



Double tax treaty update

The Dbriefs Corporate Income Tax series

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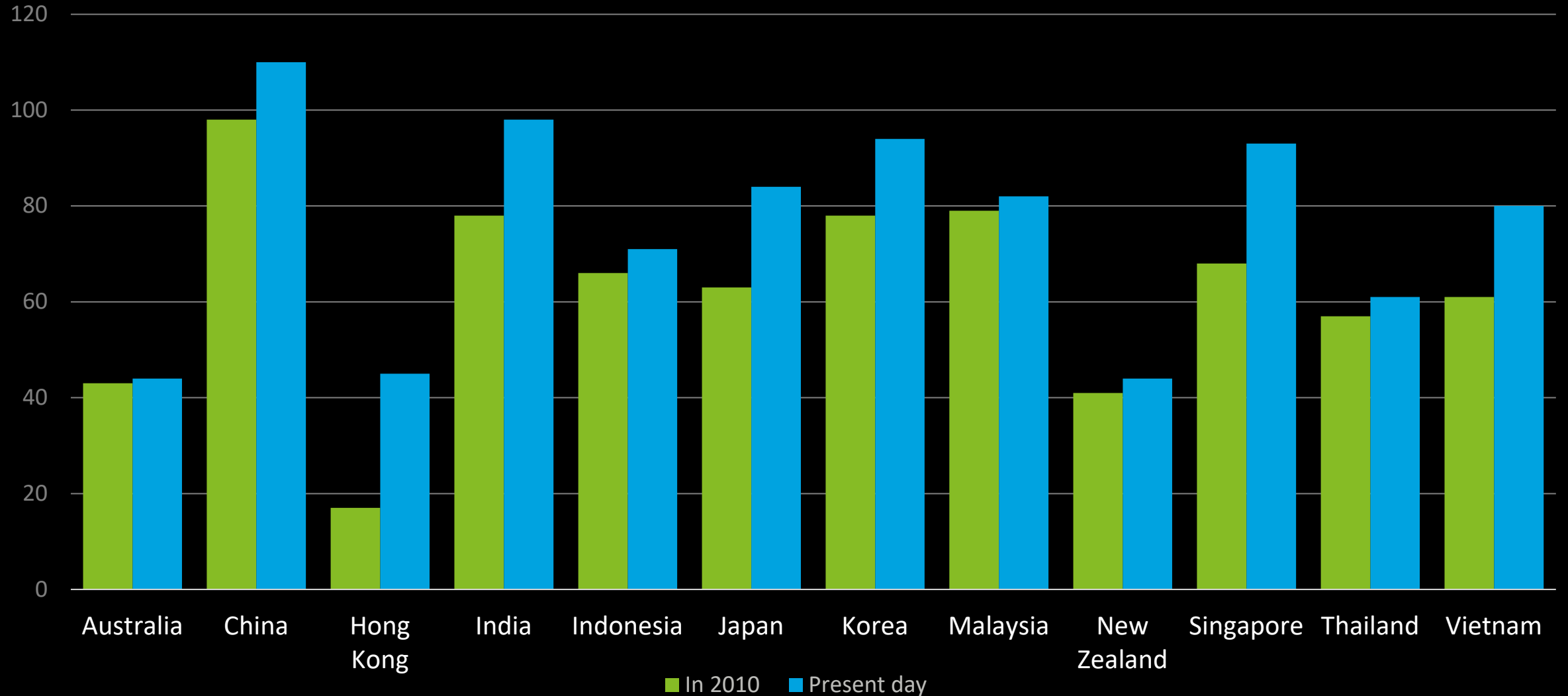
Agenda

- Tax Treaty status in APAC
- Principal Purpose Test (PPT)
- Permanent Establishment (PE) and residency
- General discussion
- Questions and answers

Tax Treaty status in APAC

Tax Treaty status in APAC

Number of treaties by country



Tax Treaty status in APAC

Treaties with major economies outside of APAC

Jurisdiction	US	UK	France	Germany	Italy	Spain	Netherlands	Brazil	Canada	Mexico	Russia	Luxembourg	Ireland
Australia	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓
China	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Hong Kong	✗	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓
India	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Indonesia	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✗
Japan	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
South Korea	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Malaysia	✗	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓
New Zealand	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓
Singapore	✗	✓	✓	✓	✓	✓	✓	✓*	✓	✓	✓	✓	✓
Thailand	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓
Vietnam	✓*	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓

