



CTC International Taxation Study Circle

BEPS Action 7 – Preventing artificial avoidance of PE Status

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 - ▶ Stricter definition of Independent Agents
 - ▶ Narrower specific activity exemption
 - ▶ New Anti-Fragmentation Rule for specific activity exemptions
 - ▶ Anti- Splitting up of contracts

- ▶ PE continues to be sole criteria of taxing business profits of FE
- ▶ Aim of BEPS Action 7
 - ▶ Develop changes to the definition of PE to prevent artificial avoidance of PE status in relation to BEPS structures
- ▶ Action 7 classified as “reinforced international standard”
 - ▶ Not a minimum standard
- ▶ Action 7 recommendations implemented through MLI
 - ▶ India is a signatory to MLI
 - ▶ India has not reserved a position any of PE related provision in ML
 - ▶ By implication, all PE related MLI provisions has been accepted by India
 - ▶ For impact of MLI provisions on India treaties, important to consider the MLI positions of India’s treaty partner

Overview of BEPS Action 7 recommendations

Before: Actual conclusion of contract and independence qua the entity

Now: Principal role directly leading to conclusion of contract and narrow independence test

Broader Agency PE rule

Before: Exclusive list of exceptions for non-existence of PE

Now: Exemption if "preparatory or auxiliary" (PoA) threshold met

Limits specific activity exemption

Action 7: PE Changes

Before: New rule to avoid abuse of time threshold of PEs

Now: Automatic aggregation of time spent by CREs on connected projects

Anti splitting of contracts

Before: New rule to avoid abuse of PE exemption

Now: Prevents splitting up of cohesive business into several small operations

Anti-fragmentation rule

Broader Dependent Agent PE (DAPE) rule



Pre BEPS

Dependent agency PE (DAPE) created when persons, on behalf of foreign enterprise (FE), habitually exercises an authority to conclude contracts in the name of the FE.

Post BEPS

DAPE rule extended to cover persons, on behalf of FE, habitually plays a principal role leading to conclusion of contracts that are routinely concluded without material changes

Such contract can either be-

- in the name of the FE or
- for the transfer of ownership of, or the granting of the right to use, property (including tangible/intangible) owned by the enterprise or that the enterprise has the right to use; or
- for the provision of services by FE

Understanding broader DAPE rule*

- ▶ **Acting on behalf of enterprise**
 - ▶ FE needs to be directly/ indirectly be affected by action of the person (Para 86)
- ▶ **Habitually**
 - ▶ Actions should take place repeatedly and not merely in isolated cases (Para 83)
 - ▶ More than merely transitory (Para 98)
 - ▶ Extent on regularity depends on facts and circumstances, no precise frequency test laid down (Para 98)
- ▶ **Principal role leading conclusion of contract**
 - ▶ Person who acts as a sales force (Para 88)
 - ▶ Person who convinced the third party to enter into contract (Para 88)
 - ▶ Condition to be determined basis commercial realities of situation (Para 97)
- ▶ **In name of FE**
 - ▶ Words not be taken literally- can apply even to situations where name of principal (FE) is undisclosed in written contract (Para 93)
 - ▶ Contract needs to create obligation that will effectively be performed by FE, even though the contract is signed by another person (Para 94)

* Para references above are from OECD Commentary 2017

Whether following situations create DAPE risk?

(a) Person negotiates all elements/ details of contracts with third party in India but contract is signed by FE outside India

(b) Contracts are routinely subject to review and approval of FE but such review does not result modification of key aspect of contract

(c) Person attends third party meetings, participates in negotiations but terms of contracts are finalised by FE itself

(d) Contracts are concluded without material modification by the FE on a non-routine basis.

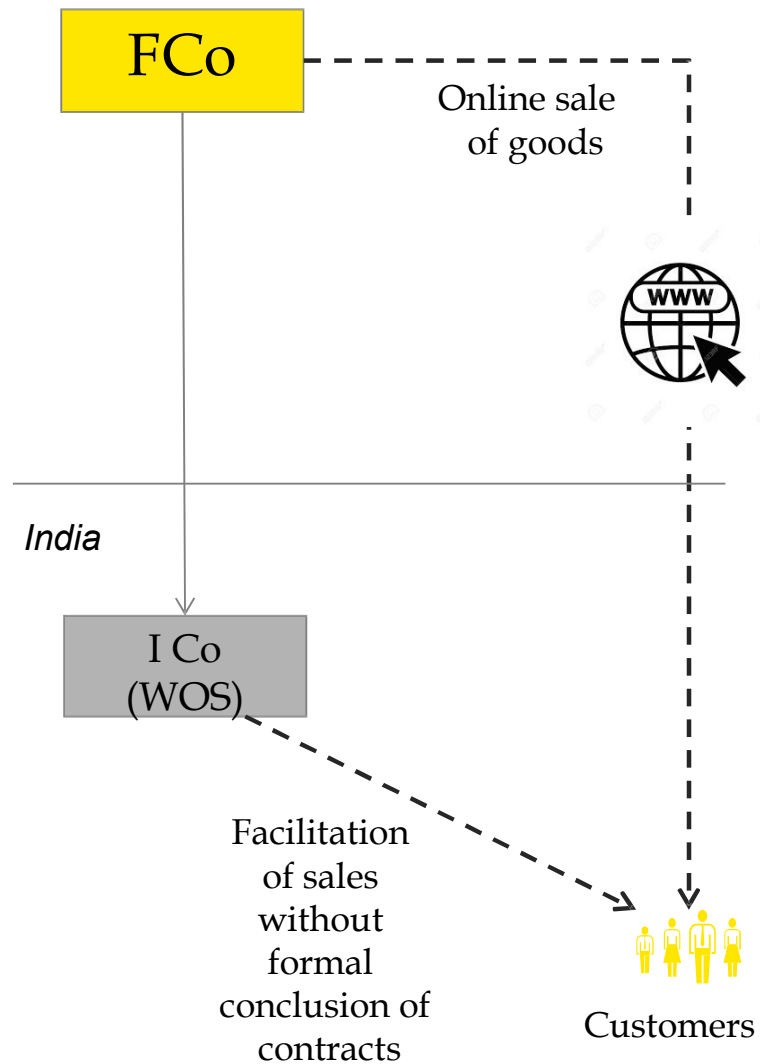
(e) Pharma co representatives promote drugs produced by FE by contracting doctors who subsequently prescribe such drugs

