countries is reserved by the other country	Russia, Sweden
CTA effective as on April 1, 2020 for withholding tax purpose – 28 countries	





# List of CTAs effective as on April 1, 2020

- |              |               |                 |                          |
|--------------|---------------|-----------------|--------------------------|
| 1. Australia | 8. Georgia    | 15. Luxembourg  | 22. Serbia               |
| 2. Austria   | 9. Iceland    | 16. Malta       | 23. Singapore            |
| 3. Belgium   | 10. Ireland   | 17. Netherlands | 24. Slovak Republic      |
| 4. Canada    | 11. Israel    | 18. New Zealand | 25. Slovenia             |
| 5. Denmark   | 12. Japan     | 19. Norway      | 26. Ukraine              |
| 6. Finland   | 13. Latvia    | 20. Poland      | 27. United Arab Emirates |
| 7. France    | 14. Lithuania | 21. Qatar       | 28. United Kingdom       |

*Currently, Synthesised Text available on Income-tax website for 17 countries*

# ● AIDS TO INTERPRET MLI

## ● OECD Website:

Multilateral Convention

Explanatory Statement

Position of Signatories to MLI

Flowcharts on Compatibility clauses

MLI Matching Database

BEPS Action Plans

## Indian Income-tax Website:

Synthesised Text – A single document for each CTA, reproducing

- the text of the CTA, incl. the text of relevant amending instruments;
- The elements of the MLI that have an effect on the CTA as a result of the interaction of the MLI positions of its Contracting Jurisdictions; and
- information on the dates on which the provisions of the MLI have effect in each Contracting Jurisdiction for the CTA



# ● SYNTHESISED TEXT – Legally binding?

## ❑ OECD Guidance for development of Synthesised Texts:

- Parties to the MLI have no legal obligation under the MLI to develop synthesised texts;
- The Explanatory Statement on the MLI expressly indicates in P. 13 that “*some Parties may develop consolidated versions of their CTAs as modified by the Convention (MLI); doing so is not a prerequisite for the application of the MLI*”
- General Disclaimer – The disclaimer would state that the synthesised text has no legal value, and that the text of the MLI, applied alongside the text of the CTA, would remain the only legal documents applicable.

## ❑ Extract of General Disclaimer under Indo-Australia Synthesised Text:

- “*The sole purpose of this document is to facilitate the understanding of the application of the MLI to the Agreement and it does not constitute a source of law. The authentic legal texts of the Agreement and the MLI take precedence and remain the legal texts applicable.*”

# NOTIFICATION

## Reservation

- Flexibility to **OPT OUT** of non-minimum standard provisions
- Minimum Standard → OPT OUT permitted only where Parties endeavour to bilaterally meet the requirement
- Reservation can be made unilaterally → Applies symmetrically

## Notification

- Optional Provisions → **OPT IN**
  - Both Parties have to notify choice of alternative provisions
  - Applies, if both Parties choose the same option (Exception Art. 5)
- Parties have to notify existing provision of CTA sought to be modified

## Compatibility Clauses

- Defines the relationship between MLI provisions and existing CTA provisions
- Types of Compatibility Clause
  - In place of
  - Applies to or modifies
  - In the absence of
  - In place of or in the absence of

Post ratification → a Party can **OPT IN** for optional provisions or **withdraw** reservation

No Option to **OPT OUT** of the provisions already accepted on ratification, except by way of bilateral negotiation of DTAA

# COMPATIBILITY

Compatibility Clause	Effect	Notification by both States	Notification Mismatch*	Notification by neither States	Reservation by one or both States
'in place of'	Replaces existing CTA provision	YES	NO	NO	NO
'applies to' or 'modifies'	Changes application of CTA provision, without replacement	YES	NO	NO	NO
'in the absence of'	Added to CTA, in absence of existing provision	YES	NO	NO	NO
'in place or in the absence of'	Replaces existing CTA provisions or added to CTA, in absence of existing provisions	YES	YES, supersedes existing CTA provisions to the extent of incompatibility. (Exceptions – Art 8 & 9)		NO

\* **Notification mismatches** are cases where one Party has notified an existing provision but the other has not, or where the Parties have made a different notification with respect to existing provisions in their MLI positions

# QUICK RECAP – A SNAPSHOT

## STEP 1: ENTRY INTO FORCE OF THE MLI

MLI enters into force when five jurisdictions deposit the instrument of ratification/acceptance/approval

MLI should be in force for both the Contracting Jurisdictions



## STEP 2: COVERED TAX AGREEMENT

DTAA that is in force between the Parties to the MLI and for which each such Party has notified to the Depository as a listed agreement under the MLI



## STEP 3: RESERVATIONS AND CHOICE OF OPTIONAL PROVISIONS

If either of the Contracting Jurisdiction makes a reservation, the reserved provisions do not apply/modify the CTA

If both the Contracting jurisdiction choose to apply same optional provisions of MLI – CTA would be modified



## STEP 4: NOTIFICATIONS OF EXISTING PROVISIONS

MLI requires that Parties notify existing provisions of DTAA to be modified by the MLI provisions

Notification effect depends on type of compatibility clause



## STEP 5: ENTRY INTO EFFECT OF THE MLI

MLI provisions will have effect in the Contracting Jurisdiction with respect to CTA at different stages



# STRUCTURE OF MLI

Minimum Std.

