

Mumbai
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MLI Implementation in India & Global Trends

Key Issues and What Next?

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DISCLAIMER

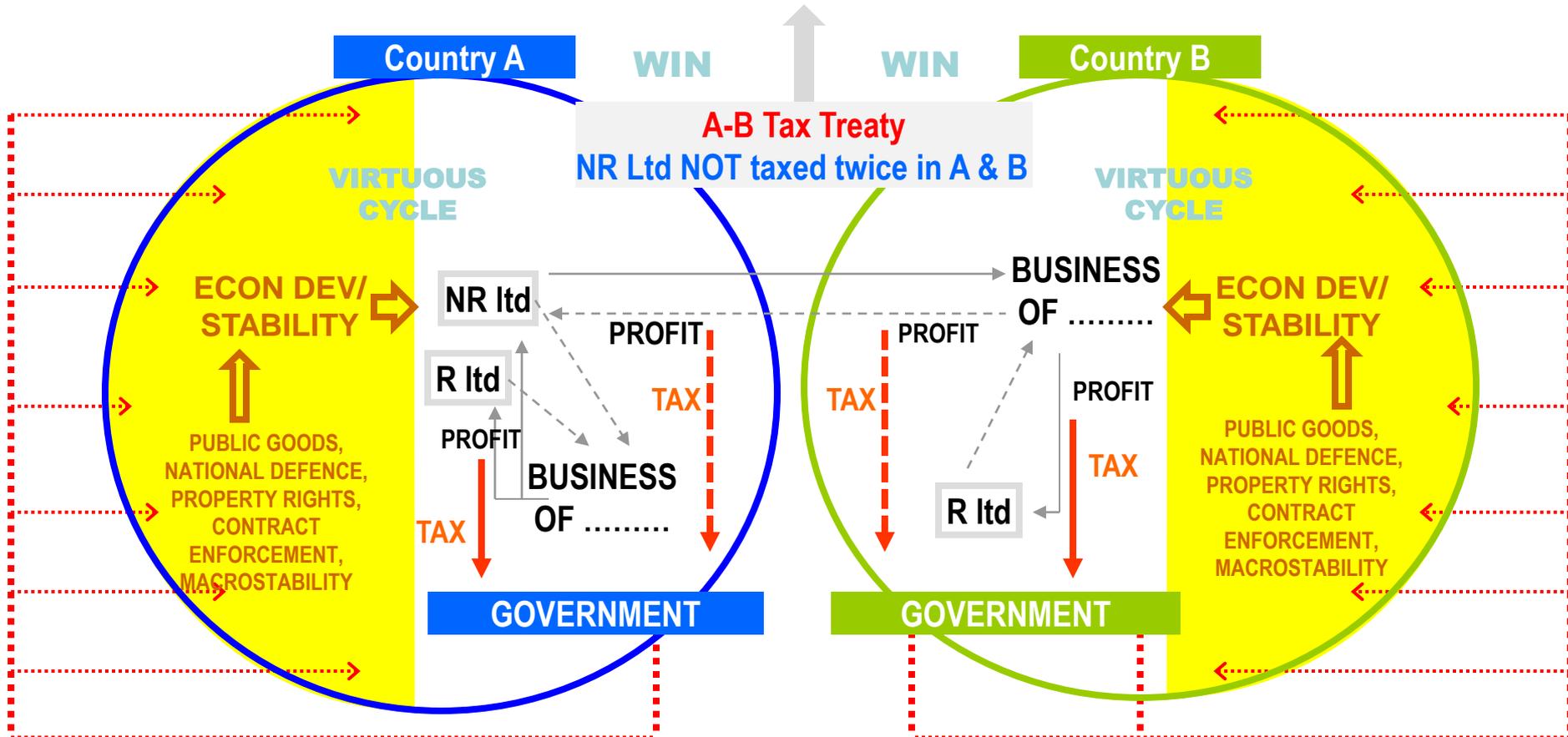
Every expression in this presentation represents only the personal view or understanding of the presenter and does not in any way, reflect the formal position of the Government of India or the Income-tax Department or any other Organization on any of these issues.

We will Try to Cover

- Why is everyone bothered about BEPS
- Multi Lateral Instrument (MLI)
 - Objectives, Challenges & Solution
 - Organization
- SUBSTANTIAL PROVISIONS
 - Articles 3 – 17
 - Background where RELEVANT
- PROCEDURE, TIMELINE & DEVELOPMENTS
- DISCUSSION (Comments, Questions)

Why is everyone bothered about BEPS?

