

IP Ownership & Dispute resolution

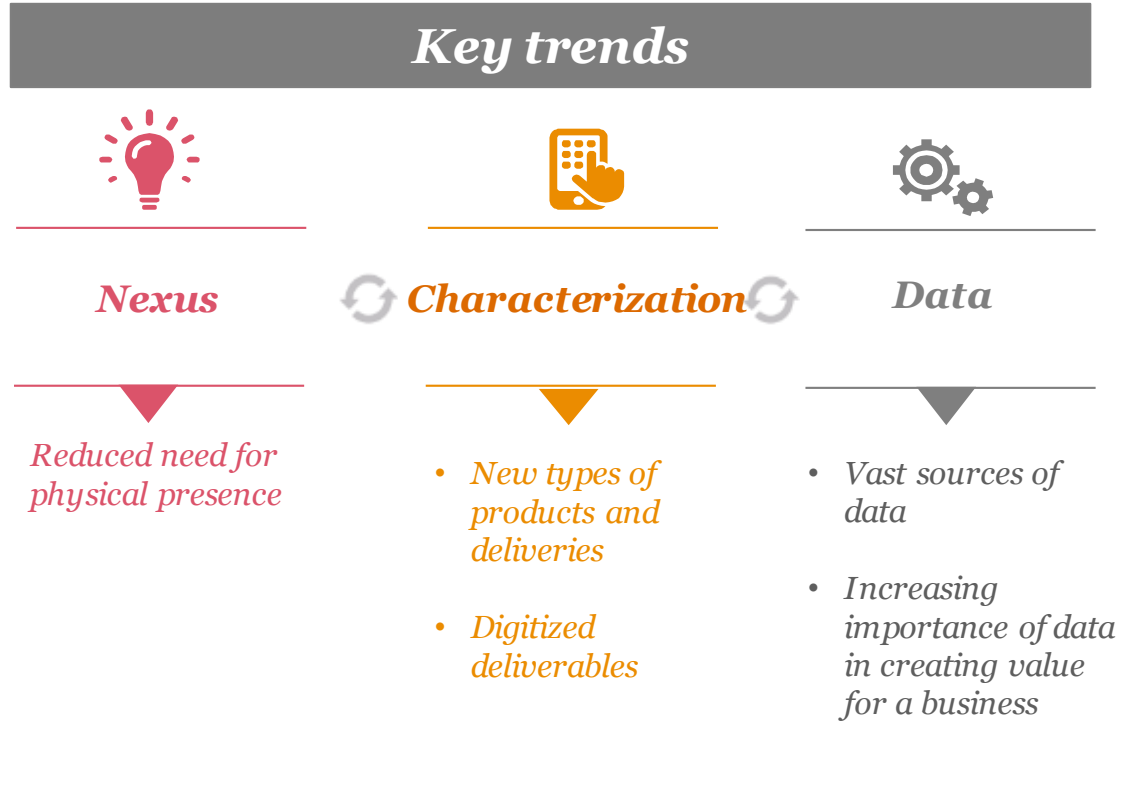
Arun Saripalli
December 21, 2019





IP Ownership

Evolving Business Landscape



New age business models

Business	Product/ Service/ Offering	Distinct factor vis-à-vis traditional business model
Airbnb	Accommodations	No ownership of places offered on rent
Alibaba/ Amazon/ eBay/ Flipkart	Retailing	No inventory holding
Paytm/ MobiKwik	Payment gateways/ digital wallets	No physical bank
Zomato/ Swiggy/ UberEats	Food delivery	No ownership of restaurants
Uber/ Ola	Car rentals/ rides	No ownership of cars



What is the intangible?



Who is the owner?

Intangibles - Concept of legal ownership vs economic ownership

Definition of intangible

The word intangible is intended to address something which is **not a physical asset or a financial asset**, which is **capable of being owned or controlled** for use in commercial activities, and whose **use or transfer would be compensated** had it occurred in a transaction **between independent parties in comparable circumstances**.