(f) Advertisement agencies who advertise and promote FE's products in India

(g) Person negotiating and finalising terms of purchase contract on behalf of FE

(h) LRD who buys and sells goods on its own account and not on behalf of FE

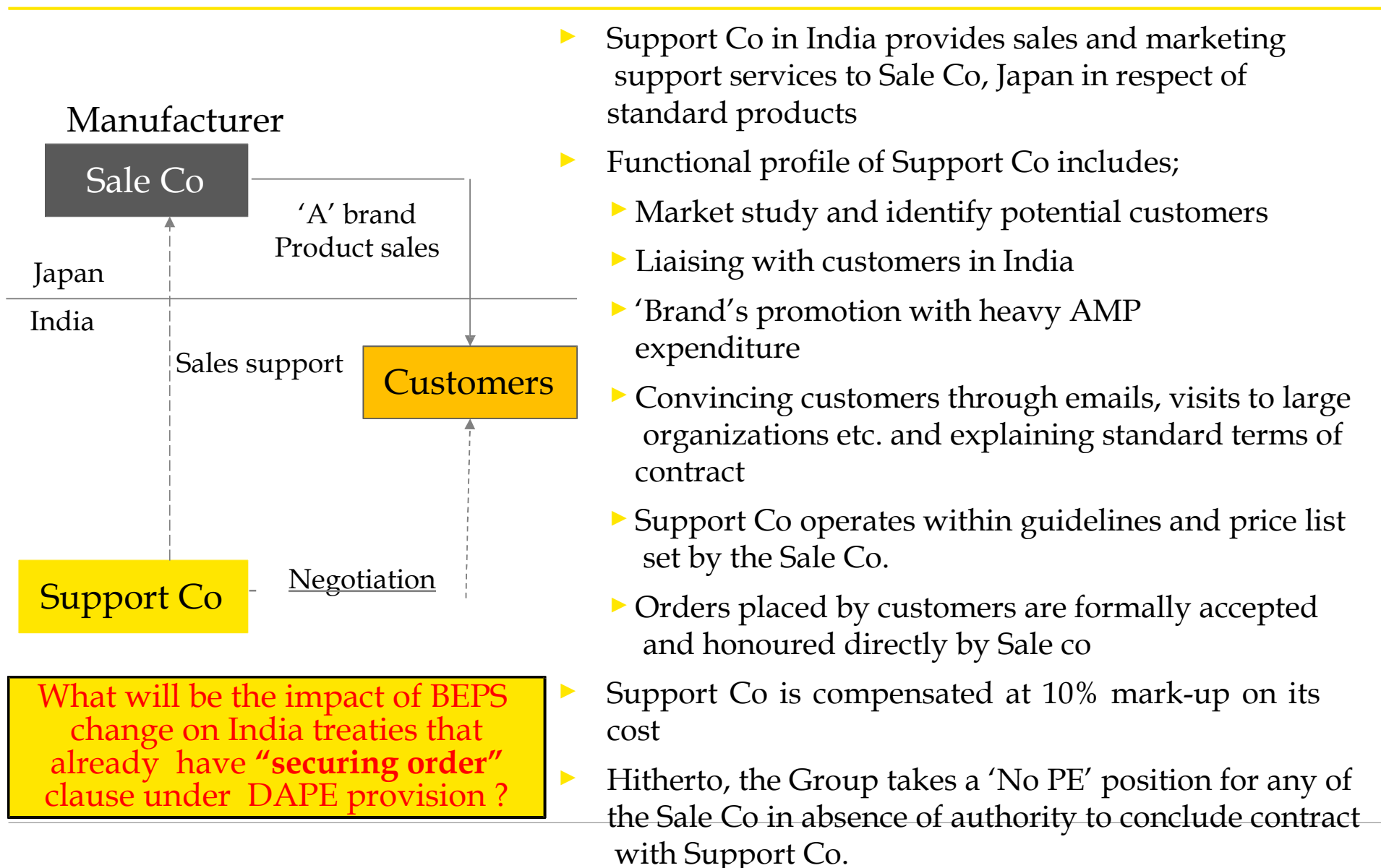
DAPE exposure for “standard terms of contract” (Para 90 of OECD Commentary 2017)



- ▶ FCo is a global distributor of goods and services through its website.
- ▶ Employees of I Co facilitate sales of F Co in India:
 - ▶ Identify potential customers
 - ▶ Use relationship building skills to understand need of customers
 - ▶ Convince them to buy the products/ services offered by F Co through emails, visits to large organisations
 - ▶ Responsible for large accounts
 - ▶ Explain standard terms (viz. fixed price, quantity, mode of concluding contracts online etc.)`
- ▶ ICo employees cannot modify price structure
- ▶ Contracts are concluded online between FCo and customers basis price structure discussed

Does FCo have DAPE risk in India?

Case Study: Sales and marketing support entities



- ▶ Support Co in India provides sales and marketing support services to Sale Co, Japan in respect of standard products
- ▶ Functional profile of Support Co includes;
 - ▶ Market study and identify potential customers
 - ▶ Liaising with customers in India
 - ▶ 'Brand's promotion with heavy AMP expenditure
 - ▶ Convincing customers through emails, visits to large organizations etc. and explaining standard terms of contract
 - ▶ Support Co operates within guidelines and price list set by the Sale Co.
 - ▶ Orders placed by customers are formally accepted and honoured directly by Sale co
- ▶ Support Co is compensated at 10% mark-up on its cost
- ▶ Hitherto, the Group takes a 'No PE' position for any of the Sale Co in absence of authority to conclude contract with Support Co.

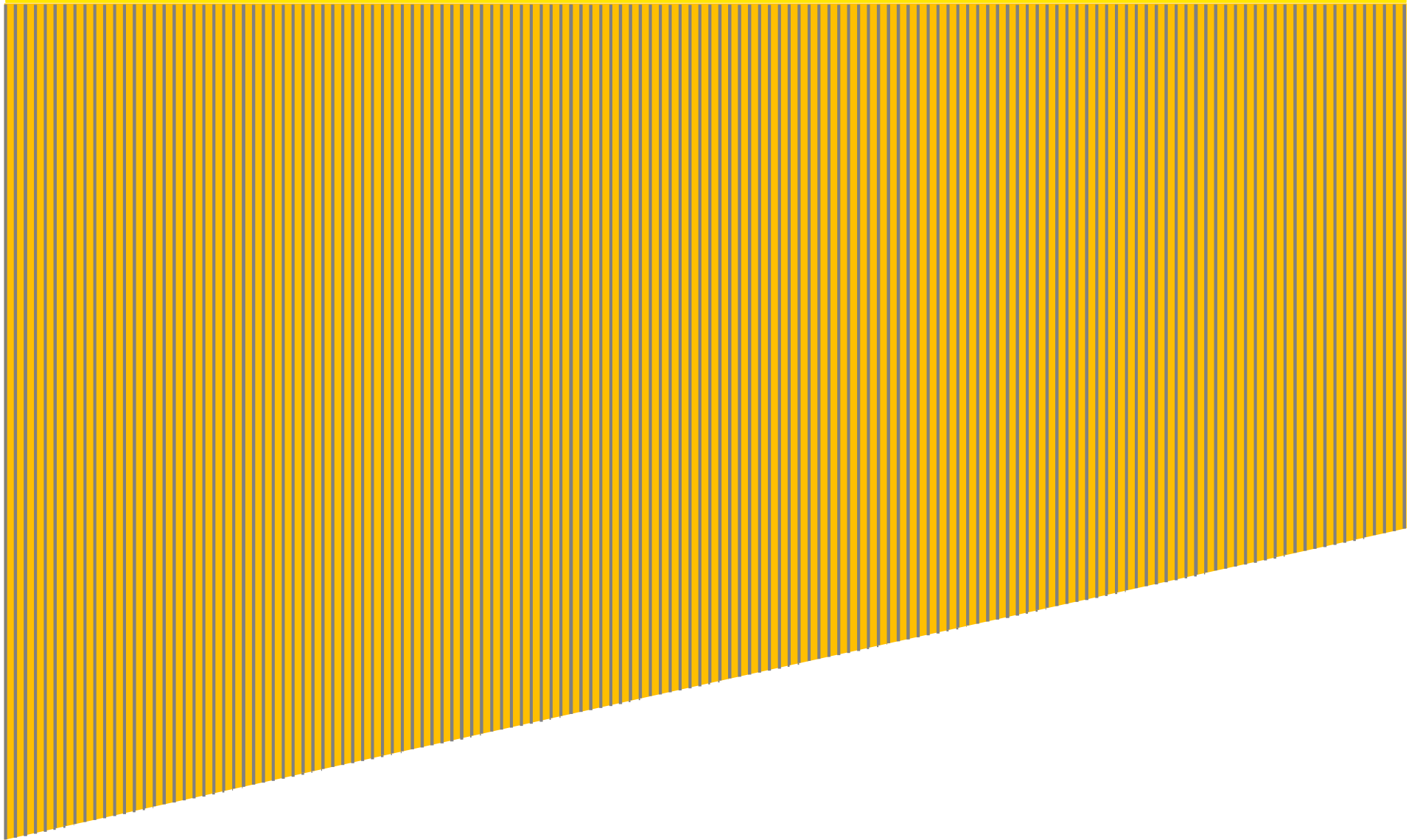
What will be the impact of BEPS change on India treaties that already have "securing order" clause under DAPE provision?