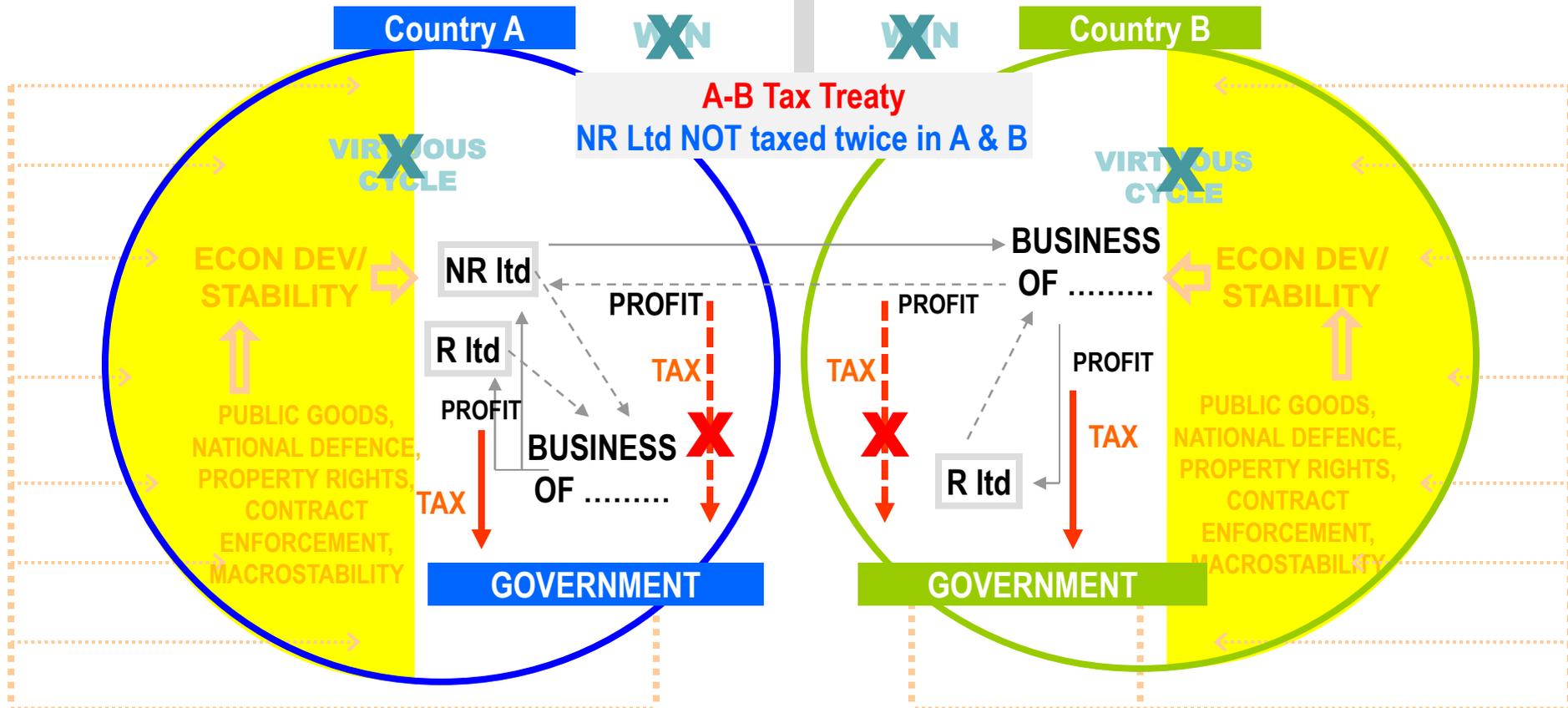
Both A & B get their fair share of taxes on the basis of their economic contribution to business profits



Avoidance of double taxation & a fair division of taxes according to economic contribution of tax distribution to profits lead to WIN-ALL situation → STABLE EQUILIBRIUM

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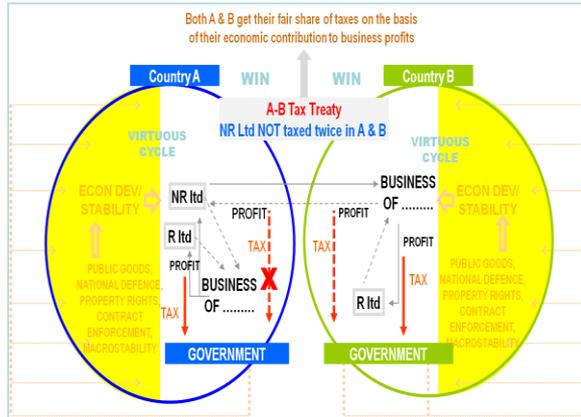


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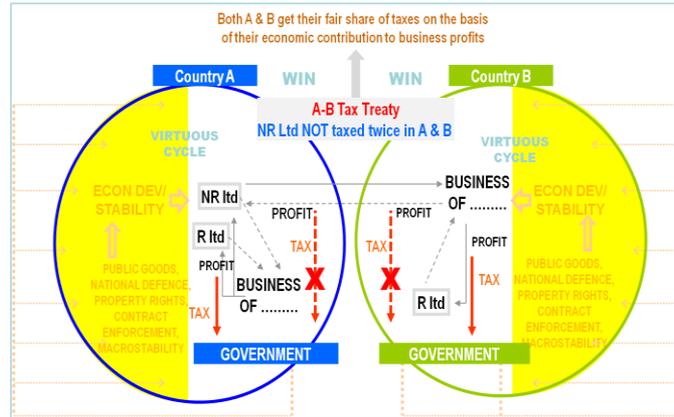
Why is everyone bothered about BEPS?