Traditional approach for determining IP ownership – Legal Ownership

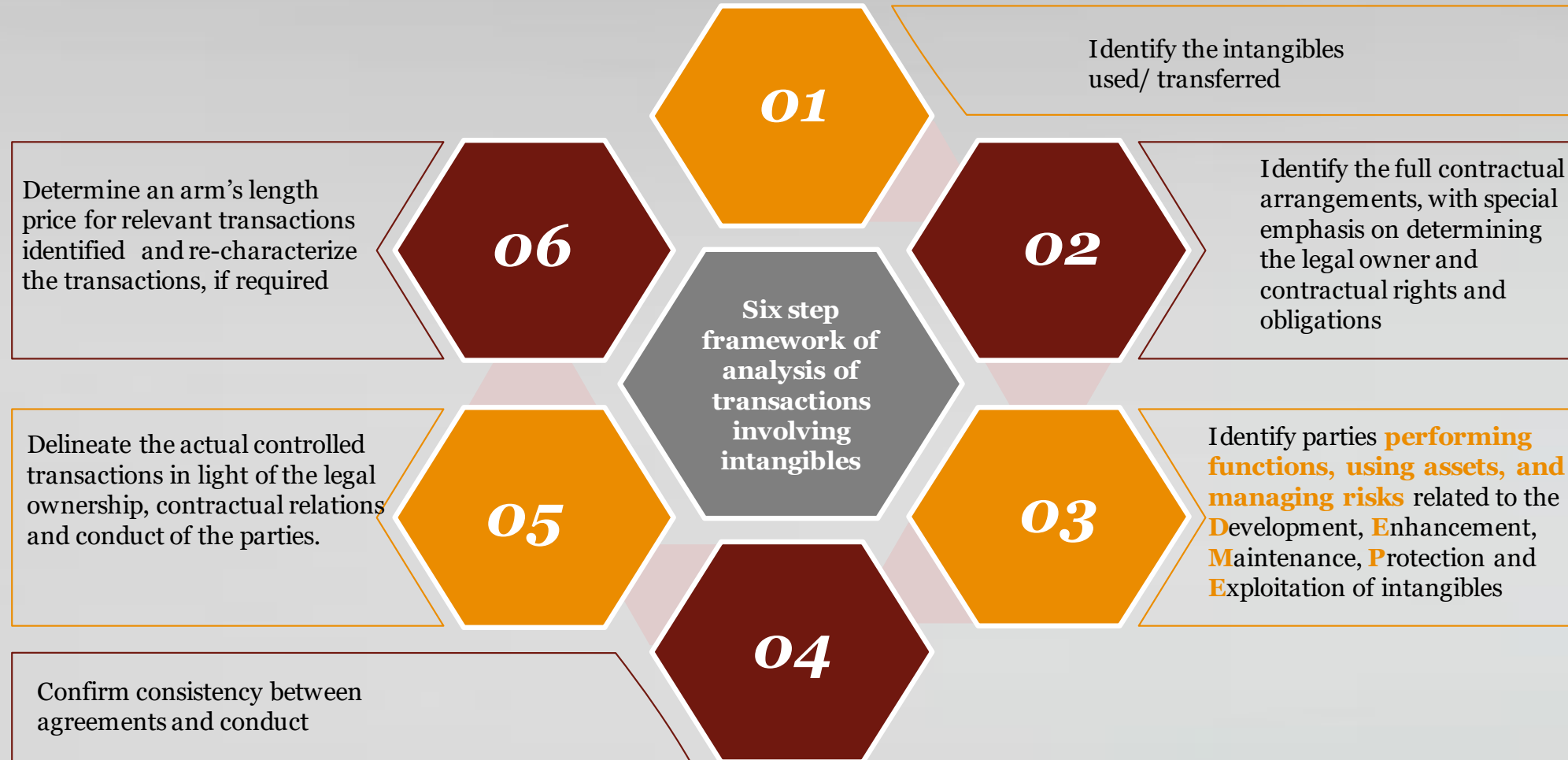
- Legal ownership is conveyed by application, enrolment or registration at, and/or issuance by the relevant national public body
- Legal ownership of intangibles by an enterprise alone does not determine entitlement to returns from the exploitation

