

IP Ownership & Dispute Resolution

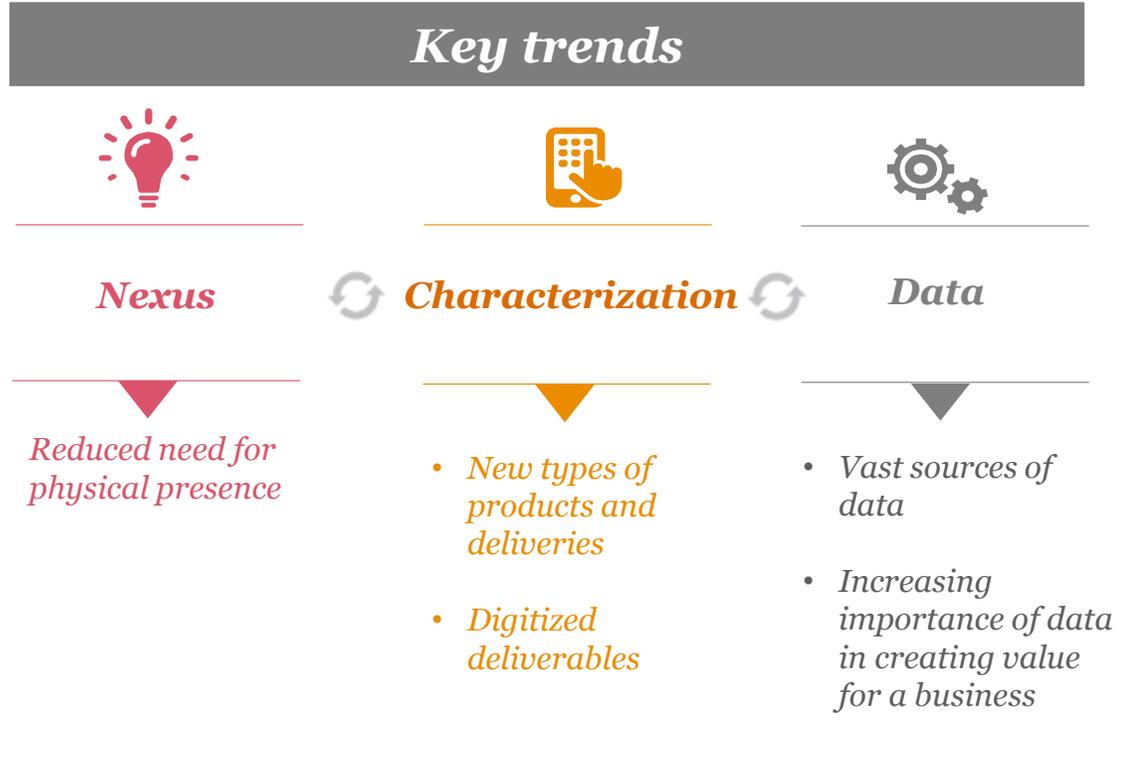
Arun Saripalli
January 25, 2020





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

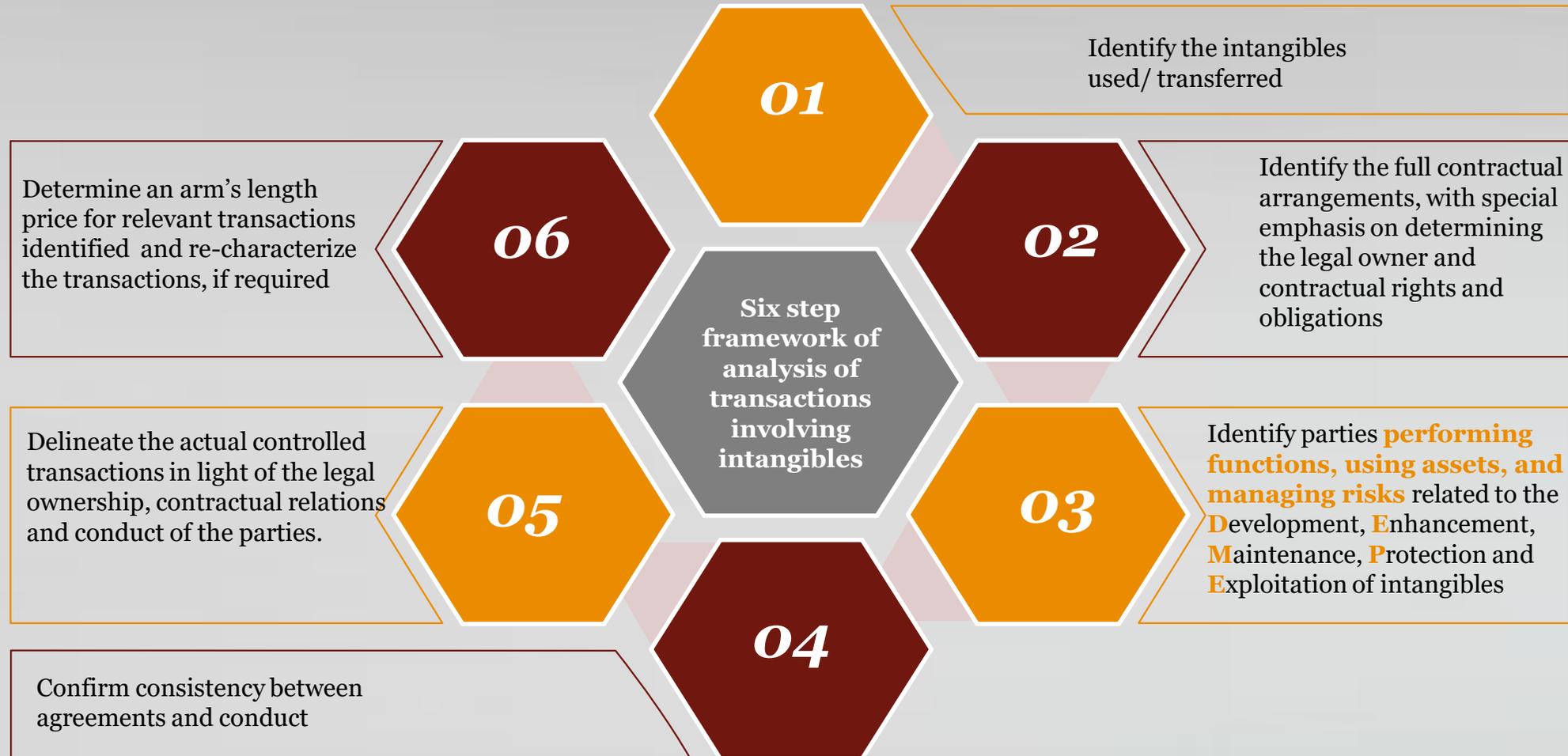
- Legal ownership is conveyed by application, enrolment or registration at, and/or issuance by the relevant national public body