Reservation

Part	Title	Article
I	Scope of MLI & Interpretation of terms	1&2
II	Hybrid Mismatches (Action Plan 2 & 6)	
	▪ Transparent Entities	3
	▪ Dual Residents	4
	▪ Methods for elimination of double taxation	5
III	Treaty Abuse (Action Plan 6)	
	▪ Preamble	6
	▪ Principal Purpose Test	7
	▪ Simplified Limitation on Benefit	7
	▪ Dividend transfer transaction	8
	▪ Capital Gains on interest in underlying immovable property	9
	▪ Third Jurisdiction PE	10
	▪ Taxing rights for own residents	11

Part	Title	Article
IV	Avoidance of PE Status (Action Plan 7)	
	▪ Commissionaire arrangements	12
	▪ Specific Activity Exemptions	13
	▪ Anti-fragmentation Rules	13
	▪ Splitting-up of Contracts	14
	▪ Definition of a Person Closely related to an enterprise	15
V	Improving Dispute Resolution (Action Plan 14 )	
	▪ Mutual Agreement Procedure #	16
	▪ Corresponding Adjustment	17
VI	Arbitration	
VII	Final Provisions	

# India has made reservation to apply 1<sup>st</sup> sentence of Art. 16(1)

# WITHHOLDING TAX OBLIGATION

- ❑ S. 195 r.w.s. 90(2) – Prima facie obligation on payer to grant treaty benefit
- ❑ Potential consequences in case of default in compliance with WHT obligations
  - Payer to be treated as ‘assessee-in-default’ u/s 201;
  - Disallowance of expense u/s 40(a)(i);
  - Representative assessee u/s 160 r.w. section 163;
  - Other penal consequences;
- ❑ Payer has to exercise reasonable due diligence
  - Shome Committee Report on GAAR – Para 3.23
  - Various judicial precedents rendered on Payer cannot be treated as an assessee-in-default if WHT obligation discharged in a fair and reasonable manner – *CIT vs. Nicholas Piramal India Ltd. [2008] 299 ITR 356 (Bom HC); CIT vs. ITC Ltd. [2014] 220 Taxman 414 (All. HC), Gwalior Rayon Silk Co. Ltd. vs. CIT [1983] (140 ITR 832) (MP), etc,*
- ❑ Extent of verification/due diligence by payer
  - Practical challenges is obtaining data/details from the payer;
  - Is Tax Residency certificate (“TRC”) a conclusive evidence?
  - Would a declaration from payee stating that he is entitled to treaty benefit suffice?





# IMPACT OF MLI – CASE STUDIES/ILLUSTRATIONS

# DUAL RESIDENT ENTITIES – Art. 4(1)

Where by reason of the provisions of a CTA → (a person) (other than an individual) (is a resident of more than one Contracting Jurisdiction), (the competent authorities of the Contracting Jurisdictions) shall endeavour (to determine by mutual agreement) (the Contracting Jurisdiction of which such person shall be deemed to be a resident for the purposes of the CTA,

having regard to its place of effective management<sup>1</sup>, the place where it is incorporated<sup>2</sup> or otherwise constituted and<sup>3</sup> any other relevant factors.

In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the CTA

[except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Jurisdictions.]

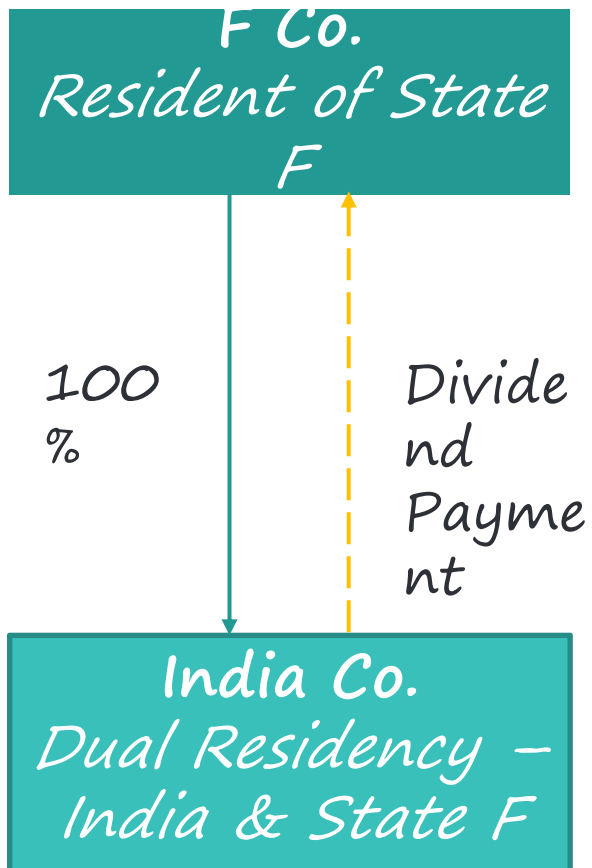
~~Parties may reserve rights to not add this text – Australia & Japan have made reservations & India has not made counter-reservation.~~