Amendment in line of BEPS introduced under ITA

Condition for dependent agent to create PE/ business connection under Explanation 2 to S. 9(1) (i)	Coverage		
	Pre-amendm ent S. 9	BEPS	Post- amendm ent S. 9
Acting on behalf of NR	↗	↗	↗
Habitually exercising authority to conclude contracts	↗	↗	↗
Habitually plays principal role leading to conclusion of contract that are routinely concluded without material modification by the NR Contracts that are - <ul style="list-style-type: none"> a) in the name of the NR, or b) for the transfer of the ownership of, or for the granting of the right to use, property owned NR or c) for the provision of services by NR 	X	↗	↗*
Exclusion to independent agents	↗	↗	↗
Exclusion where activity is limited to purchase of goods or merchandise	↗	↗	X

*Portion highlighted in “Red” appears in text of broader DAPE rule but not in amended Explanation 2 to S. 9(1)(i)

Implementation of Broader DAPE through MLI



- ▶ Broader DAPE rule implemented through Article 12(1) of MLI
- ▶ India has opted for broader agency PE rule for all its treaties
- ▶ Applicable where the treaty partner has also notified India's treaty in this respect
- ▶ Most Indian treaties have a wide Agency PE rule covering order securing, maintenance of stock, goods delivery agents
 - ▶ Replaces DAPE provision only to the extent refers to agents having authority to conclude contracts - other activities triggering agency PE like maintenance of stock or securing of orders remain unaffected by MLI.

Broader DAPE rule - Impact on Indian treaties

Classification	Impact of MLI positions	Illustrative Treaties
OECD Patterned treaties	High Impact: Expanded rule	Israel
Treaties with Securing Orders	Moderate Impact: Existing scope wide enough	Japan, Russia, Norway
Treaties with Maintenance Stock and Delivery rule, Manufacturing/ Processing rule in addition to OECD patterned	High Impact: Expanded rule	France, New Zealand

Treaties not modified by broader DAPE rule due to reservation by other country
 Australia, Cyprus, Ireland, Luxembourg, Netherlands, Singapore, UK

Stricter Independent Agent rule



Agent does not create PE if

- He is of an independent status
- Acting in ordinary course of business

Post BEPS

Stringent condition for independent agent exclusion

IA exclusion not available to agents

- Acting **exclusively or almost exclusively** on behalf of one or more enterprise to which it is closely related*

CRE defined with respect to control/ beneficial holding with threshold of 50% of voting/ beneficial/ equity interest

* OECD MC (2017)- India has reserved a right on non-inclusion of the term “to which it is closely related.”

Understanding IA exclusion post BEPS

- ▶ Meaning of “**exclusively or almost exclusively**”
 - ▶ A person working for more than one enterprise does not automatically become independent. Article 5(6) criteria (i.e. legal/economic independence, ordinary course of business) needs to be fulfilled (Para 110)
 - ▶ Independent status less likely if acting exclusively for one principal or related entities ‘**over a long time duration**’ (Para 111)
 - ▶ Acting “almost exclusively” where person has no significant business activities apart from activities conducted for CREs (Para 112)
 - ▶ Illustrates a threshold of 90% to deny the independence status (Para 112)
- ▶ Proviso to Expln 2 to Section 9 of the ITR provides for similar exclusion for independent agent – contains condition of “mainly or wholly” working on behalf for the NR or common controlled entities
- ▶ “**wholly or almost wholly**” condition in UN MC, many Indian treaties and S. 9 of the Act
 - ▶ Indian Courts have interpreted “wholly or almost wholly” – AAR* sets 90%+ threshold to categorise as dependent agent
 - ▶ “Exclusively or almost exclusively” may be considered similar to “wholly or almost wholly”

Implementation through MLI and Impact on Indian treaties

- IA exclusion dealt in Article 12(2) of MLI. India has opted for narrowed down exclusion for independent agent to all its treaties
- Applicable where the treaty partner has also notified India's treaty in this respect

Classification	Impact of MLI positions	Illustrative Treaties
OECD Patterned treaties	High impact: Narrowed exclusion	Japan, New Zealand
Treaties with wholly almost wholly condition - for FE	Moderate Impact: Scope extended to CRE	Indonesia, Serbia
Treaties with wholly almost wholly condition - for controlled entities also	Low Impact: Similar to Action 7 proposal, depending on qualification as CRE	Russia, Spain
ALP rule	Adverse Impact: Relaxation to ALP cases removed	Norway, France, Israel

Treaties not modified by IA rule due to reservation by other country: same as listed at slide ...

Specific activity exemption (Article 13 of MLI)



Preparatory or Auxiliary (PoA) activities

Article 5(4) of OECD MC (Pre-BEPS)

- ▶ Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - ▶ Use of facilities/ maintenance of a stock for **storage, display or delivery**;
 - ▶ Maintenance of stock for **processing** by another enterprise;
 - ▶ Maintenance of a fixed place of business for -
 - ▶ **Purchasing**
 - ▶ **Collecting information**
 - ▶ Any **other activity of a PoA character**
 - ▶ Any **combination of activities** provided the **overall activity is**

PoA

Preparatory or Auxiliary (PoA) activities

Article 5(4) of OECD MC (Post-BEPS)

- ▶ Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - ▶ Use of facilities/ maintenance of a stock for **storage, display or delivery**;
 - ▶ Maintenance of stock for **processing** by another enterprise;
 - ▶ Maintenance of a fixed place of business for -
 - ▶ **Purchasing**
 - ▶ **Collecting information**
 - ▶ **Any other activity**
 - ▶ **Any combination of activities**