- Legal ownership of intangibles by an enterprise alone does not determine entitlement to returns from the exploitation

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

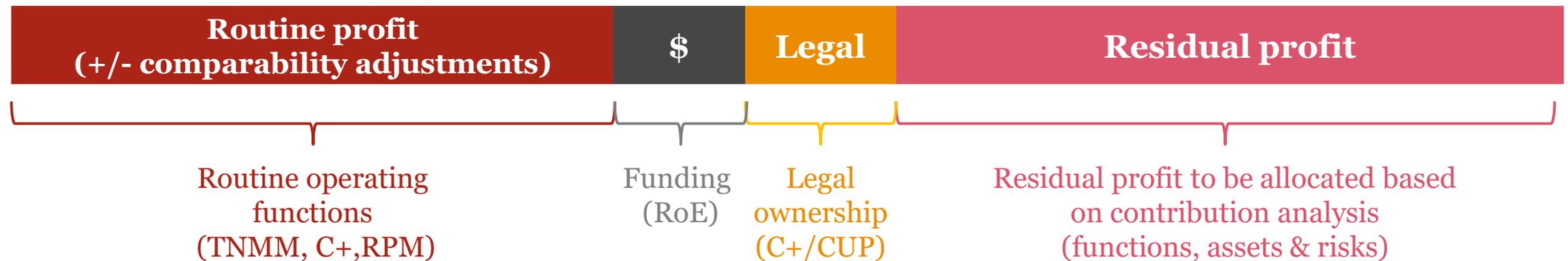
Funds IP development and performs all significant DEMPE functions

How profit will be split?