The Rule

Relevant Factors

Consequences

# Entities



## Extract of Article 10 of India - State F DTAA on Dividend

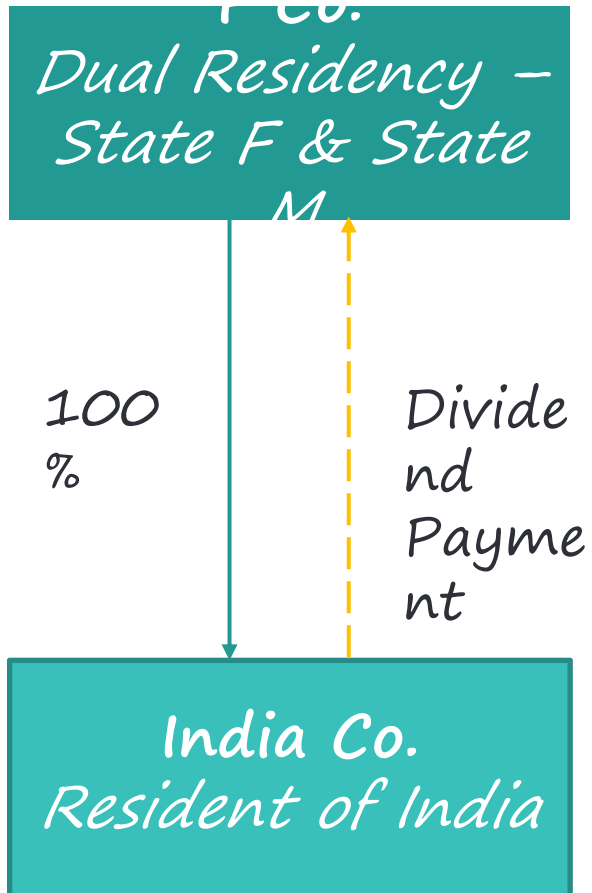
1. Dividends paid by a *company which is a resident of one of the Contracting States* for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.

Whether F Co. can access Indo - F treaty to avail benefit of Article 10?

Is there a need to approach the Competent Authority?

# Entities



## Extract of Article 10 of India – State F DTAA on Dividend

1. Dividends paid by a **company which is a resident of one of the Contracting States** for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

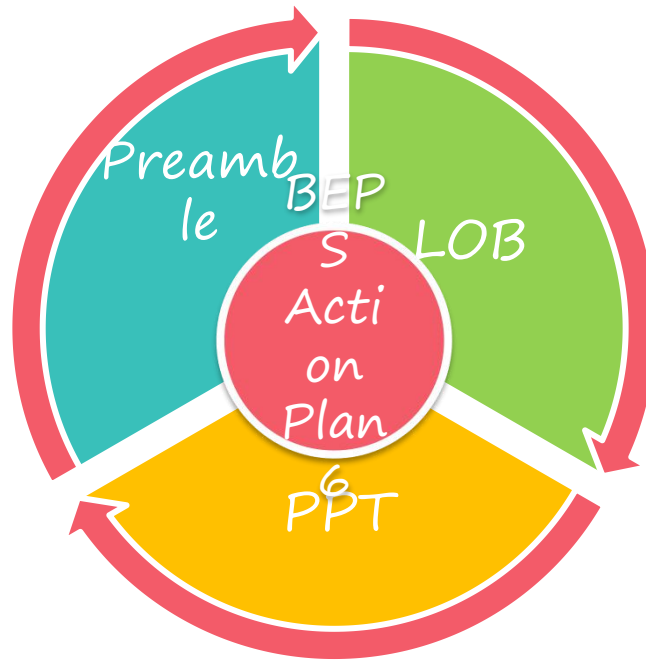
2. Such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax, and according to the law of that State, but the tax so charged shall not exceed **10 per cent** of the gross amount of the dividends.

Article 10 of India – State M treaty has a similar provision as quoted above, except that the rate is **15%**

What will be the WHT rate on dividend in India ?

# Pronged Approach

Clear statement of intent in tax treaties to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements



Introduction of specific anti-abuse rule, for instance, the **Limitation-on-Benefits** (“LOB”) rule, that limits availability of treaty benefits to entities meeting certain conditions

Conditions based on legal nature, ownership in, and general activities of entity to ensure sufficient link between entity and State of residence

Introduction of a more general anti-abuse rule based on the **principal purposes test** (“PPT”)

# ● PREAMBLE – Art 6

Minimum Standard | All 28 CTAs impacted

## PREAMBLE – Art. 6(1)

- Preamble acts as a Guiding Factor
- Existing Text of Preamble in CTA shall be modified to include

*“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),”*

## India – Singapore DTAA

The Government of the Republic of India and the Government of the Republic of Singapore, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, **intending to eliminate double taxation..... indirect benefit of residents of third jurisdictions),**

## India – Mauritius DTAA

The Government of the Republic of India and the Government of Mauritius, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and for the encouragement of mutual trade and investment: have agreed as follows:

**No Change → Mauritius has not notified India → Not CTA**



7(1)

Minimum  
Standard | All  
28 CTAs  
impacted

*Notwithstanding* any provisions of a Covered Tax Agreement (CTA),

Presence of  
a 'benefit'

a *benefit* under the CTA shall not be granted in respect of an item of income or capital

Subjective  
element

if it is *reasonable to conclude*, having regard to all relevant facts and circumstances, that *obtaining that benefit* was *one of the principal purposes* of any *arrangement or transaction* that resulted directly or indirectly in that benefit,