THREE POSSIBLE SCENARIOS

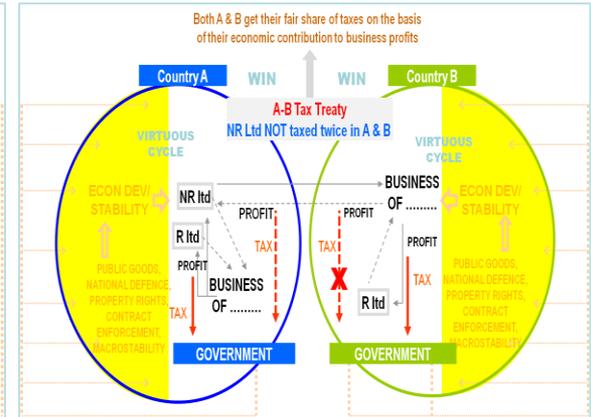
NR pays TAX in B but not in A



NR pays NO TAX in either A or B



NR pays TAX in A but not in B



Economy suffers in A
 Interruption of Virtuous Cycle in A leads to economic slowdown & instability
 R in A faces higher tax burden & loses
 NR has tax advantage → Monopolizes Markets in A

Economy suffers in both A & B
 Interruption of Virtuous Cycle leads to economic slowdown & instability
 R faces higher tax burden & loses
 NR has tax advantage → Monopolizes Markets in both A & B

Economy suffers in B
 Interruption of Virtuous Cycle in B leads to economic slowdown & instability
 R in B faces higher tax burden & loses
 NR has tax advantage → Monopolizes Markets in B

BASE EROSION & PROFIT SHIFTING PROJECT

Why is everyone bothered about BEPS?

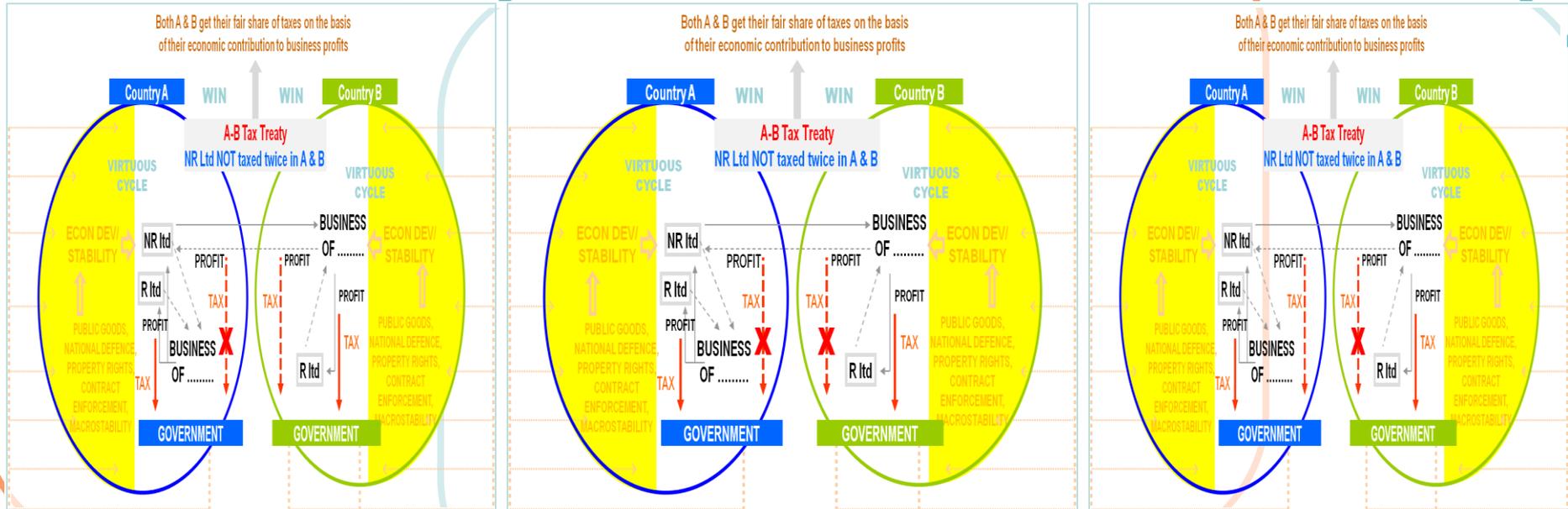
THREE POSSIBLE SCENARIOS

NR pays TAX in B but not in A

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DOMESTIC LAW MEASURES



TAX TREATY MEASURES ACTIONS 1, 6, 7 & 14

Action 15: MULTI LATERAL INSTRUMENT

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MULTI LATERAL CONVENTION

- **OBJECTIVES**

- To provide an opportunity for swiftly implementing tax treaty-related BEPS measures
- By signing a single Multi Lateral Convention

- **CHALLENGES**

- Widespread differences in tax treaties
- Widespread differences in preferences of countries
- Widespread differences in legal practices

- **SOLUTION**

- Sufficient Flexibility in treaties to be subjected to MLI
- Sufficient Flexibility in OPTING-IN & OPTING-OUT of provisions
- Relative inflexibility with MINIMUM STANDARDS

MULTI LATERAL CONVENTION

| | |
|-----------------|---|
| TITLE | Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting |
| PREAMBLE | “...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 those agreements for the indirect benefit of residents of third jurisdictions)” |
| PART I | SCOPE & INTERPRETATION OF TERMS (ART 1-2) |
| PART II | HYBRID MISMATCHES (ART 3-5) |
| PART III | TREATY ABUSE (ART 6-11) |
| PART IV | AVOIDANCE OF PE STATUS (ART 12-15) |
| PART V | IMPROVING DISPUTE RESOLUTION (ART 16-17) |
| PART VI | ARBITRATION (ART 18-26) - optional |
| PART VII | FINAL PROVISIONS (ART 27-39) |