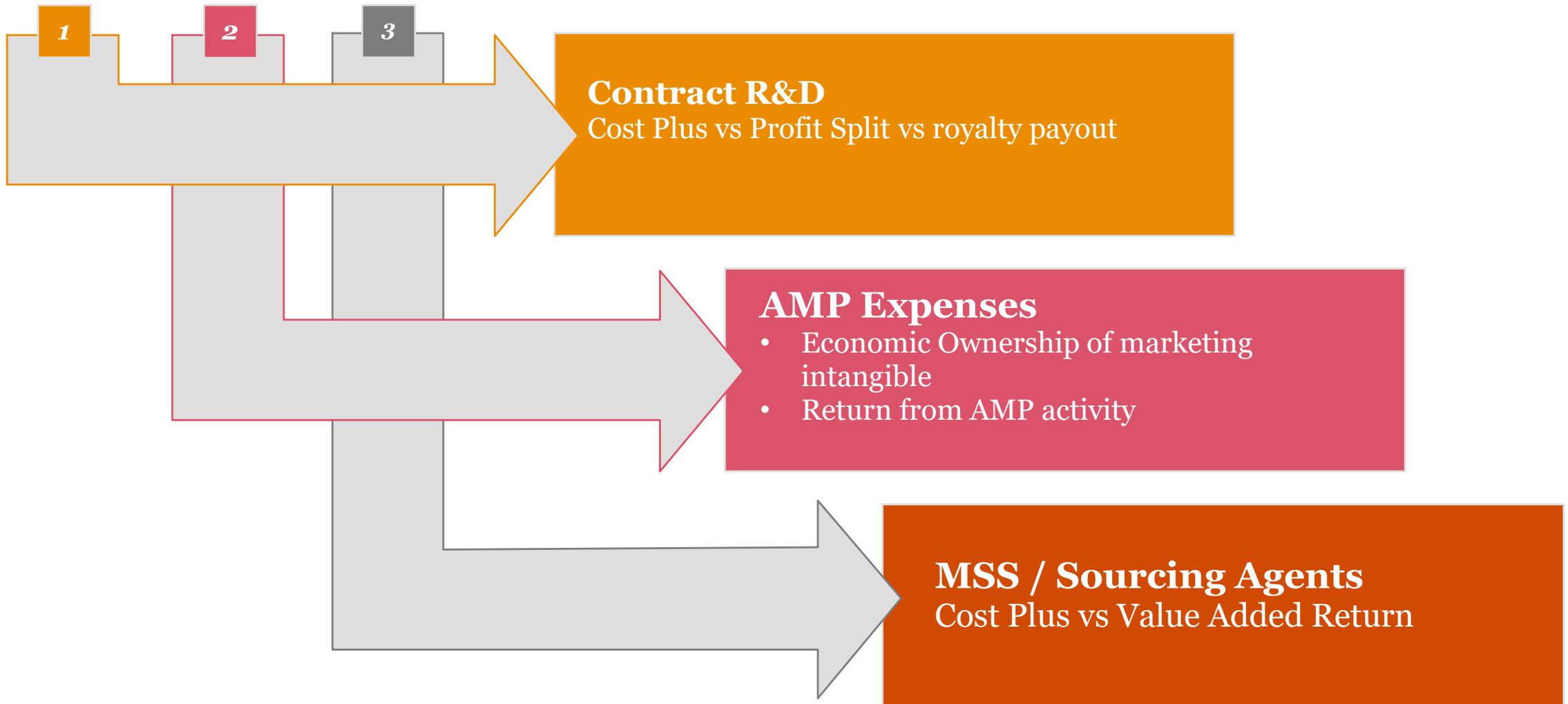
In the Past



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

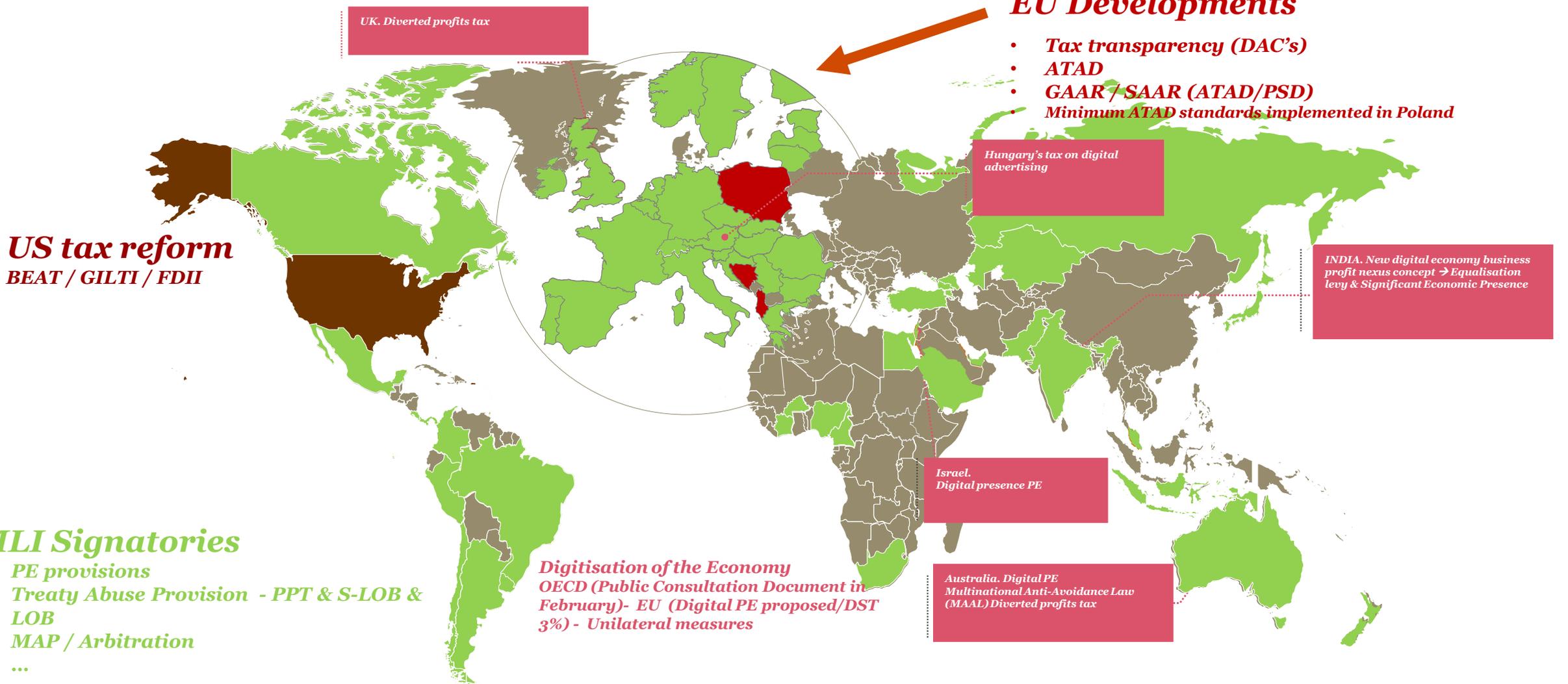


Royalty and intra-group charges

Recent TP Developments in India

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

Evolving Tax Landscape



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