Objective  
element

*unless* it is *established* that granting that benefit in these circumstances would be in *accordance with the object and purpose* of the relevant provisions of the CTA

# TREATY BENEFITS – HOW TO DETERMINE IT?

- ❑ Undertake an objective analysis of aims and objects of all persons involved in putting arrangement / transaction in place
- ❑ Why are all of them party to it?
- ❑ Conclusive proof – not required
- ❑ “reasonable to conclude” after objective analysis
- ❑ Looking merely at the “effect” is not sufficient
- ❑ What is a reasonable explanation of:
  - *“Why you have done what you have done?”*
- ❑ Mere denial is not sufficient

# ILLUSTRATIONS - PPT

- ❑ India – Ireland DTAA definition of royalty includes use of CIS equipment (excluding aircraft). Major hub for aircraft leasing business across the globe. Whether PPT applies?
- ❑ India – Philippines DTAA no separate article of FTS. Philippines is a major hub for repairs and maintenance of plant and machinery for various equipment manufactures across the globe. Whether PPT applies?
- ❑ R. Co. for expanding its business globally has identified three different countries with similar economic and political environments. It selects State S for setting up its business on account of favourable treaty with State R. Will PPT apply? Expansion of business in the principal purpose.
- ❑ R. Co is a collective investment vehicle managing diversified portfolios of investment globally. It has significant investments in State S on account favourable treaty on dividend taxation. Whether PPT applies? The intent of treaties is to provide benefit to encourage cross border investments

# SIMPLIFIED LOB (SLOB) – Art 7

SLOB  
complements DDT

Resident of State R, can avail treaty benefit if,

OWNERSHIP for atleast half of 12 month period  
(incl. time of benefit)

- Atleast 50% held by Qualified Persons resident of State R;
- Atleast 75% held by Equivalent Beneficiary

Is a QUALIFIED PERSON at the time of availing treaty benefit

- Individual;
- that Contracting Jurisdiction, or a political subdivision or local authority thereof, or their agencies and instrumentalities;
- Publicly traded companies;
- Certain non-profit making organisations & recognised pension funds

Is engaged in instrumentalities; Conduct of business

Relief granted by Competent Authority

01.04.2020, SLOB applies only to CTA with Slovak Republic, Denmark &

# Art. 8(1)

Provisions of a CTA that –

(exempt dividends paid by a company which is a resident of State S from tax) or (that limit the rate at which such dividends may be taxed,) **provided that** (the beneficial owner or the recipient is a company which is a resident of the State R and which owns, holds or controls more than a certain amount of the capital, shares, stock, voting power, voting rights or similar ownership interests of the company paying the dividends,)

**shall apply** only if the ownership conditions described in those provisions are met throughout a 365 day period that includes the day of the payment of the dividends

(for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividends).

Ronak G. Doshi

## Extract of Art. 10 of Indo-Canada DTAA

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed :

(a) 15 per cent of the gross amount of the dividends if the beneficial owner is a company which controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividends;

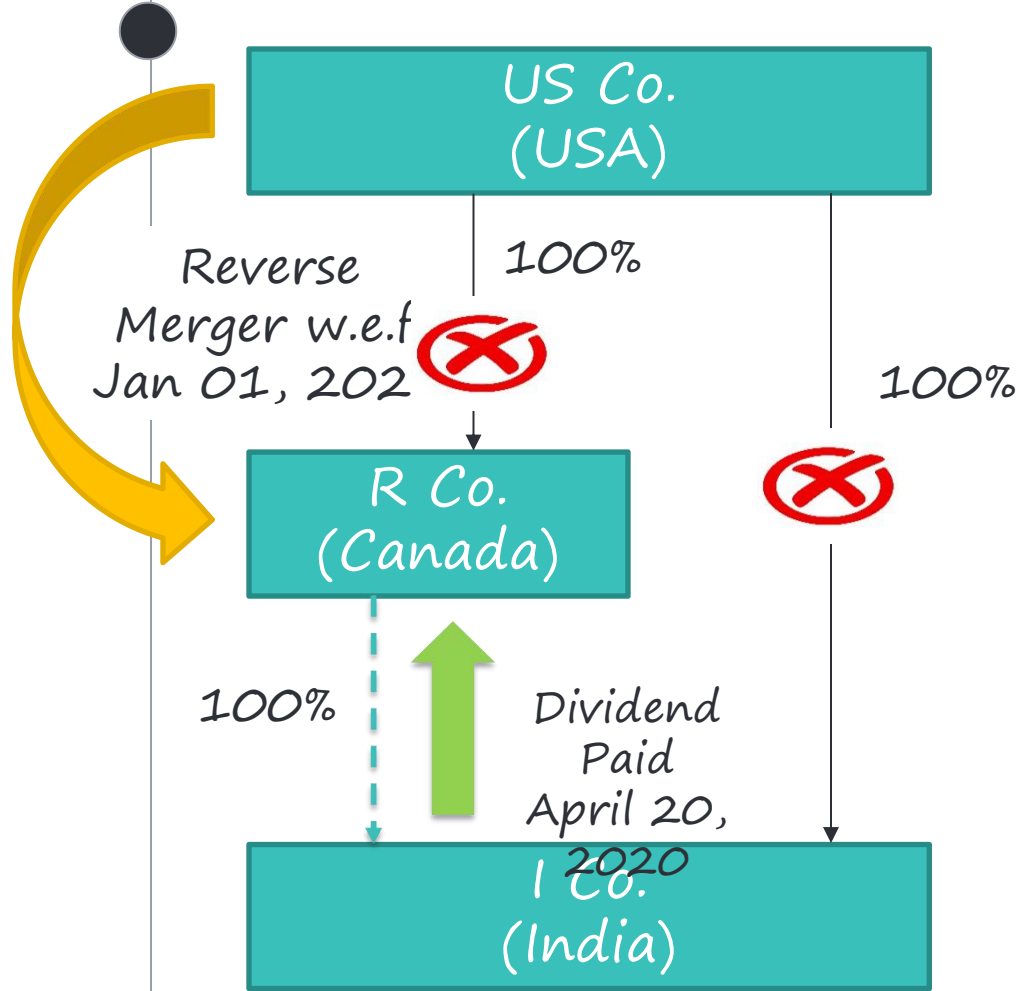
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CTA Provision