Substantive Provisions

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MULTI LATERAL CONVENTION

SUBSTANTIAL PROVISIONS

BEPS MEASURE

The substantive measure recommended for adoption in a Final BEPS Action Report

COMPATIBILITY CLAUSE

Explains how the substantive clause will be incorporated in the tax treaty → whether it will REPLACE the relevant provision or whether it will APPLY in the absence of a similar provisions / overruling provisions incompatible to it

RESERVATION

Only certain types of reservation that are provided in this article can be resorted

NOTIFICATION CLAUSE

for OPTING in a provision (where so provided)

for notifying preferred OPTION (where so provided)

for notifying similar provision that will be replaced/overruled

for notifying RESERVATION (if any)

Art 3 – Transparent Entities

SUBSTANTIAL PROVISIONS

BEPS MEASURE (Para 1-3)

Income derived by **or through** FISCALLY TRANSPARENT ENTITY accorded treaty benefit, but ONLY to the EXTENT it is treated/taxed as income of resident (Para 1)

Income exemption in resident country NOT to be given for income taxed on basis of residence in other State (Para 2)

UNLIMITED right to tax own residents (Para 3)

COMPATIBILITY CLAUSE (Para 4)

Para 1 (± 3) to APPLY in absence/ in place of similar prov.

RESERVATION (INDIA-PROVISIONAL) (Para 5)

Entirety of this article NOT to APPLY

NOTIFICATIONS CLAUSE (Para 6)

No OPT-IN

Only RESERVATIONS

Art 3 – Transparent Entities

Original intent

To EXTEND treaty benefits to FISCALLY TRANSPARENT ENTITIES even if they are not “LIABLE to tax” as such

BEPS Measure

2. For the purposes of this Convention, **income derived by or through an entity** or arrangement that is treated as wholly or partly **fiscally transparent** under the tax law of either Contracting State shall be **considered to be income of a resident** of a Contracting State but **only to the extent** that the income is **treated**, for purposes of taxation by that State, **as the income of a resident** of that State. [Art 1(2)-OECD'17]

Commentary in OECD-MTC'17 (Paragraph 7)

“..it does not matter where the entity or arrangement is established the **paragraph applies to an entity established in a third State** to the extent that, under the **domestic tax law of one of the Contracting States, the entity is treated as wholly or partly fiscally transparent** and income of that entity is attributed to a resident of that State”

Art 3 – Transparent Entities

Analysis

Provision in Article 1 – PERSONS COVERED

Can it apply to an entity in a third State, even if it is NOT treated as FISCALLY TRANSPARENT under the laws of that State ?!

Does it extend the scope of B/L treaty to person not resident in either State if it is treated FISCALLY TRANSPARENT under the laws of either Contracting State ?!

India's Position on Para 7 of Art 1 (2) of OECD-MTC'17

“India does not agree with the view expressed in paragraph 7 of the Commentary on Article 1 that the term “income derived by or through an entity or arrangement” includes income derived by or through an entity that may not be a resident of either of the Contracting States. India considers that this term includes only such income that is derived by or through entities that are resident of one or both Contracting States.”

Art 4 – Dual Resident Entities

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Residence of dual resident **entities** to be mutually determined by CAs → benefit only IF an Agreement (Para 1)

DISCRETIONARY RELIEF - Not contestable in Courts

COMPATIBILITY CLAUSE (Para 2)

Para 1 to APPLY in absence/ in place of similar prov.

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE (Para 4)

No OPT-IN

Only RESERVATIONS

Art 5 –Methods for Elimination of Double Taxation

SUBSTANTIAL PROVISIONS

BEPS MEASURE

3 OPTIONS: Non-Reciprocal Application on own residents
(Para 1)

Op-A: Ordinary Credit method to apply in place of Income Exemption method where income gets any treaty benefit in the State where it arises. (Para 2)

Op-B: Ordinary Credit method to apply in place of Income Exemption method where DIVIDEND is a deductible tax expense in the State where it arises (Para 4)

Op-C: Ordinary Credit method (Para 6)

COMPATIBILITY CLAUSE (Para 3/5/7)

Op-A/B to APPLY; Op-C to REPLACE similar provision

RESERVATION (INDIA-PROVISIONAL)

Entirety of Article NOT to Apply (Para 8)

NOTIFICATIONS CLAUSE

OPTION [Opt either or None]

CTAs (treaties) & Relevant Articles (Para 10)

Art 6 – Purpose of a Covered Agreement

BEPS MEASURE

A Covered Tax Agreement shall include this text: (Para 1)

*“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),”.*

Can also add (optional) (Para 3)

“Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,”.