provided that such activity or the overall activity is PoA

**Pre
BEPS**

**Automatic Specific
Activity
Exemption**

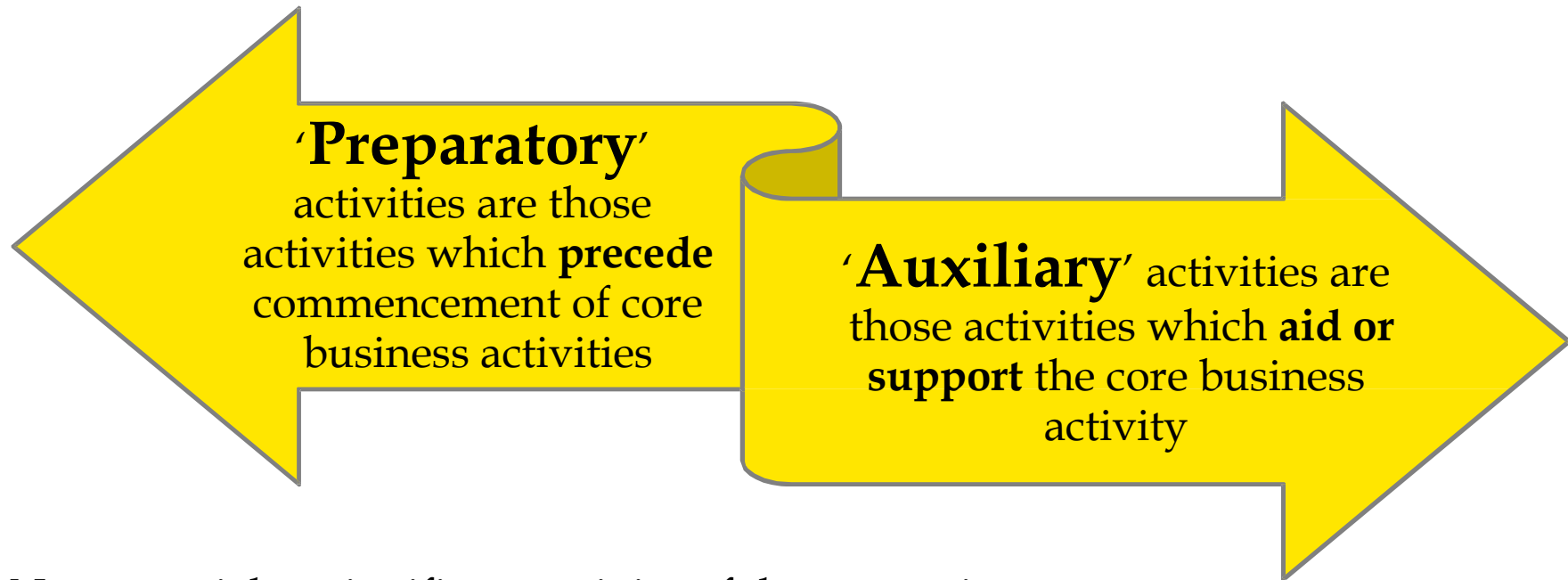
- No case by case evaluation of PoA nature of activities
- Controversy whether exemption available even if specified activity is a core activity for enterprise?

**Post
BEPS**

Exemption only if activity is PoA

- No automatic or blanket exemption
- Case by case evaluation to test if the activity is of PoA nature
- No exemption if activity in itself forms an essential & significant part of enterprise's activity as a whole

General features of PoA activities



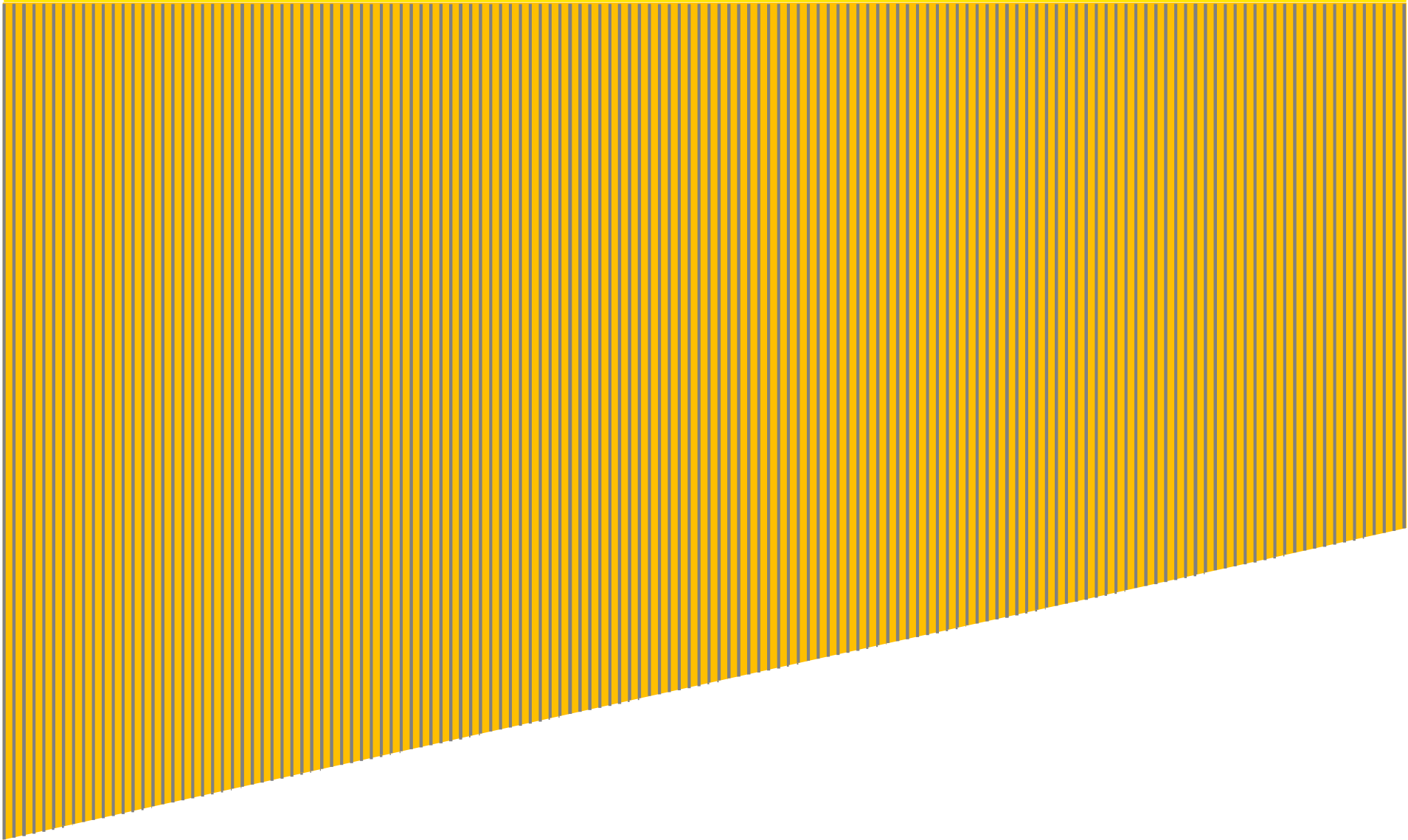
- ▶ Not essential or significant activity of the enterprise
- ▶ No or insignificant revenue generating activity
- ▶ General purpose of activity not be identical with general purpose of enterprise
- ▶ Not economically viable on its own; loses its significance if untied from core
- ▶ Meant solely for the enterprise and not for benefit of others including AEs/ CREs
- ▶ Carried on relatively for a short-period (usually, not always)

Whether PoA?