Mere legal ownership is not sufficient for determining IP ownership

Evolving approach – Economic Ownership

- Economic ownership is linked to the notion of ‘economic fairness’.
- *“Economic ownership of a brand is an intangible asset, just as legal ownership.”*
(Delhi High Court in the case of Sony Ericsson)

Analytical framework for evaluating intangible compensation



DEMPE Functions

No two businesses are the same

The identification of SPFs* and DEMPE functions:



*Significant People Functions

DEMPE Scenarios

Scenario 1

Acts solely as a legal title shell, no capital at risk, no funding and no activities

Scenario 2

Funds IP development and does not perform all DEMPE functions

Scenario 3

Funds IP development and performs some DEMPE functions

Scenario 4

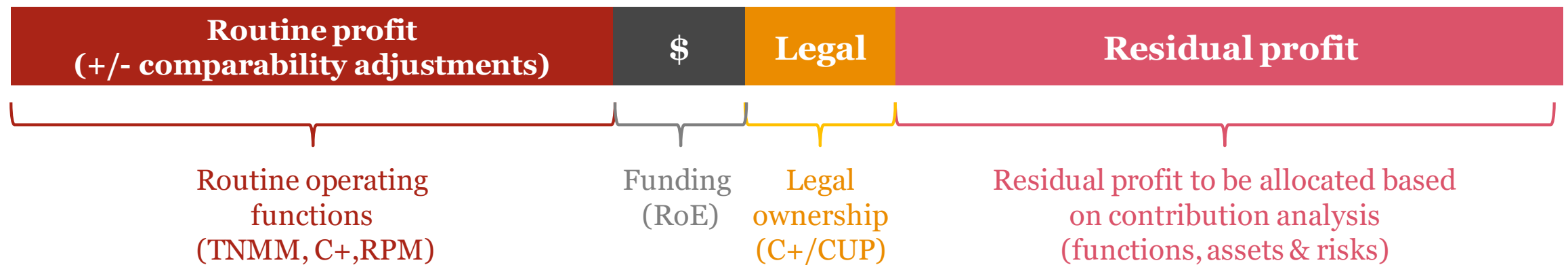
Funds IP development and performs all significant DEMPE functions

How profit will be split?