* Not in force

✗ No Treaty

✓ Withhold tax rate is favored rate of 5% for dividends, 10% for interest/royalty

✓ Withholding tax rate is not favored nation rate

Tax Treaty status in APAC

Treaties with major economies within APAC

Jurisdiction	Australia	China	Hong Kong	India	Indonesia	Japan	South Korea	Malaysia	New Zealand	Singapore	Thailand	Vietnam
Australia		✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
China	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Hong Kong	✗	✓		✓	✓	✓	✓	✓	✓	✗	✓	✓
India	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓
Indonesia	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓
Japan	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓
South Korea	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓
Malaysia	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
New Zealand	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
Singapore	✓	✓	✗	✓	✓	✓	✓	✓	✓		✓	✓
Thailand	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Vietnam	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

✓ Withholding tax rate is not favored nation rate

✗ No Treaty

✓ Withhold tax rate is favored rate of 5% for dividends, 10% for interest/royalty

✓ Withholding tax rate is not favored nation rate

Polling question 1

Do you foresee a change to the use of Singapore and Hong Kong as regional headquarter centers?

- Yes, to a significant degree
- Yes, but only marginally
- No impact at all
- Don't know/not applicable

Multilateral instrument (MLI) status update

APAC MLI status table

Jurisdiction	Status	Entry into force	Earliest effective date for withholding taxes
Australia	In force	1 Jan 2019	1 Jan 2019
China	Signed	TBD	TBD
Hong Kong	Signed	TBD	TBD
India	In force	1 Oct 2019	1 Apr 2020
Indonesia	In force	1 Aug 2020	1 Jan 2021
Japan	In force	1 Jan 2019	1 Jan 2019
Korea	In force	1 Sep 2020	1 Jan 2021
Malaysia	Signed	1 Jun 2021	1 Jan 2022
New Zealand	In force	1 Oct 2018	1 Jan 2019
Singapore	In force	1 Apr 2019	1 Jan 2020
Thailand	Intends to sign	TBD	TBD

Based on OECD MLI database as of 19 March 2021

Bilateral treaty updates 2019 – 2021

Jurisdiction	In force (effective date)	Pending (signature date)
Australia	Israel (1 Jan 2020)	TBD
Bangladesh	Czech Republic (1 Jul 2021)	Nepal (5 Mar 2019)
China	New Zealand (1 Jan 2020) Spain (2 May 2021)	Italy (23 Mar 2019)
Hong Kong	Cambodia (1 Apr 2020) Estonia (1 Apr 2020) Georgia (1 Jan 2022) Macau (1 Jan 2021) Serbia (1 Jan 2021)	TBD
India	Iran (21 Mar 2021)	Chile (11 Mar 2020)
Indonesia	Cambodia (1 Jan 2021)	Singapore (4 Feb 2020)
Japan	Ecuador (1 Jan 2020) Georgia (23 Jul 2021) Jamaica (1 Jan 2021) Peru (1 Jan 2022) Spain (1 Jan 2022) Uzbekistan (1 Jan 2021)	Argentina (27 Jun 2019) Morocco (8 Jan 2020) Serbia (21 Jul 2020) Uruguay (13 Sep 2019)

Bilateral treaty updates 2019 – 2021 (Cont'd)

Jurisdiction	In force (effective date)	Pending (signature date)
Korea	Cambodia (1 Jan 2022)	TBD
	Czech Republic (1 Jan 2020)	
	Singapore (31 Dec 2019)	
	UAE (1 Jan 2021)	
Malaysia	Cambodia (1 Jan 2021)	TBD
Singapore	Tunisia (1 Jan 2020)	Serbia (26 Feb 2021)
	Turkmenistan (30 Apr 2020)	
Sri Lanka	Oman (1 Jan 2021)	TBD
Taiwan	Czech Republic (1 Jan 2021)	Saudi Arabia (2 Dec 2020)
Vietnam	Croatia (1 Jan 2020)	TBD
	Macau (1 Jan 2019)	

Principal Purpose Test (PPT)

Polling question 2

Will BEPS encourage me to centralize my holding and finance companies more?