Consequence

Exemption

# CASE STUDY – Dividend



- R Co. & I Co. were wholly owned subsidiaries of S Co.;
- US. Co. merged in R Co. with an appointed date of Jan 01, 2020;
- I Co. declared dividend in April, 2020 pertaining to FY 2019-20. As on record date, shares of I Co., were entirely held by R Co.;
- Rate of tax on dividend –
  - Indian Income-tax Act – 20%
  - Indo-USA DTAA – 15%
  - Indo-Canada DTAA – 10%
- R Co. has furnished valid TRC from Canadian Govt. for calendar year 2020.

**What will the WHT rate on remittance of dividend?**

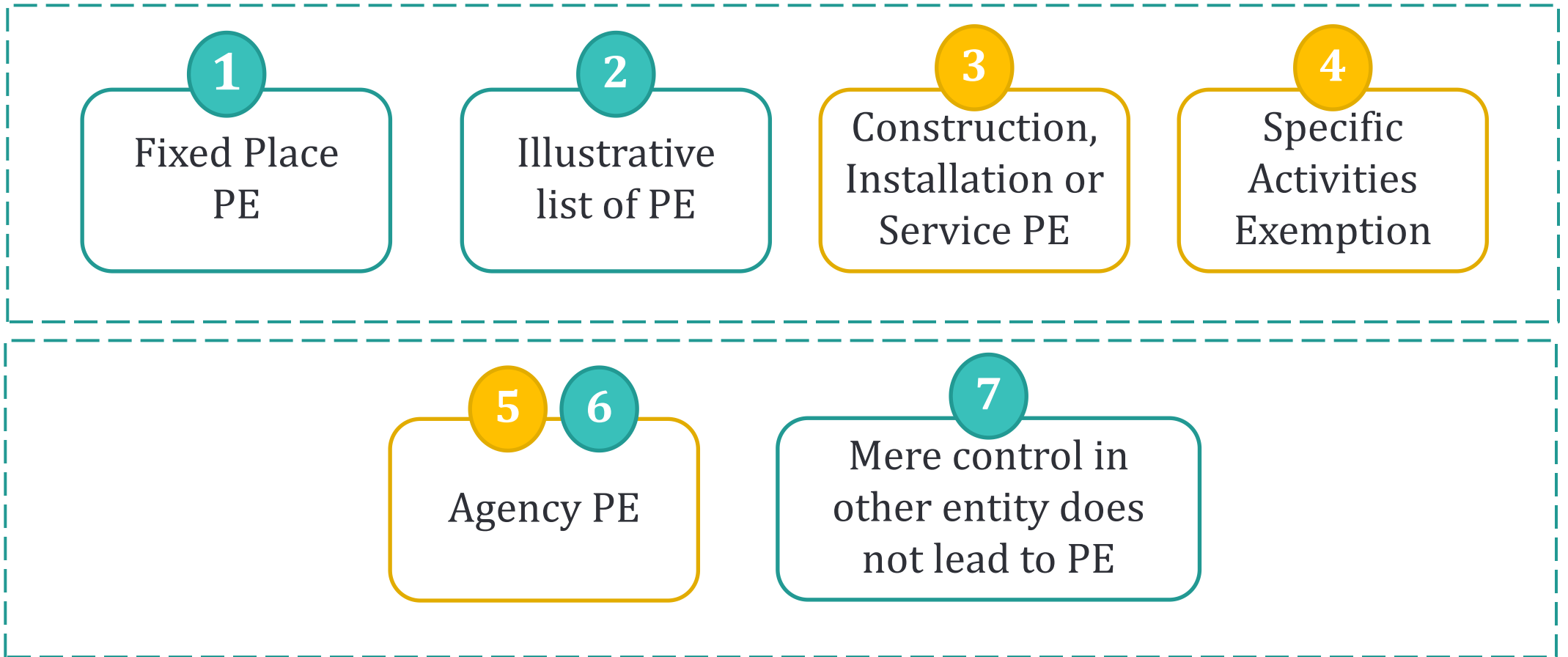
**Whether I Co. has to examine who is beneficial owner of dividend income?**