Nature of activity	Description	PoA?
Storage (warehousing)	Large warehouse of e-tailor (e.g. Amazon) with significant employees for storing and timely delivery to its online customers	
	Bonded warehouse with special gas facilities used by exporter solely for storing fruits in controlled environment during custom clearance process	
Delivery	Delivery of spare parts to customers solely for machinery supplied to them	
	Delivery of spare parts to customers for machinery supplied and, in addition, for the maintenance or repairs of such machinery	
Purchases	Purchase office with skilled knowledgeable personnel for buying agriculture products or purchases by a trader	
	Purchase of supplies for office use by a local office set up for market research	
Collection of information	Collection of information by an insurance company to identify market risk*	
	Newspaper bureau collecting information on possible news stories without engaging in any advertising activities	
Others	Scientific research* or advertising or servicing of patents/ know-how contracts	
	Management office of MNC with supervisory and co-ordination role	

* India reserves a right on characterisation of these activities as PoA (OECD Model Commentary 2017)

Anti-fragmentation rules [Article 4.1 of OECD MC]



Pre BEPS

No anti-fragmentation rule

- Cohesive business activities artificially fragmented and performed by different group entities
- PoA exemption claimed for each fragmented activity
- India's treaties with Norway, Australia, Singapore, etc. contain anti-frag. rule covering activities undertaken by FE alone (i.e. if FE maintains any other fixed place of business in State S, no PoA exemption)

Post BEPS

PoA exemption to be tested on combined activities with CREs

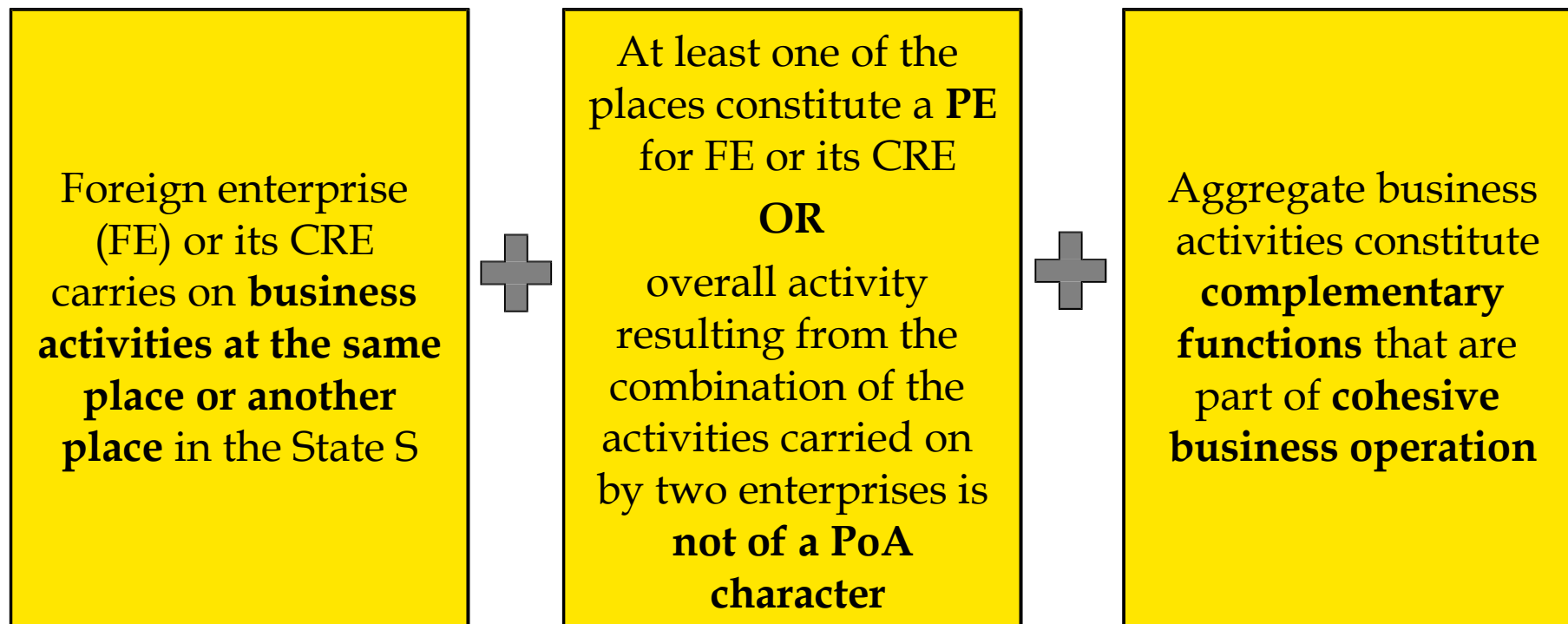
- Enterprise and/ or its CRE* carries on activity at the same or different locations in State S will now create a PE risk, if:
 - they are performing *“complementary functions as part of a cohesive business operation”* **and**
 - that such activities when combined > what is PoA

* CRE defined with respect to control/ beneficial holding with threshold of 50% of voting/beneficial/equity interest

New Anti-fragmentation Rule

Art 5(4.1) of OECD MC

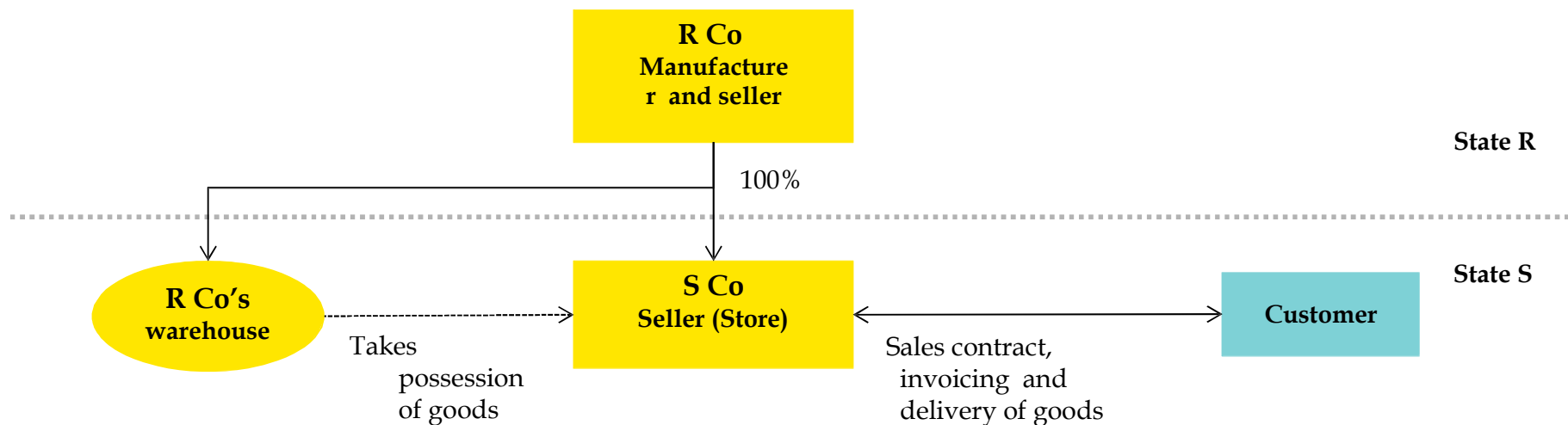
- ▶ As per Article 5(4.1), Article 5(4) does not apply where* :



** India positions on the 2017 OECD Commentary - According to India, even when the anti-fragmentation provision does not apply, an enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a PoA activity*

OECD illustration on anti-fragmentation rule

- ▶ For example, the facts below would create a PE under new Article 5(4.1):



- ▶ S Co and R Co are Closely Related Enterprises
- ▶ S Co's store is a PE of S Co in State S
- ▶ Business activities carried on by R Co at its warehouse and by S Co at its store constitute complementary functions that are part of a cohesive business operation (i.e., storing goods in one place for delivering as a part of obligation resulting from sale through another place)