- Yes, to a significant degree
- Yes, but only marginally
- No impact at all
- Don't know/not applicable

Principal Purpose Test (PPT)

Overview

Tax authority can deny treaty benefit if:

One of the principal purposes of the arrangement was to obtain the benefit

Unless:

Granting the benefit in the circumstances would be in accordance with object and purpose of treaty

- **OECD commentary**

- Consider all surrounding circumstances, case-by-case
- Not merely an effects test
- Arrangements inextricably linked to core commercial activity
- Arrangements whose form is not driven by the obtaining of a benefit
- Purpose of treaties: provide benefits in respect of bona fide exchanges of goods and services and movements of capital and persons

MLI choices made by Asia Pacific countries

PPT only

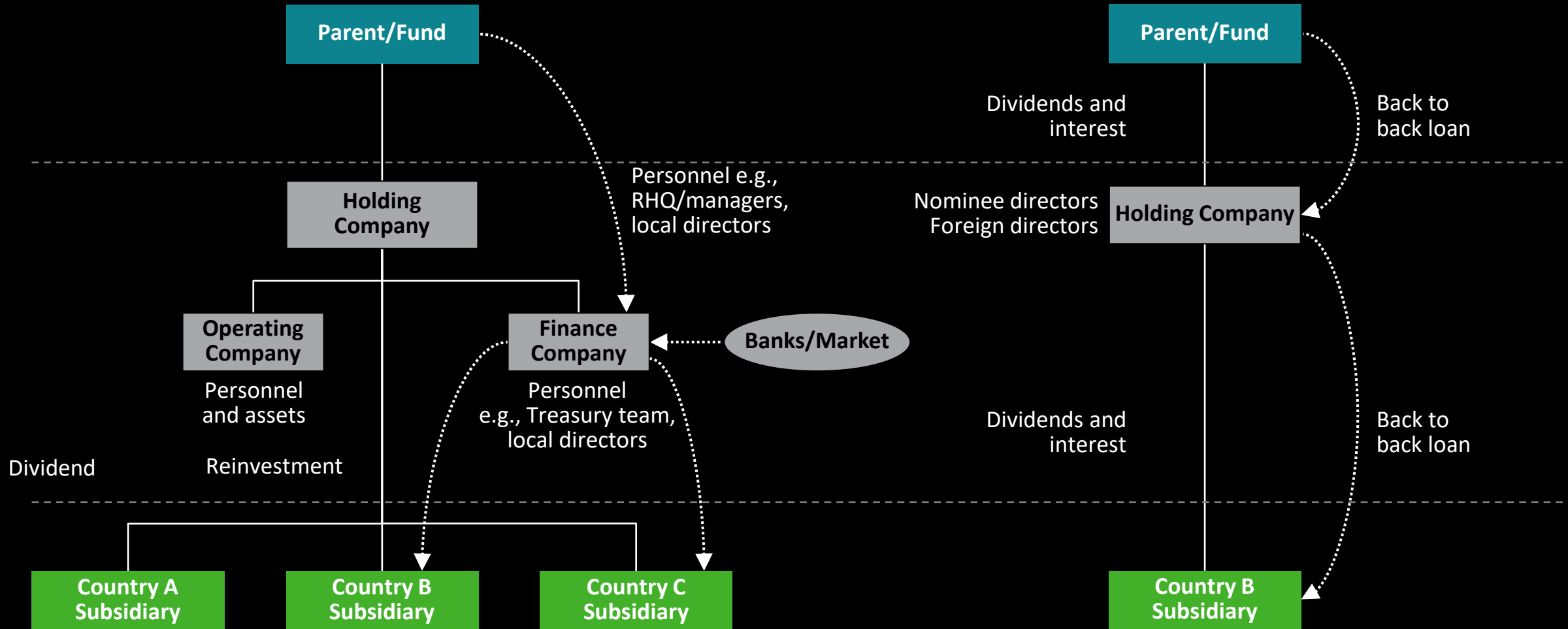
Australia	China	Hong Kong	Japan
Korea	Malaysia	New Zealand	Singapore