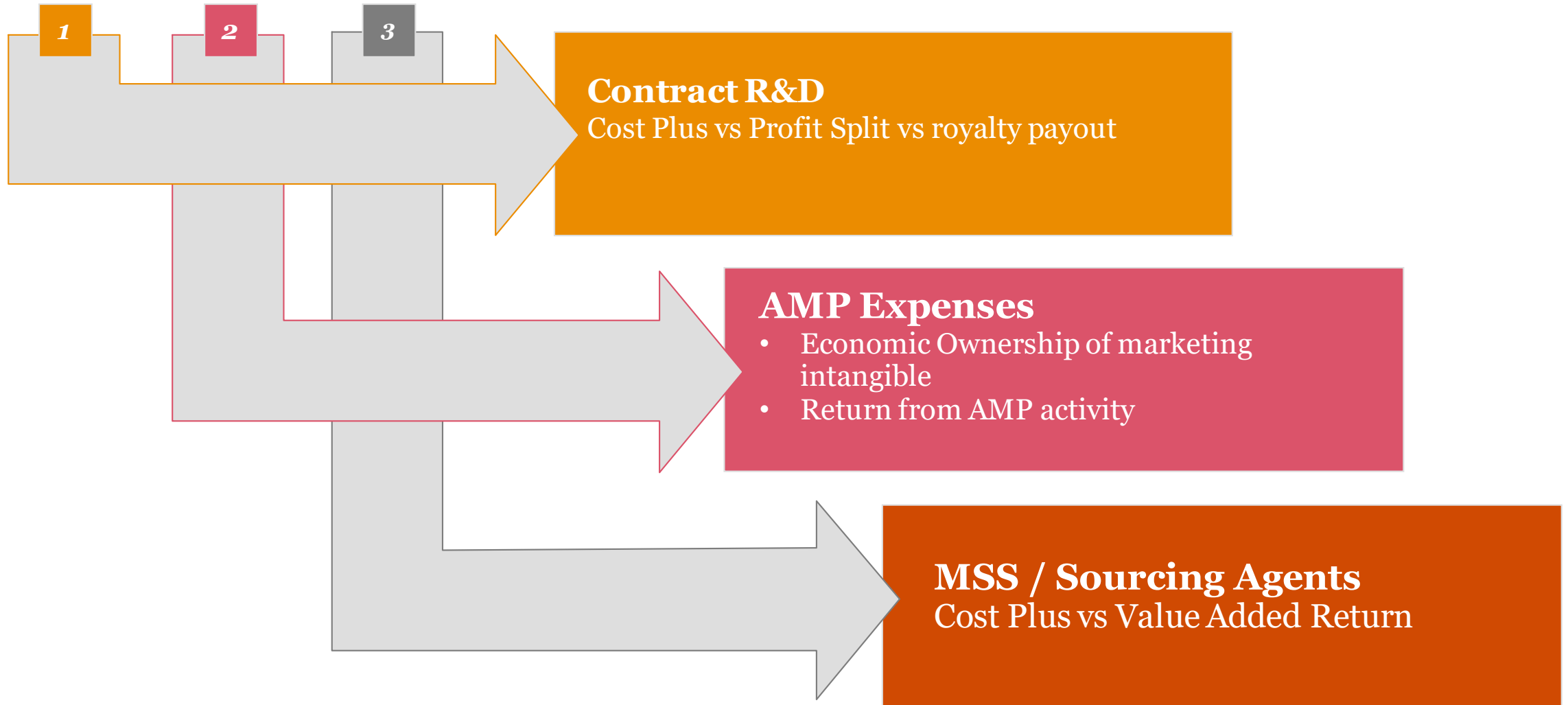
In the Past



Today and Tomorrow?



Indian Landscape



Key Takeaways

Post BEPS era – evaluate the contribution of each party to IP Development

Align contracts and actual conduct

Revisit “substance” of each of the contributors

Adopt pro-active litigation planning



Tax authority challenges and dispute resolution

Key TP issues in India



Advertisement, Marketing and Sales
Promotion expense



Contract R&D



IT / ITeS



Royalty and intra-group charges

Recent TP Developments in India

- Risk based audit for TP
- Increase in appeal thresholds
- Local Committee for high-pitched Litigation
- APA

Evolving Tax Landscape

EU Developments

- Tax transparency (DAC's)
- ATAD
- GAAR / SAAR (ATAD/PSD)
- Minimum ATAD standards implemented in Poland

UK. Diverted profits tax

Hungary's tax on digital advertising

INDIA. New digital economy business profit nexus concept → Equalisation levy & Significant Economic Presence