Option A

PE exemption to specified activities
subject to activities being PoA in
nature

OR

Option B

Automatic exemption to the listed
activities

AND/ OR

Anti-fragmentation rule

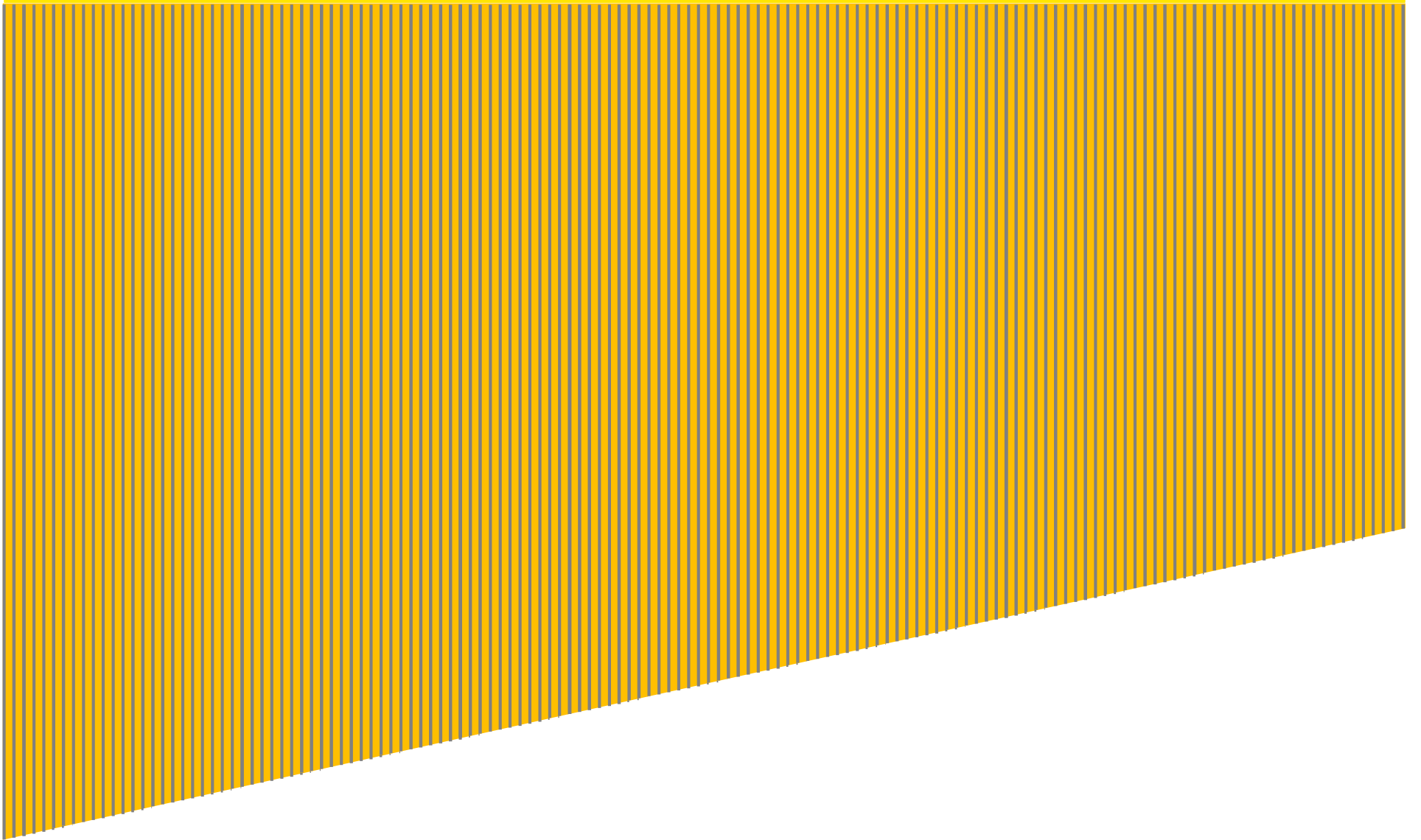
Denies specific activity exemption to a place of business
maintained by the enterprise or a CRE in specific
circumstances

India position

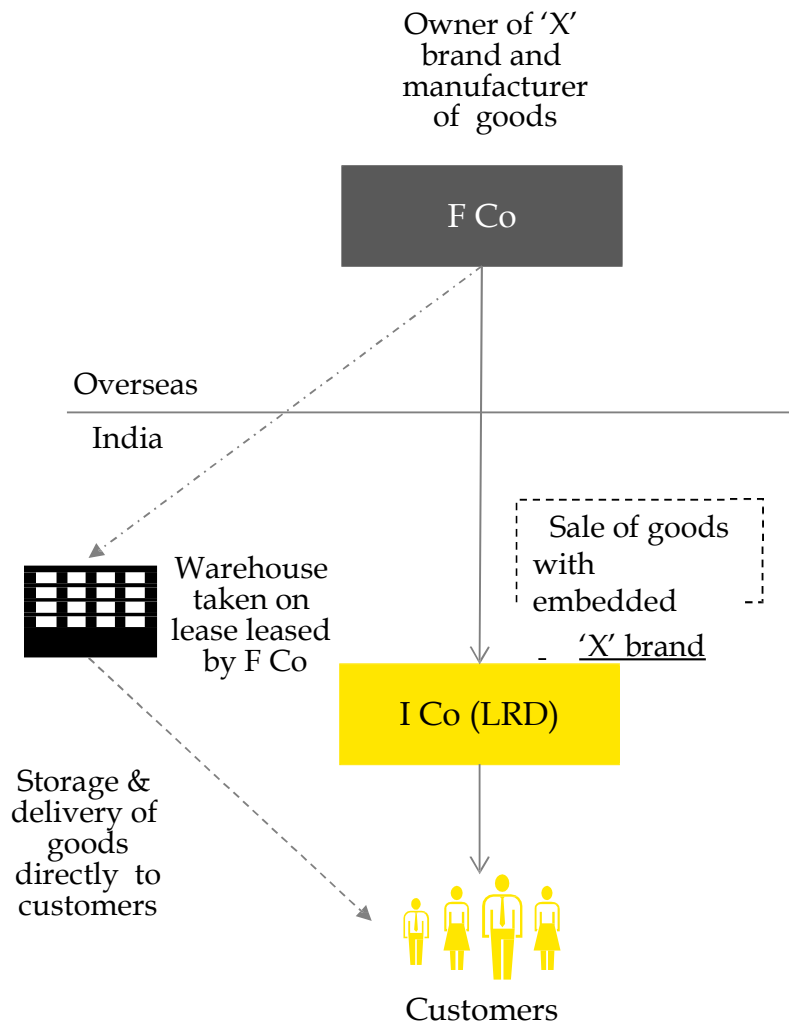
- Opted for Option A by specific notification
- Not made specific reservation on anti-frag; thus, choosing to apply anti-frag.