COMPATIBILITY CLAUSE (Para 2)

IN PLACE or IN ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 8)

No Reservations

NOTIFICATIONS CLAUSE

OPT-IN for Para 3, RESERVATION

TEXT to be REPLACED if any

Art 7 – Prevention of Treaty Abuse

ACTION 6 REPORT

New PROVISION– ENTITLEMENT OF BENEFITS

ARTICLE 29 in OECD-MTC'17 consisting of
Principle Purpose Test + Limitation of Benefit

(PPT – PARA 9)

(PPT – PARA 1-7)

→ DETAILED
→ SIMPLIFIED

MINIMUM STANDARD

(Action 6 Report: Exec. Summary)

PPT or

PPT + LOB (detailed/simplified)

LOB (detailed) + Anti-Conduit Rules

PPT

LOB +

PPT

ACR

Most countries in favor of either PPT or LOB+PPT

Only few countries favor PPT + LOB

INDIA

Preference for PPT + LOB

Art 7 – Prevention of Treaty Abuse

INTERACTION OF LOB & PPT

Both have INDEPENDENT APPLICATION

PPT

LOB +

PPT

ACR

“171. Paragraph 9 supplements and does not restrict in any way the scope or application of the provisions of paragraphs 1 to 7 (the limitation-on-benefits rule) ... the guidance provided in the Commentary on paragraph 9 should not be used to interpret paragraphs 1 to 8 and vice-versa.”

“172. ...the fact that a person is entitled to benefits under paragraphs 1 to 7 does not mean that these benefits cannot be denied under paragraph 9. Paragraphs 1 to 7 are rules that focus primarily on the legal nature, ownership in, and general activities of, residents of a Contracting State. ... these rules do not imply that a transaction or arrangement entered into by such a resident cannot constitute an improper use of a treaty provision.”

(OECD COMMENTARY ON ARTICLE 29, based on ACTION 6 REPORT)

Art 7 – Prevention of Treaty Abuse

PRINCIPLE PURPOSE TEST

Default provision – mandatory unless a State OPTS for “detailed LOB with Anti-conduit Rules” to fulfill the MINIMUM STANDARD

Option to include ‘DISCRETIONARY BENEFIT’ in PPT

SIMPLIFIED LIMITATION OF BENEFIT RULES

OPTIONAL

FLEXIBILITY

OPTIONS for

Non-Reciprocal Application of LOB

INCLUSION of Simplified LOB where Other Contracting State OPTS for it

Art 7 – Prevention of Treaty Abuse

PRINCIPAL PURPOSE TEST

BEPS MEASURE

*Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital **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, 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 Covered Tax Agreement. (Para 1)*

DISCRETIONARY RELIEF BY CA (Para 4 - Optional)

COMPATIBILITY CLAUSE (Para 2)

IN PLACE or IN ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 15)

No Reservations

NOTIFICATIONS CLAUSE [Para 17(a),(b)]

Provisions to be REPLACED → REPLACED only where both parties Notify; other cases PPT APPLIES & SUPERCEDES.

OPT-IN for Para 4

Art 7 – Prevention of Treaty Abuse

LIMITATION OF BENEFIT RULES

BEPS MEASURE

Only QUALIFIED RESIDENTS entitled to benefits (Para 8)

Individuals, Govt, Listed Comp, NGOs, Pension Funds qualify (Para 9)

Entities with majority ownership with RESIDENTS [Para 9 (e)]

Active conduct of Business – Substantial – Group activities (Para 10)

Entity OWNED 75% by EQUIVALENT BENEFICIARIES (Para 11)

Entitled to same tax as provided under treaty [Para 13(c)]

DISCRETIONARY RELIEF BY CA (Para 12)

COMPATIBILITY CLAUSES

OPTIONAL (Para 6)

FLEXIBLE – Inclusion if other Contracting State Prefers [Para 7(a)]

Non Reciprocal Application [Para 7(b)]

IN PLACE or IN ABSENCE of similar provision (Para 14)

RESERVATION (INDIA-PROVISIONAL) (Para 15, 16)

No Reservations

NOTIFICATIONS CLAUSE [Para 17(c)]

Provisions to be REPLACED

Art 8 – Dividend Transfer Transactions

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Concessional Tax Rate of Inter-Corporate Dividend subject to Minimal Holding *“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”* → new concept of *“Minimal Holding PERIOD”*

(Para 1)

COMPATIBILITY CLAUSE (Para 2)

Minimal Holding PERIOD to APPLY in PLACE/ ABSENCE

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE (Para 4)

Provisions to which APPLICABLE - Applies only where both parties NOTIFY

RESERVATIONS

Art 9 - Capital Gains from Shares deriving Value from Immovable Property

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Provision for SOURCE taxation of CG from Shares/Interests deriving value from IMMOVABLE PROPERTY *“shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and...shall apply to shares or comparable interests, such as interests in a partnership or trust..”* (Para 1) OR

Replace it with MODIFIED ART13(4) (Para 4)

COMPATIBILITY CLAUSE

Para 1 to APPLY in PLACE/ ABSENCE (Para 2)

Para 4 OPT-IN by both Contr. States REPLACES (Para 3,5)

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE

Notify Provisions for APPLICATION of Para 1 (Para 4)

OPT-IN for Para 4 –when by both parties, Para 1 shall not apply (Para 4)

Art 10 – ANTI-ABUSE for PE in III Jurisdiction

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Where Income attributable to PE in III Jurisdiction & EXEMPTED in country of residence, the *“benefits of the Covered Tax Agreement shall not apply to any item of income on which the tax in the third jurisdiction is less than 60 per cent of the tax that would be imposed in the first-mentioned Contracting Jurisdiction”* (Para 1)