Simplified Limitation of Benefit (LOB) + PPT

India	Indonesia
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Principal Purpose Test (PPT)

Examples



Principal Purpose Test

Positive factors

People functions

- Headcount and payroll
- Seniority and relevant skills of personnel
- Real decision-making and substantive economic functions

Assets and funding

- Active conduct of a business
- Reinvestment (not a conduit)
- Appropriate capital structure

Context

- Attractive local business environment
- Transacting with third parties
- Dealing with multiple countries
- Contemporaneous evidence

Relevant substance

Permanent Establishment (PE) and residency

Impact of multilateral instrument and COVID-19 pandemic

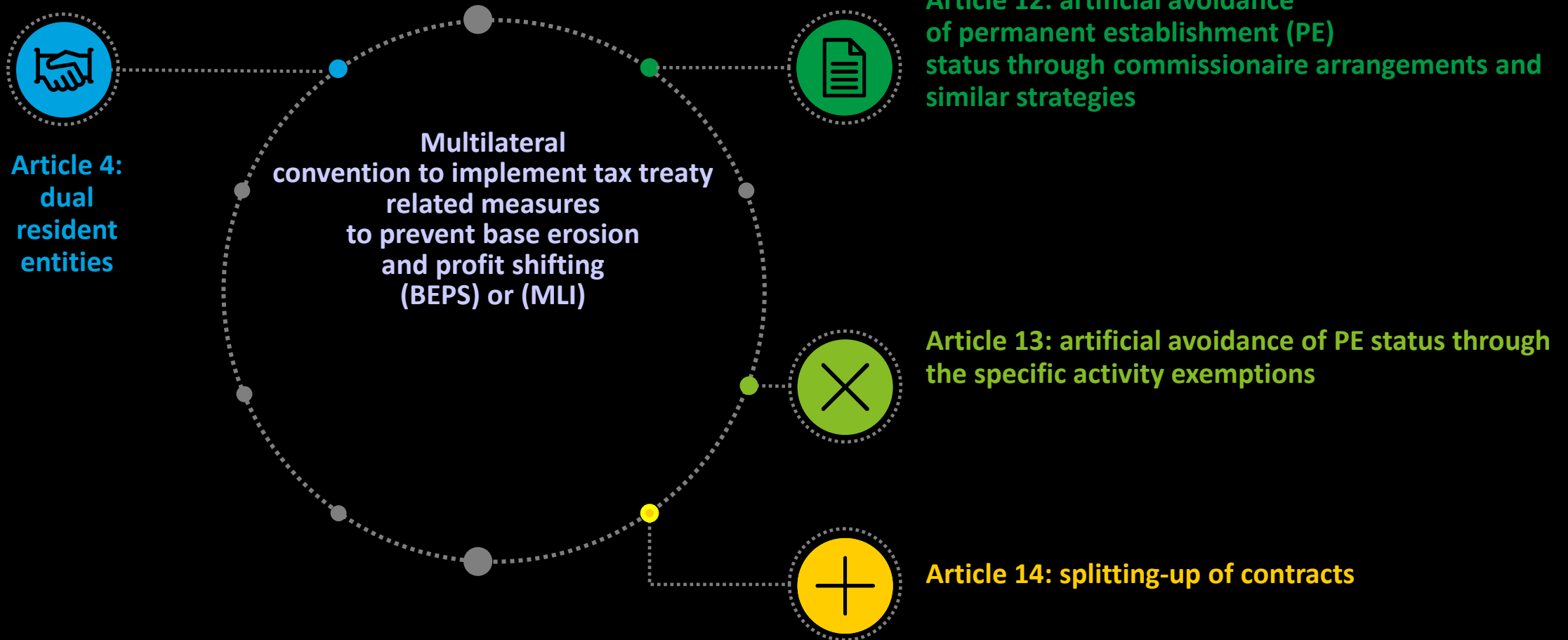
Polling question 3

My group has allowed or is planning to allow workers to work from home in a different jurisdiction on a habitual basis, after the COVID-19 pandemic.