MLI Positions	Treaties impacted based on MLI matching principle
Option A + Anti-frag Rule	Australia, Israel, Italy, Japan, Netherlands, Russia, Denmark
Option B + Anti-frag Rule	Belgium, France, Ireland
Only Anti-Frag Rule	UK (Opted only for Anti-frag rule)
Only Option A included without Anti-frag Rule	Austria (reservation on Anti-frag rule)
Treaties not modified due to incompatibility	Singapore (Chosen Option B and opted out of Anti-Frag Rule)
Treaties not modified due to reservation by other country	Canada, Cyprus, Sweden (Opted out of entire Article 13)

Case Studies



Limited Risk Distributor (1)

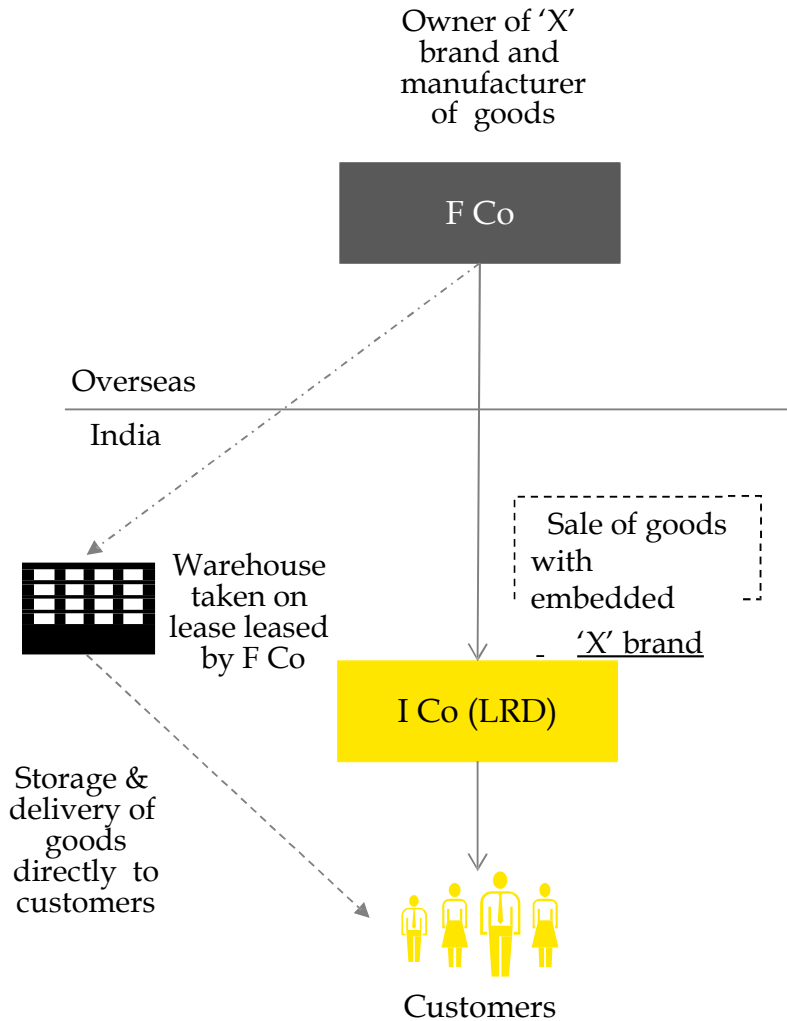


- ▶ F Co is engaged in manufacturing of consumer goods; sold under 'X' brand
- ▶ I Co is a WOS of F Co and is exclusive but limited risk distributor (LRD) for F Co in India
 - ▶ In respect of order solicited, privity of contact remains between customers and I Co
- ▶ For facilitating quick delivery, F Co has taken a warehouse on lease in India
 - ▶ FCo's employees maintains stock of goods in warehouse and delivers directly to customers as and when I Co makes a sale
 - ▶ Title and risk in the goods passes from F Co to I Co concurrent with passing to customers from I Co
- ▶ I Co is compensated with a relatively lower but assured return on sales (say, 2%)

PE exposure : Pre and Post BEPS

PE exposure by	Pre-BEPS	Post BEPS
LRD (I Co)	No PE (I Co neither acting on behalf of F Co nor is it selling goods that are owned by such F Co)	No PE (I Co neither acting on behalf of F Co nor is it selling goods that are owned by F Co)*
Warehouse taken on leased by F Co	No PE (automatic exemption for storage & delivery of goods, regardless of whether storage/ delivery is PoA in nature)	<ul style="list-style-type: none"> · PoA exclusion unlikely since storage and delivery functions crucial in supply chain of F Co · Even assuming PoA exemption is available vis-à-vis FCo's activities, no PoA exemption due to anti-frag rule · Profit attribution to both activities (including PoA activities)
<p>* India positions on the 2017 OECD Commentary - Distribution of goods owned by an enterprise through associated or related enterprise) may create PE for FE, particularly in a case where the risks are not borne by such distributor</p>		

Limited Risk Distributor (2)



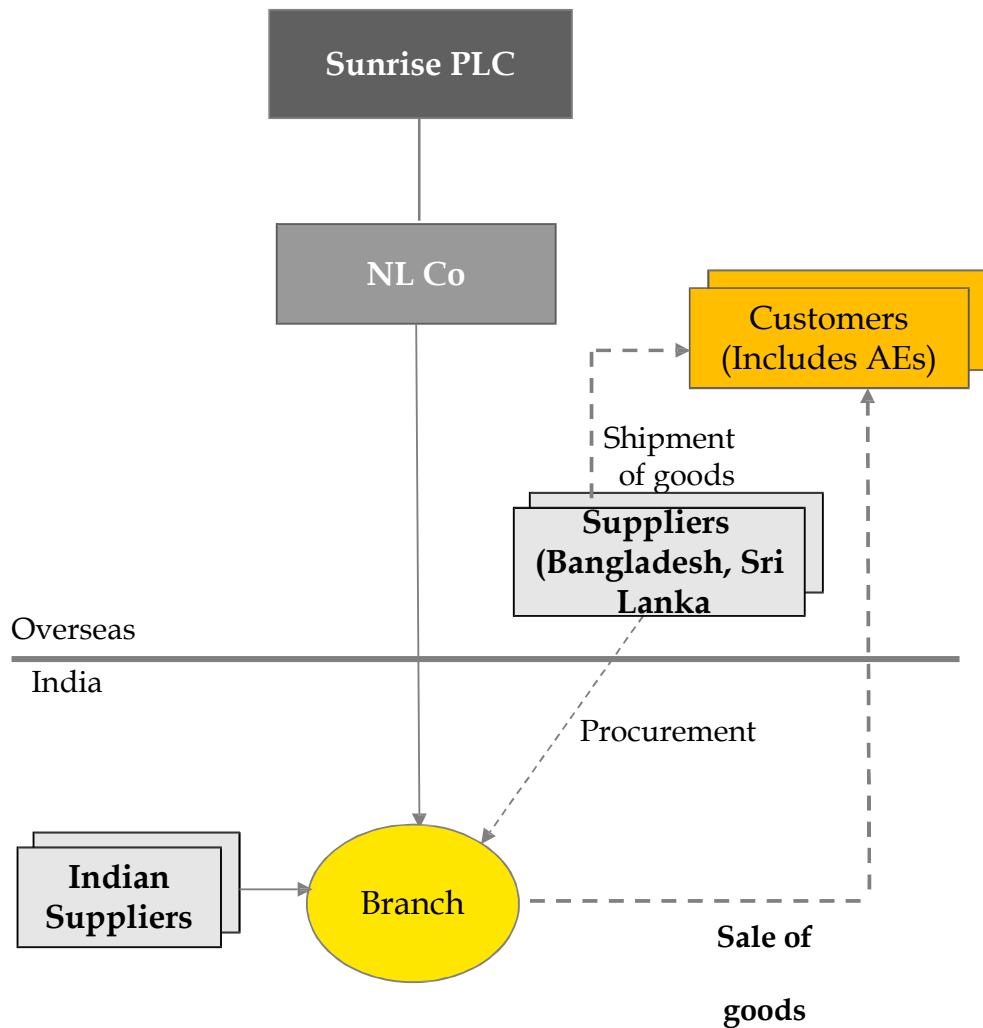
- ▶ F Co is engaged in manufacturing of consumer goods; sold under 'X' brand
- ▶ I Co is a WOS of F Co and is exclusive but limited risk distributor (LRD) for F Co in India
 - ▶ In respect of order solicited, privity of contact remains between customers and I Co
- ▶ A third party logistics service provider (LSP), working for multiple unrelated groups, maintains stock of goods on behalf of Group Co and delivers the same directly to customers as and when D Co makes a sale
 - ▶ F Co is granted unlimited access to this warehouse for inspecting and maintaining its goods
 - ▶ Title and risk in the goods passes from F Co to I Co concurrent with passing to customers from I Co