Not applicable where income derived by *“active conduct of a business”* (Para 2)

DISCRETIONARY BEENFIT clause (Para 3)

COMPATIBILITY CLAUSE (Para 4)

To APPLY in PLACE/ ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 5)

No Reservations

NOTIFICATIONS CLAUSE (Para 4)

RESERVATIONS, No OPT-IN

Art 11 – Unrestricted RIGHT to tax own RESIDENTS

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Treaty *“shall not affect the taxation by a Contracting Jurisdiction of its residents, except...”*

- **Correlative/Corresponding Adjustment** [Art 7(3)*/ 9(2)],
- **Govt. Servant** (Art.19),
- **Students/teachers**/researchers **** (Art. 20),
- **Relief from Double Tax** (Art. 23),
- **Non-discrimination** (Art. 24),
- **MAP** (Art. 25),
- **Pensions under Social Security Legislation** (Art. 18A)** *or arising in other State* (Art. 18B)**,
- **Expressly restricted right to tax** (Art. 28*/29**) (Para 1)

COMPATIBILITY CLAUSE (Para 2)

To APPLY in PLACE/ ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE (Para 4)

RESERVATIONS, No OPT-IN

* Only in OECD MTC

** Only in UN MTC

Art 12 – Artificial Avoidance of PE Status

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Extend DAPE to agent who *“habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise”*

Extend CONTRACTS to include those *“(a) in the name of the enterprise; (b) for the transfer of the 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”*
(Para 1)

Independent Agent Exclusion not to apply where the agent *“acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related”*
(Para 2)

COMPATIBILITY CLAUSE

Para 1 to APPLY in PLACE of similar provision, *“but **only to the extent** that such provisions address the situation in which such person has, and habitually exercises, in that Contracting Jurisdiction an authority to conclude contracts in the name of the enterprise”*

*Thus Only concluding contracts condition in the tax treaty is modified. Other conditions leading to DAPE such as maintenance of stock of goods from which delivery is made** that apply separately remain unaffected.*
[Para 3(a)]

** Only in UN MTC

Art 12 – Artificial Avoidance of PE Status

SUBSTANTIAL PROVISIONS

COMPATIBILITY CLAUSE -contd.

Para 2 to apply in PLACE of provision dealing with Independent Agent Exclusion [Para 6 in OECD-MTC, Para 7 in UN-MTC]

[Para 3(b)]

RESERVATION (INDIA-PROVISIONAL) (Para 4)

No Reservations

NOTIFICATIONS CLAUSE (Para 5,6)

RESERVATIONS, No OPT-IN

Provisions on which APPLICABLE to be NOTIFIED

APPLIES ONLY where both Contr. States have NOTIFIED the provisions

* Only in OECD MTC

** Only in UN MTC

Art 13 - Artificial Avoidance of PE Status through Specific Activity Exemption

BACKGROUND

Commentary on Art 5(4) [prior to BEPS] – Para 21-27

“...the provisions of paragraph 4 are designed to prevent an enterprise of one State from being taxed in the other State, if it carries on in that other State, activities of a purely preparatory or auxiliary character.”
....Para 21

“It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits.”
....Para 24

“.....paragraph 4 is designed to provide for exceptions to the general definition of paragraph 1 in respect of fixed places of business which are engaged in activities having a preparatory or auxiliary character.”
....Para 27

Generally interpreted as exempting preparatory & auxiliary activities

Art 13 - Artificial Avoidance of PE Status through Specific Activity Exemption

BACKGROUND

ACTION 7 REPORT : Paragraphs 4 & 11 to 13 (Page 28)

Noted that some delegates held a view that activities listed in clauses (a) to (d) in Art. 5 (4) were exempt per se

This view was taken up for examination by WP-1

Agreed to modify Art. 5(4) to explicitly provide that they will be exempt only if they are of a “preparatory or auxiliary” character.

Noted the **ALTERNATE view** that **IF ANTI-FRAGMENTATION RULE is included, then this modification NOT REQUIRED. Such countries may adapt an alternate version** (*page 38 of Action 7 report/ para 78 of Commentary in OECD-MTC’18*)

Also noted: *“This report includes the changes that will be made to Article 5 of the OECD Model Tax Convention and the Commentary thereon as a result of the work on Action 7 of the BEPS Action Plan. It should be noted that **these changes are prospective only and, as such, do not affect the interpretation of the former provisions of the OECD Model Tax Convention and of treaties in which these provisions are included**, in particular as regards the interpretation of existing paragraphs 4 and 5 of Article 5.”* (*para 4 of Action 7 report*)

* Only in OECD MTC

** Only in UN MTC

Art 13 - Artificial Avoidance of PE Status through Specific Activity Exemption

BACKGROUND

ACTION 7 REPORT

RECOMMENDED MODIFICATION IN ART 5(4)* to make it explicitly clear that all activities LISTED in para 5(4) will be EXEMPT only if they are PREPARATORY/AUXILIARY

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

- a)
- b)
- c)
- d)

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;

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,

provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

* Only in OECD MTC

** Only in UN MTC

Art 13 - Artificial Avoidance of PE Status through Specific Activity Exemption

SUBSTANTIAL PROVISIONS

BEPS MEASURE

OPTIONS A / B / neither (Para 1)