- Agree
- Disagree
- Partly agree
- Can't say

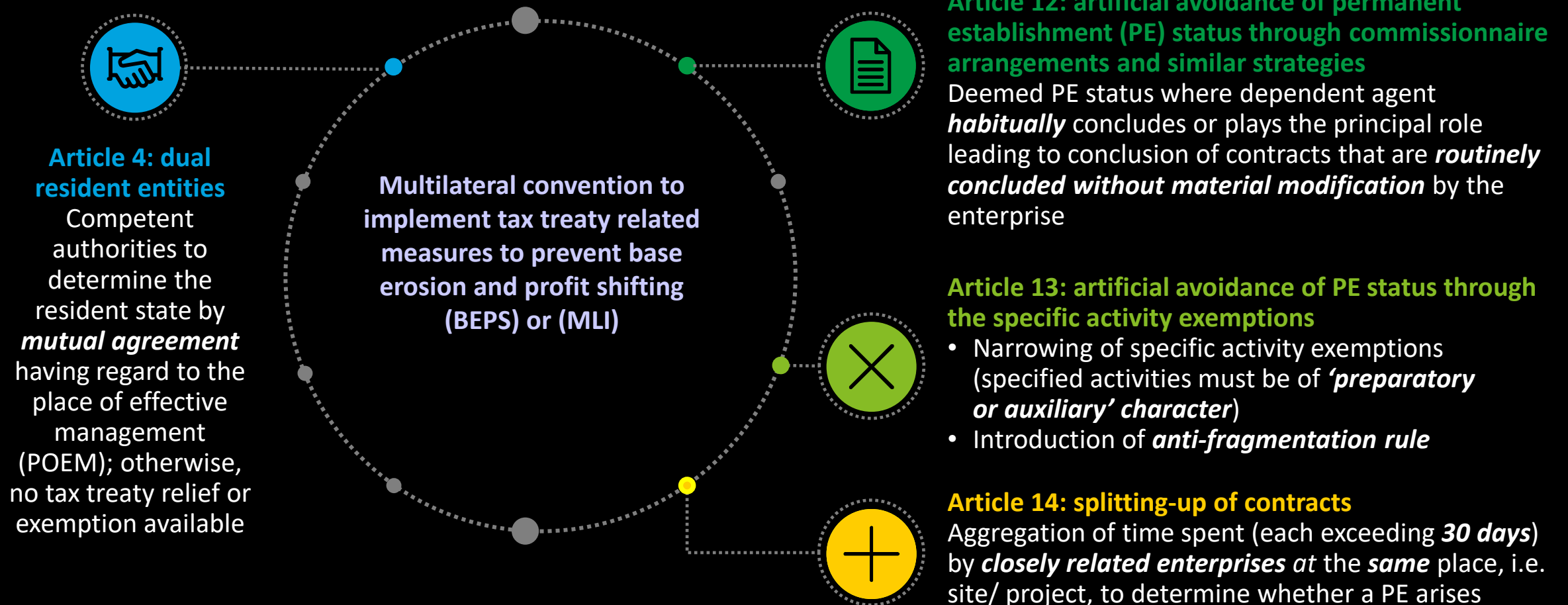
Permanent establishment; dual residence

Impact of multilateral instrument



Permanent establishment; dual residence

Impact of multilateral instrument



Permanent establishment; dual residence

MLI positions in APAC

Country	Article 4 (Dual residency)	Article 12 (Expanded agency PE)	Article 13 (Specific activity exemptions)	Article 13 (Anti-fragmentation rule)	Article 14 (Anti-contract splitting rule)
Australia	✓	✗	✓ (A)	✓	✓
China *	✓	✗	✗	✗	✗
Hong Kong *	✗	✗	✗	✗	✗
India	✓	✓	✓ (A)	✓	✓
Indonesia	✓	✓	✓ (A)	✓	✓
Japan	✓	✓	✓ (A)	✓	✗
South Korea	✗	✗	✗	✗	✗
Malaysia	✗	✓	✓ (A)	✓	✗
New Zealand	✓	✓	✓ (A)	✓	✓
Singapore	✗	✗	✓ (B)	✗	✗

✓ Opt in

✗ Opt out

A - Option A (All activities, whether already included in the tax treaty or not, to be of a preparatory or auxiliary character)