Israel. Digital presence PE

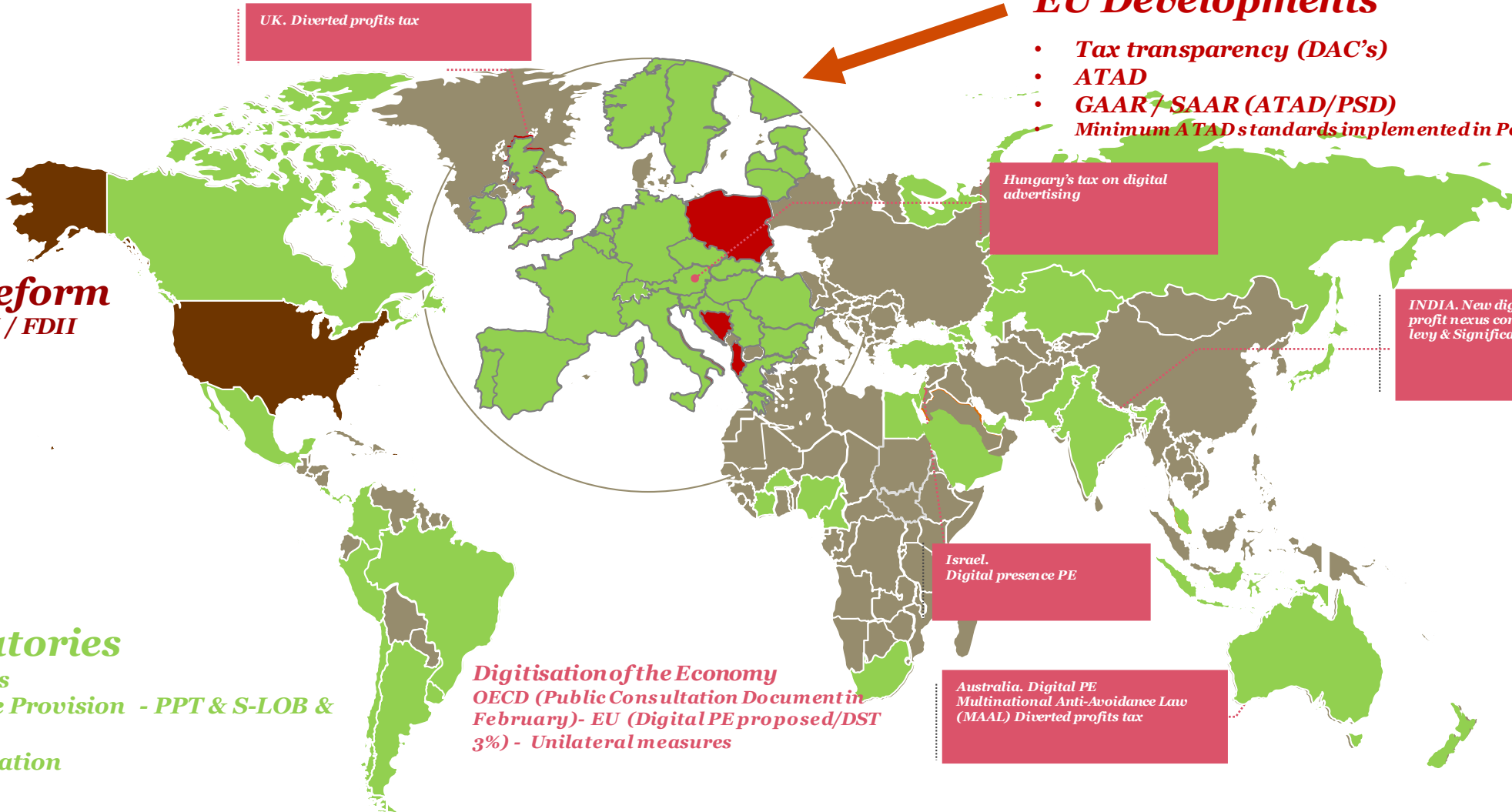
Australia. Digital PE
Multinational Anti-Avoidance Law (MAAL)
Diverted profits tax

US tax reform
BEAT / GILTI / FDII

Digitisation of the Economy
OECD (Public Consultation Document in February)- EU (Digital PE proposed/DST 3%) - Unilateral measures

MLI Signatories

- PE provisions
- Treaty Abuse Provision - PPT & S-LOB & LOB
- MAP / Arbitration
- ...



And the add-ons...

Unprecedented transparency

- *Disclosure requirements at a global level (CbCR + Master File)*
- *Exchange of information (significant tax rulings – includes unilateral APA agreements)*



*Expected surge in
TP disputes*



Embrace the change

Transfer pricing so far..
Reactive approach to date



Compliance focused



Protracted litigation



Invest in..



Value chain analysis



Defense against PSM



Variable royalty models



Understand and establish data value chain



Time to turn Pro-active



Upfront planning and price setting



Global alignment



Assume potential dispute, prepare litigation strategy



Upfront engage with tax authorities – BAPA / MAP

“

Better plan and act, than act on
the plan!!

Thank you