A: Modified Prov recommended by Action 7 (Para 2)

B: Alternate Prov in Commentary (Para 3)

ANTI-FRAGMENTATION Rule: Art 5 (4) NOT APPLICABLE for activities that are part of a Cohesive business carried on through any Group entity or its PE in source State (Para 4)

COMPATIBILITY CLAUSE (Para 5)

OPTION A/B To APPLY in PLACE of similar provision

Para 4 to APPLY on Art. 5 (4)

RESERVATION (INDIA-PROVISIONAL) (Para 6)

No Reservations

NOTIFICATIONS CLAUSE (Para 7,8)

OPT IN - OPTIONS A/B/none, Relevant provisions → An options applies when opted for by both Contr. States

RESERVATIONS

Anti FR Rule applies on prov. notified u/p 7/8 by both Contr. States.

Art 14 – Splitting up of Contracts

SUBSTANTIAL PROVISIONS

BEPS MEASURE

For determining whether stipulated period for constituting PE has been exceeded – activities >30days connected to the same Building/ Construction/ Installation project carried by CLOSELY RELATED ENTERPRISES shall be added.

(Para 1)

COMPATIBILITY CLAUSE (Para 2)

To APPLY in PLACE/ in ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE (Para 7,8)

RESERVATIONS

Relevant Provisions

Art 15 – Person Closely Related to an Enterprise

SUBSTANTIAL PROVISIONS

BEPS MEASURE

Definition for purpose of Art 12, 13 and 14 :

CLOSELY RELATED if

“one has control of the other or both are under the control of the same persons or enterprises”

“if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other”

“if another person possesses directly or indirectly more than 50 per cent of the beneficial interest in the person and the enterprise”

(Para 1)

RESERVATION (INDIA-PROVISIONAL) (Para 2)

No Reservations

NOTIFICATIONS CLAUSE

Reservations

Art 16 – Mutual Agreement Procedure

SUBSTANTIAL PROVISIONS

BEPS MEASURE

- MAP request may be presented to CA of **EITHER STATE** (Para 1.1)
- Within 3 years (min time to be available) (Para 1.2)
- CAs shall endeavour to resolve such cases (Para 2.1)
- Agreement implementation notwithstanding time limits (Para 2.2)
- CAs shall endeavour to resolve interpretational issues (Para 3.1)
- CAs MAY consult for cases not provided in treaty (Para 3.2)

COMPATIBILITY CLAUSE (Para 4)

- 1.1: In PLACE/ in ABSENCE of similar provision
- 1.2: In PLACE of provision with <3 years/ in ABSENCE
- 1.3/1.4/.1.5/1.6: In ABSENCE of such provision

RESERVATION (INDIA-PROVISIONAL) (Para 5)

Reservation on Para 1.1 – Min Std by Consultation Alternative

NOTIFICATIONS CLAUSE (Para 6)

Reservations, Relevant provisions, Treaties without relevant provisions

CA = Competent Authority under the tax treaty

Art 17 – Corresponding Adjusting

SUBSTANTIAL PROVISIONS

BEPS MEASURE

In case of Adjustment made by ALP → *“other Contracting Jurisdiction shall make an appropriate adjustment to the amount of the tax charged therein on those profits”* (Para 1)

COMPATIBILITY CLAUSE (Para 2)

To APPLY in PLACE/ in ABSENCE of similar provision

RESERVATION (INDIA-PROVISIONAL) (Para 3)

No Reservations

NOTIFICATIONS CLAUSE (Para 4)

RESERVATIONS

Relevant Provisions → Prov. notified by BOTH Contr. States will be REPLACED; Otherwise provision in treaty will SUPERCEDED

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PROCEDURE

PROCEDURE : (Art 28)

The Convention opened for SIGNATURE on 31.12.2016
by STATES / specified JURISDICTIONS

TWO STEP PROCESS : SIGNING → RATIFICATION

(deposit of instrument of ratification)

RESERVATIONS (Art 28)

Only those EXPRESSLY permitted

UNLESS EXPLICITLY provided reservations change the
relationship RECIPROCALLY [Para3] [Art. 21-Vienna Convention]

Different Reservations can be made for Specified Tax Jurisdictions

Reservations also TWO STEP PROCESS:

MADE AT SIGNING → CONFIRM AT RATIFICATION

PROVISIONAL LIST AT SIGNING → FINAL AT RATIFICATION

Reservation can be OMITTED or RELAXED later → It will APPLY
the concerned provision on covered treaties

*(but New RESERVATIONS CANNOT be ADDED after ratification.
Nor can it be REPLACED WITH A MORE STRINGENT
RESERVATION)*

PROCEDURE

NOTIFICATIONS (Art 29)

List of “COVERED TAX AGREEMENTS” – to be covered by MLI

Can be EXTENDED later → MLI will apply to added CTAs

SUBSEQUENT AMENDMENTS (Art 30)

Not PREJUDICED

Every Amending Protocol is technically a CTA, so a later amendment after CTA has been amended by MLI is not restricted in any way by MLI, unless the later Amending Protocol is added to the list of CTAs by both Contracting Parties

ENTRY INTO FORCE OF MLI for a CONTRACTING PARTY(Art 34)