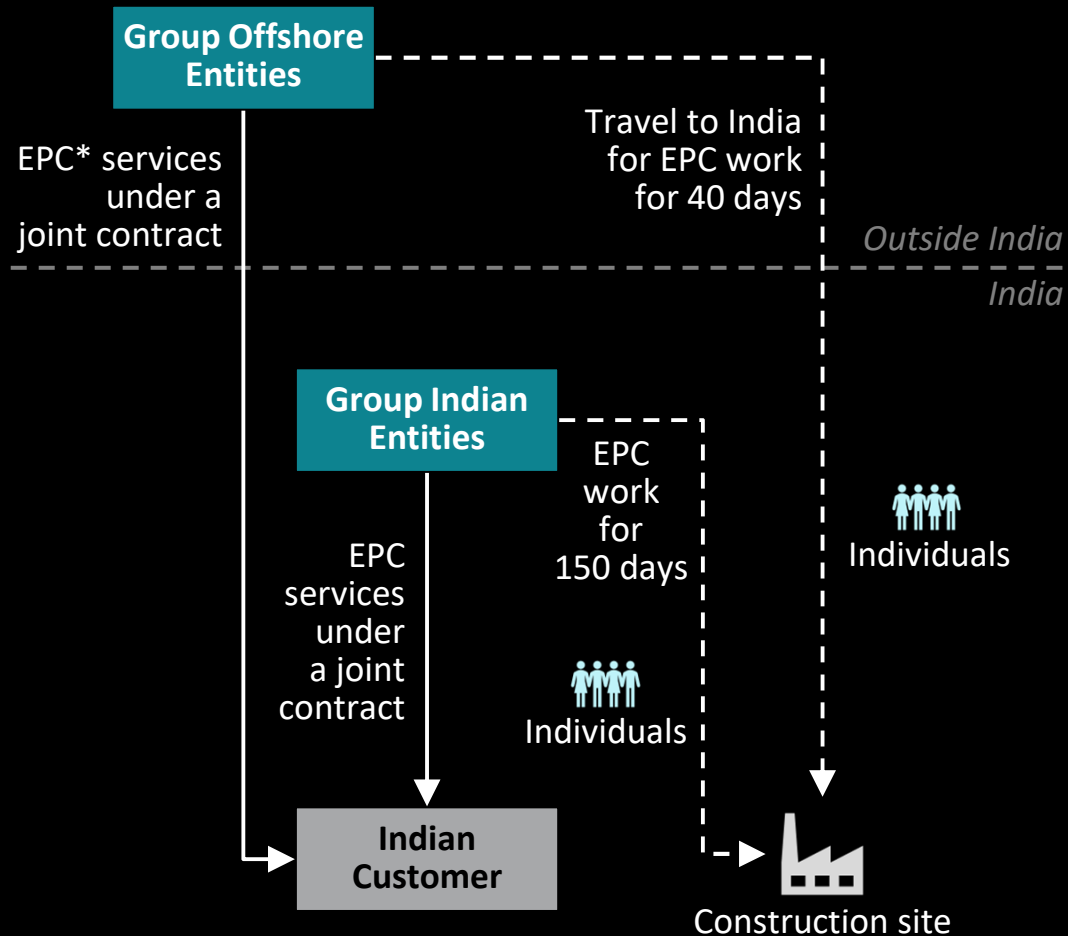
B - Option B (Activities already included in the tax treaty carved out; other activities to be of a preparatory or auxiliary character)

Source: <http://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>; <https://apcss.org/about/ap-countries/>

* Provisional positions as instrument of ratification **not** deposited at **30 March 2021**