**Whether PPT has to be examined?**



# ESTABLISHMENT

## BASIC STRUCTURE of Art. 5

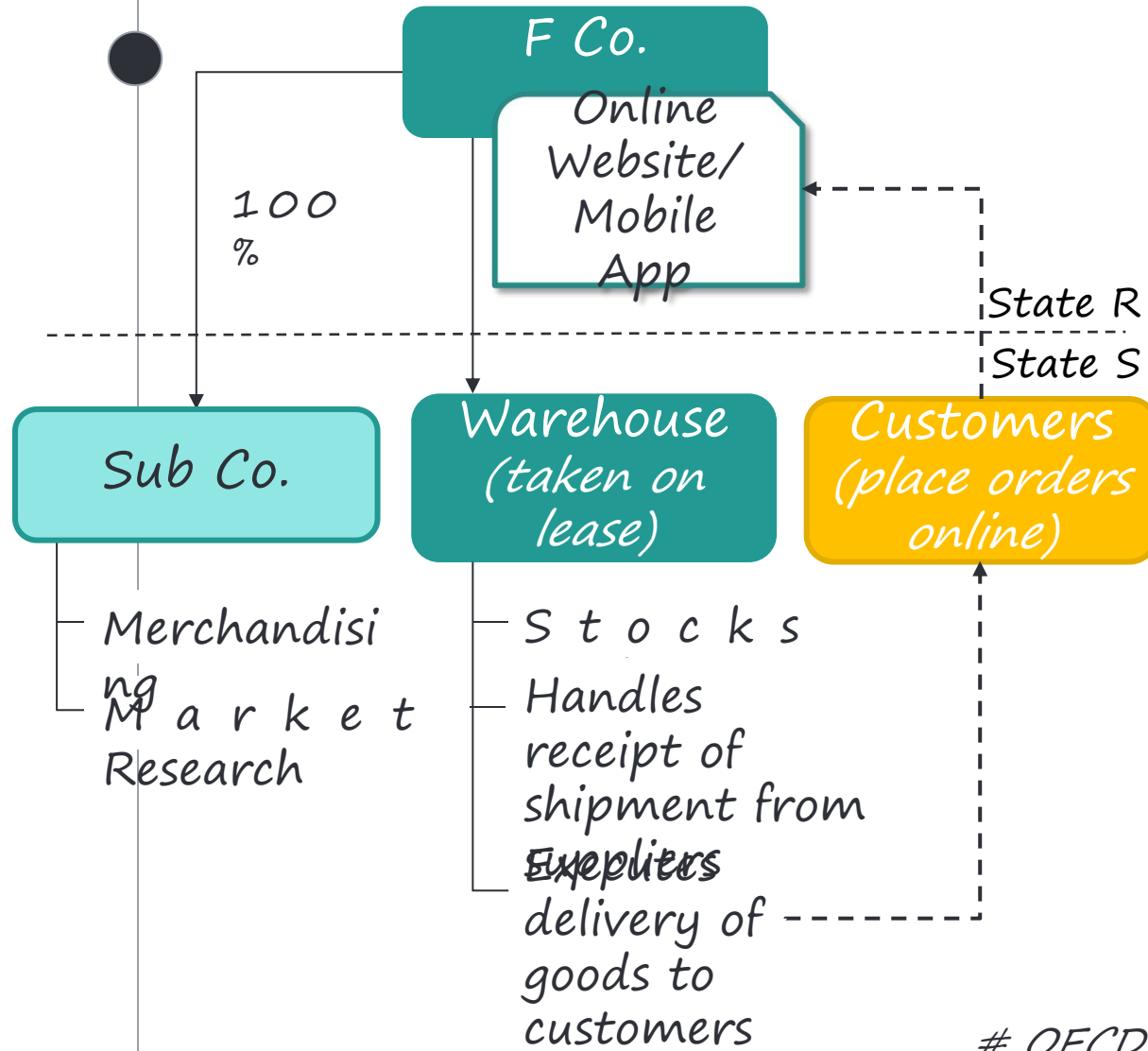


Notwithstanding the provisions of a CTA that define PE, the term 'PE' shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
  - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
  - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
  - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
  - e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character **not described in subparagraph a) to d)**;
  - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character."
- whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;**

**provided that such activity [i.e. (a) to (d) & (e)] or, in the case of clause f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character."**

# Exemption



- F Co. owns a website & online shopping app;
- It acquires goods from unrelated suppliers and stores the same in a leased warehouse in State S;
- F Co.'s employees in the warehouse facilitate delivery of goods from warehouse to customers using independent delivery service providers;
- F Co. also has a WOS in India viz. Sub Co. carrying out merchandising and market research activities;
- State R & State S have opted for Option A (i.e. Art. 13(2) of MLI)

**Whether F Co. has a PE in State S? (Post MLI)**

# OECD, March 18 - Additional Guidance on Attribution of Profits to PE

## 13(4) | Simplified

Specific activities exemption (as modified by Art. 13 (2) or (3)) shall not apply to **fixed PoB used or maintained by R Co. in State S** if the following conditions are satisfied:

- R Co. or its closely related enterprise carry on business activities at such POB or at another place in State S;