On RATIFICATION by Five PARTIES → MLI enters into force

w.e.f. 1st of month following 3 months after 5th ratifications for 1st FIVE parties ratifying the MLI

w.e.f. 1st of month following 3 months after ratification for Contracting Parties subsequently ratifying the MLI

PROCEDURE

ENTRY INTO EFFECT – APPLICATION of MLI to a TREATY (Art 35)

Options / Reservations possible under paragraphs 2 to 7 – India has chosen to :

Substitute calendar year with **taxable period** (Para 2)

replace “latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement” WITH

“30 Days after receipt of Instrument communicating Completion of Internal Procedure for application of MLI to a treaty” (Para 7)

as the **CTA EVENT** with reference to which amendments in a particular CTA by the application of MLI will enter into effect in the territory of India

Thus, an Indian tax treaty will be amended by the application of MLI for:

TDS : w.e.f. taxable events happening on April 1st following the CTA

Other than TDS: Taxable period beginning w.e.f. 1st April following the expiration of 6 calendar months after the CTA

PROCEDURE

INTERPRETATION OF TERMS IN MLI

A few DEFINITIONS in ARTICLE 2

“any term not defined herein shall ...have the meaning that it has at that time under the relevant CTA.”

So Definitions in CTA will apply & if no Definition therein → Article 3(2) will apply and accordingly the definition under Domestic Law will apply

INTERPRETATION & IMPLEMENTATION (Art 32)

Issues relating to interpretation of CTA as amended by MLI → As per provisions of CTA → Definitions in CTA, Article 3 (2), MAP [Art 32(1)]

Issues relating to interpretation of MLI – by CONFERENCE OF PARTIES convened at a request supported by at least one third members (Art 31)

Conference of Parties to be called by DEPOSITORY – OECD : likely to be concerned with procedural & implementation issues

PROCEDURE

SUMMARY OF PROCEDURE

ACTION 15: MLI

BEPS Final Reports

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

- Opened for Signing : 31st December, 2016
- Signing at OECD : 7th June, 2017 (**INDIA signed**)
- Ratification : Austria, Isle of Man, Jersey, Poland, SLOVENIA (22nd March, 2018) – 3 MONTHS → **MLI enters into force** for Contracting Parties (those who have ratified it) **w.e.f. 1st July, 2018**
- For subsequent Ratifications → MLI enters into force following expiry of 3 month period (**INDIA yet to RATIFY**)
- AMENDMENTS in TAX TREATIES by application of MLI enter into force for a Contracting Party
 - for TDS : for Taxable event happening on/after the 1st day of the Calendar Yr / Taxable Period following the CTA EVENT
 - other than TDS : for Taxable Period beginning on/ after expiry of 6 months following the CTA EVENT

PROCEDURE

SUMMARY OF PROCEDURE

ACTION 15: MLI



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

OPENED: 31ST DEC 2016 → SIGNED 6TH JUNE 2017 (INDIA 31ST DEC 2016)

MLI ENTRY INTO FORCE: 1ST JULY 2018 FOR CONTRACTING PARTIES



BEPS Final Reports

INDIA is still only a SIGNATORY not a CONTRACTING PARTY (Art 2)

For CONTRACTING PARTIES → MLI enters into force following expiry of 3 month period from the date of depositing of **Instrument of Ratification**

AMENDMENTS in TAX TREATIES by application of **MLI** enter into force for a Contracting Party as per Article 35 of MLI with reference to a date given in para (1) , subject to reservations made under para (7)

(Let us CALL this date in para 1/ 7 of Art 35 as the CTA EVENT)

PROCEDURE

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

OPENED: 31ST DEC 2016

SIGNED 6TH JUNE 2017 (INDIA 31ST DEC 2016)

MLI ENTRY INTO FORCE: 1ST JULY 2018 FOR CONTRACTING PARTIES

INDIA is still only a SIGNATORY not a CONTRACTING PARTY (Art 2)

For CONTRACTING PARTIES → MLI enters into force 3 months after Ratification

AMENDMENTS in TAX TREATIES is given effect with reference to the CTA Event

for TDS : wef 1st day of the Calendar Yr / Taxable Period following the CTA EVENT

others : for Taxable Period beginning 6 months following the CTA EVENT

CTA Event: - Latest of the dates on which MLI enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement

In case of Reservation under Art 35 (7): **30 Days after receipt of Instrument communicating Completion of Internal Procedure for application of MLI to a treaty**
(INDIA has made a reservation)

PROCEDURE

STATUS OF MLI

ACTION 15: MLI

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

OPENED: 31ST DEC 2016 → SIGNED 6TH JUNE 2017 (INDIA 31ST DEC 2016)

MLI ENTRY INTO FORCE: 1ST JULY 2018 FOR CONTRACTING PARTIES

MLI STATUS as on 10th October, 2018

TOTAL **SIGNATORIES: 84**

6 others have expressed an INTENT to SIGN

TOTAL **CONTRACTING PARTIES: 15**

MLI has thus already amended CTAs notified by the Contracting Parties

INDIAN TAX TREATIES will be amended after India deposits the Instrument of Ratification & Communicates the Completion of its Internal Formalities in respect of CTAs notified by it

Will be given effect in FY beginning after expiry of 6 months after 30 days following such notification (TDS application in FY beginning 30 days after such notification)

Comments ?? Questions

THANK YOU