Permanent establishment

Case study – impact of MLI: India

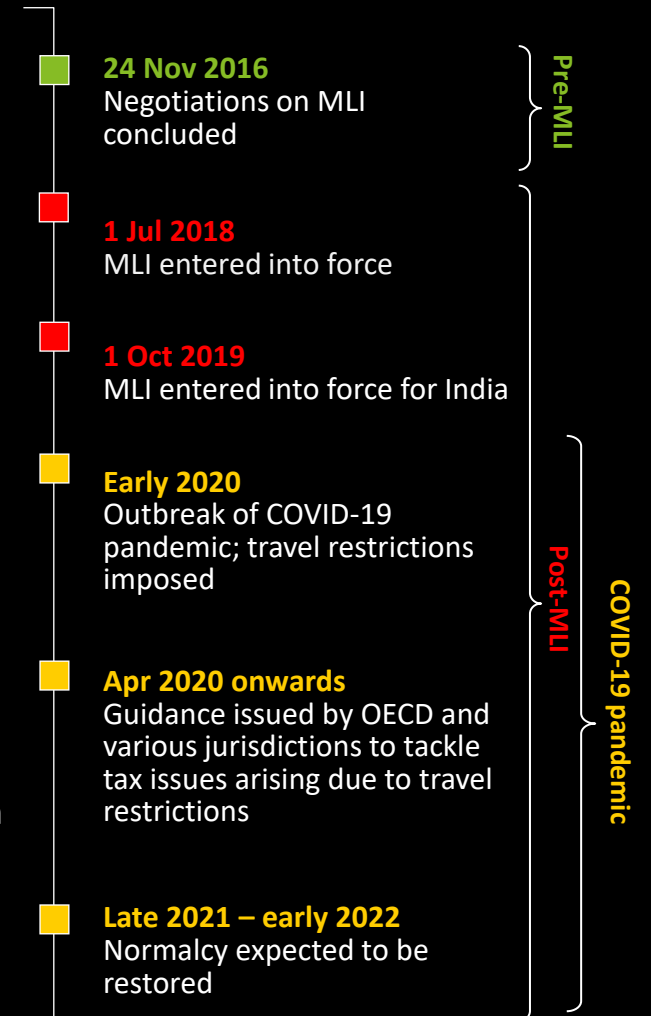
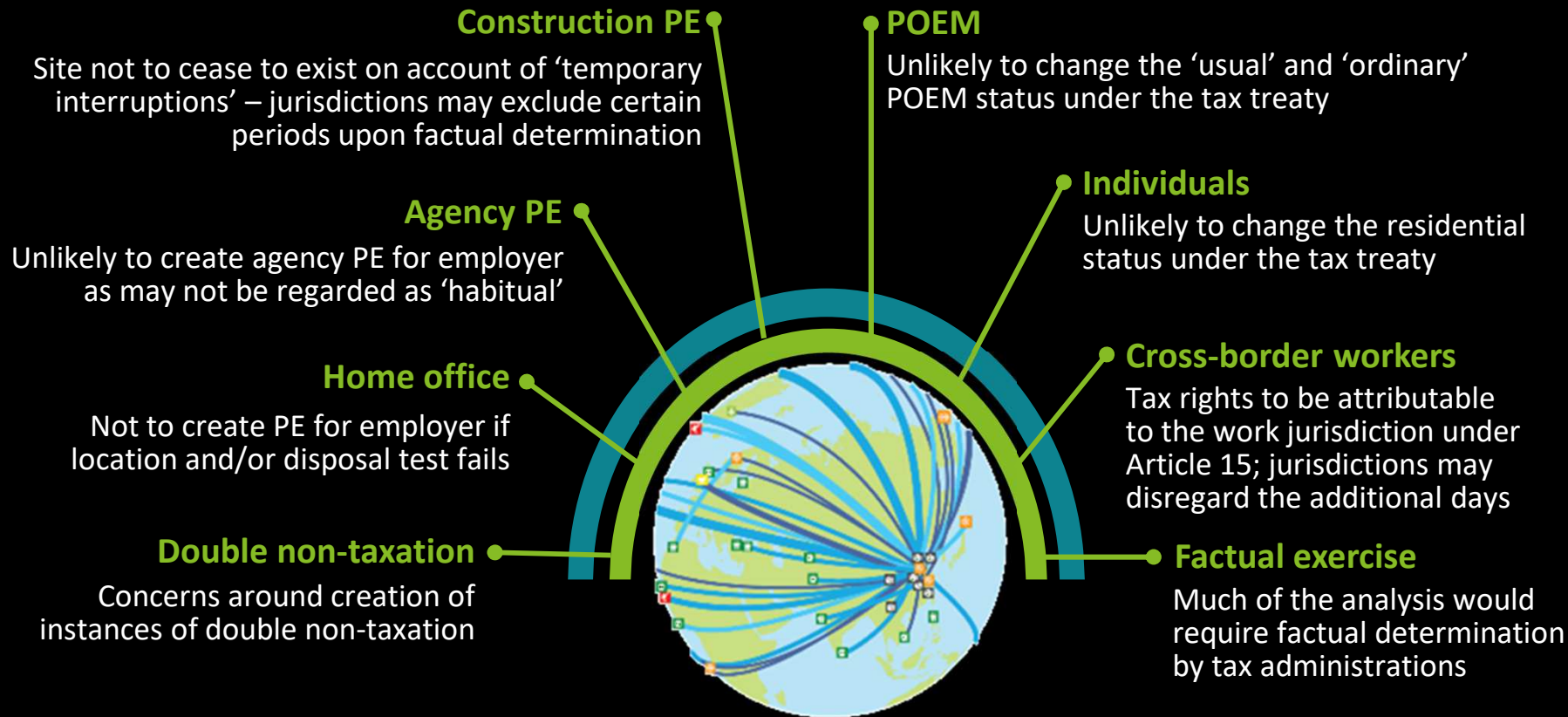