AND

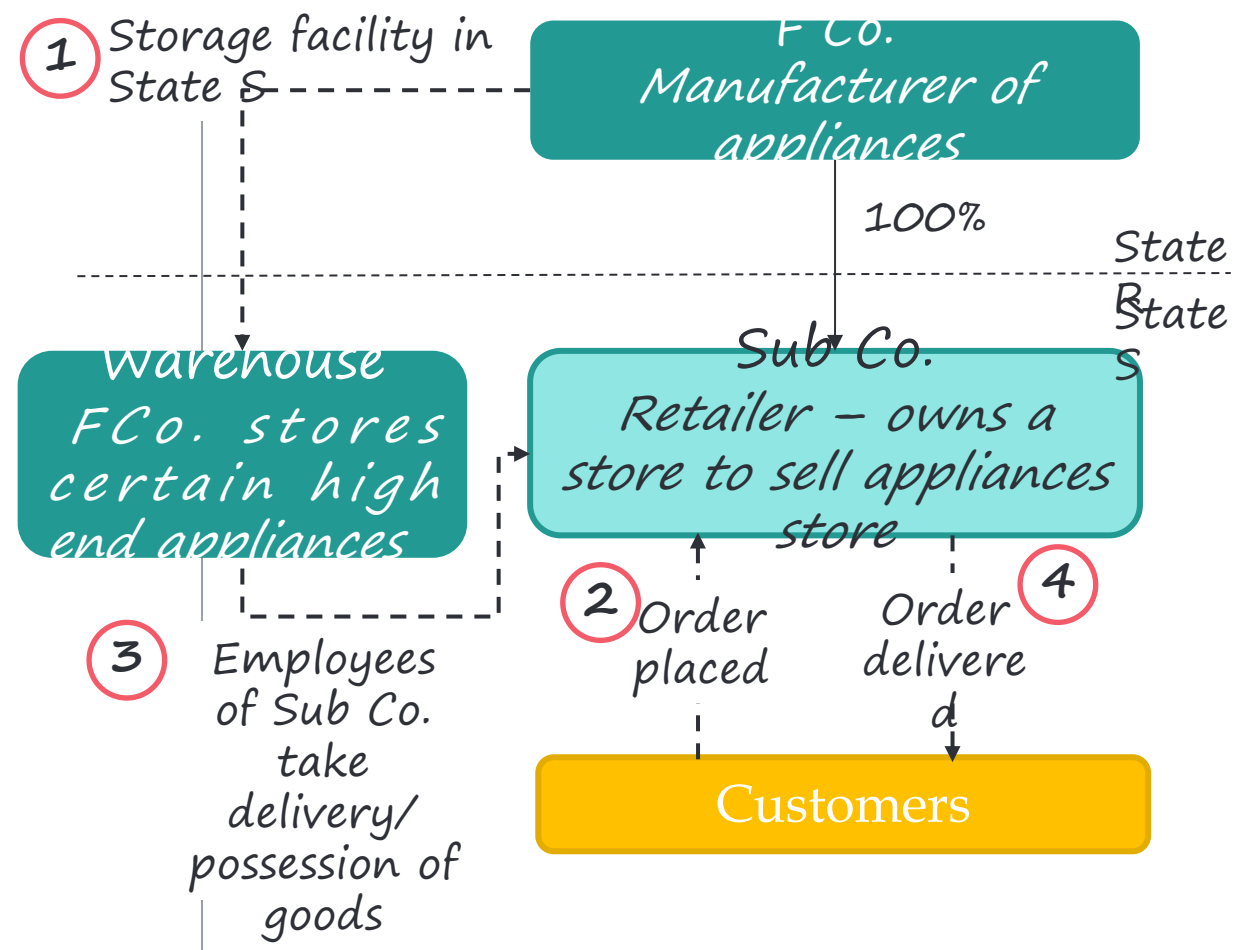
- Such POB or other place constitutes PE of R Co. or the related enterprise;

OR

- Overall activity resulting from combination of activities carried out by the two enterprises is not PoA in nature,

provided that such business activities carried on by the two enterprises, constitute **complementary functions that are part of a cohesive business operation.**

# CASE STUDY# – Anti-Fragmentation



- F Co. is a manufacturer and trader of appliances;
- S Co., a WOS, owns a retail store in State S for selling appliances;
- F Co. also owns a warehouse in State S where a few high end appliances, identical to those sold by S Co., are stored;
- When a customer places large orders for such high-end appliances, employees of S Co. take delivery/possession of the same from the warehouse and in turn delivers the same to its customers
- State R & S have opted for Option A (Art 13(2) of MLI) & Anti-Frag Rules

## Whether F Co. has a PE in State S

# 14(1) Simplified

Art. 5(3)  
(Pre MLI)

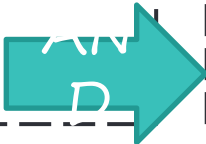
A building site or construction or installation project constitutes a PE only if it lasts more than twelve months.