PE exposure : Pre and Post BEPS

PE exposure by	Pre-BEPS	Post BEPS
LRD (I Co)	No PE (I Co neither acting on behalf of F Co nor is it selling goods that are owned by such F Co)	No PE (I Co neither acting on behalf of F Co nor is it selling goods that are owned by F Co)*
Warehouse of ILSP	<p>No fixed place PE since disposal test fails -</p> <ul style="list-style-type: none"> · F Co does not have unlimited access to a separate part of the warehouse for inspecting and maintaining goods · Mere presence of goods belonging to FCo does not mean the place is at disposal of Fco 	No fixed place PE (hence, no need to evaluate PoA exemption and anti-frag. rule)

** India positions on the 2017 OECD Commentary - Distribution of goods owned by an enterprise (through associated or related enterprise) may create PE for FE, particularly in a case where the risks are not borne by such distributor*

Procurement hub in India



- ▶ The Group has a procurement hub in Netherlands, NL Co.
- ▶ NL Co's India branch procures goods from India as well Bangladesh and Sri Lanka
- ▶ FAR limited to procurement
- ▶ Goods are shipped and sold to overseas group entities as well as third party customers as per instructions of NL Co.

Issue:

- ▶ Whether branch constitutes PE of NL Co?

▶ **Pre-MLI implications**

- ▶ Arguable, automatic exemption if purchases solely for the enterprise

▶ **Post-MLI implications**

▶ **Position under India-NL treaty:**

- ▶ Treaty exclusion if activities “Solely” comprising of purchases
- ▶ India-NL treaty undergoes change and purchase exclusion may be denied if activity constitutes core function of NL Co

▶ **What if procurement hub was set up in Singapore instead of Netherlands?**

- ▶ No modification to India - Singapore CTA due to incompatibility
- ▶ PoA exemption continues

▶ **Position under ITA**

- ▶ S.9(1)(i): No attribution in respect of operations which are confirmed to the purchase of goods in India for the purpose of export
- ▶ Purchase from India exported to group entities or third party customer will be eligible for exclusion under Explanation 1(b) to S.9(1)(i)
- ▶ Income attributable to purchases from Bangladesh and Sri Lanka will still be taxable in India

▶ **What if agent in India was concluding purchase contracts?**

Purchase activity	PoA exemption	Impact on DAPE
Under tax treaties	Yes but not automatic	Yes but not automatic
Under ITA	Exclusion from profit attribution	??

Anti-splitting of contracts



Pre BEPS

Abuse of construction PE

Construction-type activities carried out under separate contracts by different companies do not create PEs as long as each contract does not exceed 12-month threshold

Post BEPS

Anti-contract splitting rule

Automatic aggregation of time spent by related entities if following conditions are met:

- FE has construction type project in source state
- Connected activities are carried out at the same site/ place by one or more CREs*
- FE's activities as well as each of such connected activities exceeds 30 days

* CRE defined with respect to control/ beneficial holding with threshold of 50% of voting/beneficial/equity interest

- ▶ Factors to determine if projects are “connected”*:
 - ▶ Additional contracts concluded with the same person or related persons;
 - ▶ Additional contracts is a logical consequence of a previous contract;
 - ▶ Activities would have been covered by a single contract absent tax planning considerations;
 - ▶ Nature of the work involved under the different contracts is same or similar;
 - ▶ Same employees are performing the activities under the different contracts.
- ▶ Even in pre- BEPS scenario, Service PE clause in UN MC uses phrase “same or connected project”
 - ▶ Implies aggregation of time spent on activities done for same or connected project
 - ▶ Factors indicated for aggregation of time similar to factors indicated by OECD above

*Para 53 of OECD Commentary 2017

Case Study on Anti-splitting of contracts

ACo has entered into contract with Indian Railways to build bullet trains in India. ACo further sub-contract its work as under:

Foreign enterprise	Country of residence	Activity performed	Time spent in India
A Co (Taxpayer)	Netherlands	Civil work	4 Months (excluding 1 month suspension due to floods)
B Co (WOS)	Israel	Manufacturing and commissioning of Bullet train	5 Months (2 months overlapping with A Co)
C Co (sub-contractor working exclusively for A Co group)	India	Laying down rail- line	25 days
D Co (independent sub- contractor without any supervision by A Co)	India	Building stations	3 Months
Does A Co create a Construction PE in India post BEPS??			

- ▶ Indian treaties do not contain anti-contract splitting rule. However, even pre-MLI, courts have interpreted construction PE clause strictly:
- ▶ Mumbai ITAT ruling in the case of **Valentine Maritime** (45 SOT 34)
 - ▶ Each building site, construction project, assembly project or supervisory activities in connection therewith has to be viewed on a standalone basis unless required by the specific DTAA (for e.g. Article 5(2)(k) of India Australia DTAA specifically provides for aggregation of different projects)
 - ▶ Exceptions as per the ITAT
 - ▶ Where the taxpayer has artificially split the contract to avoid the duration test
 - ▶ When the activities are so inextricably interconnected or interdependent that these are required to be viewed as a coherent whole

Anti-contract split provision introduced in Article 14 of MLI

India position on Article 14 of MLI - No reservation

Unless reserved by other country, provision supersedes the existing CTA to the extent incompatible

Implementation through MLI and Impact on Indian treaties

MLI Position	Impact on India's treaty with the other country	Treaties impacted based on MLI position
Opted for entire Article 14	High Impact - Provision of construction PE as well as exploration of natural resources subject to automatic aggregation rule	Indonesia, Israel, New Zealand
Opted for Article 14 except for PE provisions relating to exploration of natural resources	Moderate Impact - Provision of construction PE subject to automatic aggregation rule Provisions relating to natural resource PE remain intact	Australia, Netherlands, Norway
Reservation on entire Article 14	No Impact - no change in the treaty	Cyprus, Japan, Luxembourg, Singapore, UK, Canada

Closely related enterprises (CRE)



- ▶ BEPS introduces & defines new concept of ‘CRE’ - based on beneficial holding and control
 - ▶ **First part - General Rule based on control**

“a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises.”
 - ▶ **Second part - Based on percentage beneficial holding**

“a person is considered to be closely related to an enterprise if either one possesses directly or indirectly more than 50 per cent of the beneficial interests in the other or if a third person possesses directly or indirectly more than 50 per cent of the beneficial interests in both the person and the enterprise.”
 - ▶ Concept of CRE distinguished from the concept of Associated Enterprises under Article 9
 - ▶ Concept of CRE represents a more definite standard
-

Questions?



Thank You!

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