- **Constitution of construction PE of group offshore entities in India**
- **Pre-MLI**
 - If duration of presence of group offshore entities continues for a period exceeding the threshold period (typically six months)
- **Post MLI**
 - **Direct impact**
 - Assuming Article 14 of MLI is applicable in India in respect of the applicable tax treaty, duration of presence of group Indian entities at the construction site, i.e., 150 days, also to be considered
 - **Indirect impact**
 - Remuneration derived by employees/personnel of group offshore entities in respect of EPC work undertaken in India may be taxable in India if attributable to construction PE in India
- **Validity of past judicial precedents in relation to sub-contracting undermined?**

*Engineering, procurement and construction

Permanent establishment and residency

Impact of COVID-19 pandemic



Source: https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic

Permanent establishment and residency

Case study – impact of COVID-19 pandemic: Australia



FY 2019-20

Residential status of individuals in India

PE of Australian Entity in India

FY 2020-21

Residential status of individuals in India

PE of Australian Entity in India

*Individuals were working remotely from India for Australian Entity during their entire stay in India

Permanent establishment and residency

Case study – impact of COVID-19 pandemic: Australia



Date	Particulars*
1 Feb 2020	Individuals came to India
12 Mar 2020	Individuals were quarantined in India on account of COVID-19
25 Mar 2020	Last day of quarantine for individuals in India
26 Mar 2020	Individuals were unable to leave India on account of travel restrictions imposed by the Indian Government because of COVID-19
13 Jul 2020	Travel restrictions were lifted by the Indian Government; however, individuals were unable to travel back to Australia on account of travel restrictions imposed by the Australian Government because of COVID-19
28 Sep 2020	Travel restrictions were lifted by the Australian Government
29 Sep 2020	Individuals continued to stay in India due to the internal policy of the Australian Entity
2 Nov 2020	Individuals left India

*Individuals were working remotely from India for Australian Entity during their entire stay in India

FY 2019-20

Residential status of individuals in India: Period from 12 March to 31 March 2020 excluded; Likely to be non-residents

PE of Australian Entity in India: No explicit relaxation; To be determined as per Article 5 of India-Australia tax treaty

FY 2020-21

Residential status of individuals in India: No explicit relaxation; Likely to become resident under Indian tax law; To be determined as per tie-breaker rule of Article 4 of India-Australia tax treaty

PE of Australian Entity in India: No explicit relaxation; To be determined as per Article 5 of India-Australia tax treaty – remote working from 29 September to 2 November 2020 increases exposure

Polling question 4

My group has implemented, or is considering to implement, changes to its contracts as a result of the changes proposed by the MLI in relation to constitution of permanent establishments.

- Agree
- Disagree
- Partly agree
- Can't say

Question and answers

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G20/OECD Pillar 1 and Pillar 2 project: Latest developments and what to expect

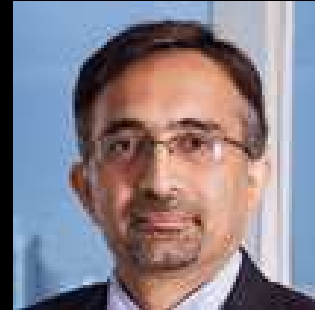
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