For the sole purpose of determining whether 12 months has been exceeded:

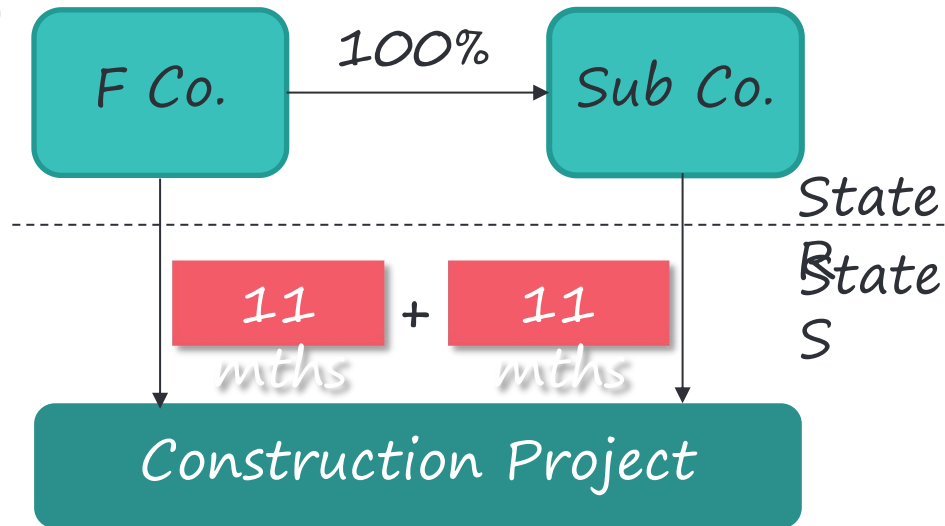
(a) where an enterprise of State R carries on activities in State S at a place that constitutes a building site, construction project, installation project, and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding 12 months

(b) where **connected activities** are carried on in State S at the same building site, construction or installation project, each exceeding 30 days, by **one or more enterprises closely related to the first-mentioned enterprise,**

these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction or installation project,



# CASE STUDY# - Splitting-up of Contracts



As per Art. 5(3) of the R – S DTAA, “a building site or construction or assembly project or supervisory activities in connection therewith constitutes a Permanent Establishment, where such site, project or supervisory activity continues for a period of more than **twelve months**.”

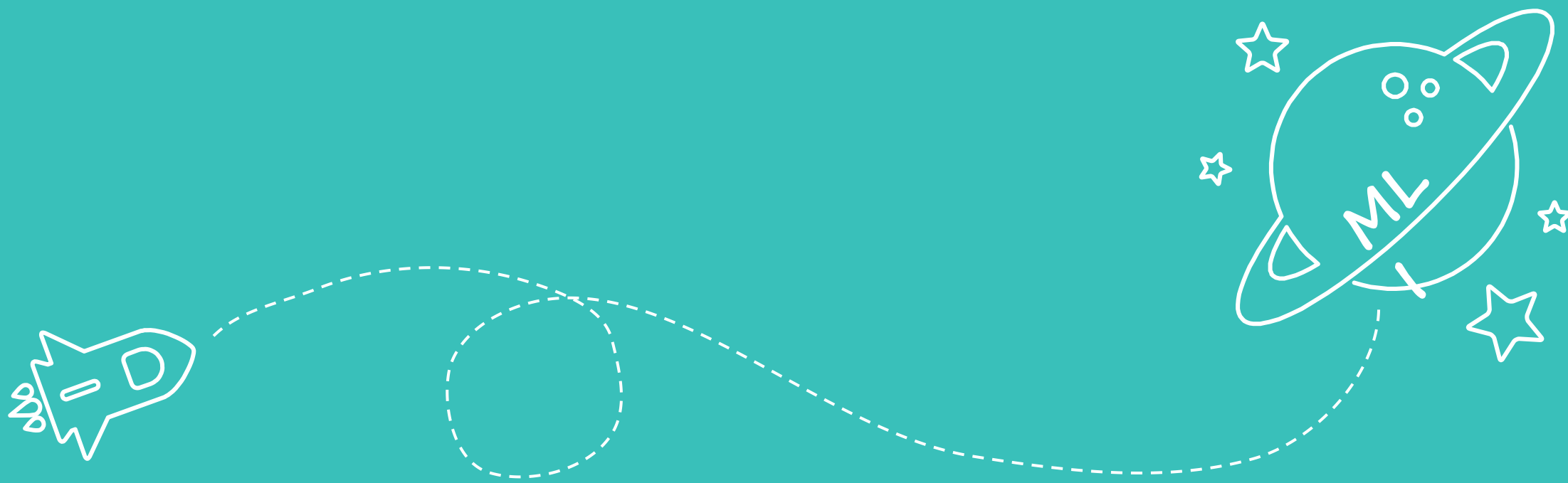
- F Co. is engaged in construction activities;
- It successfully submitted a bid of construction of power plant in State S;
- Construction project is expected to last for 22 months;
- The project is split into two having duration of 11 months each;
- 1<sup>st</sup> contract is concluded with F Co. and 2<sup>nd</sup> with Sub Co., a recently incorporated WOS of F Co.;
- The contractual arrangement is such that F Co. is jointly and severally liable with Sub Co. for the performance of Sub Co.’s contract.

**Whether F Co. has a PE in State S? (Post MLI)**



## WAY FORWARD...

- ❑ Examine whether DTAA has been modified by MLI (incl. entry into effect);
- ❑ If yes, study the impact of MLI on the CTA;
- ❑ Robust documentation - Attempt to gather details/documents to reasonably conclude that Payee is entitled to treaty benefit;
- ❑ Amendments to the undertaking/declaration presently being taken, incorporating MLI impact;
- ❑ Assessing the need to take/revise indemnities from Payees, etc.



THANK YOU!