

Seminar D

IMPLEMENTATION OF BEPS:

Middle East Asia (Including India)/ Oceania (Australia & New Zealand)

13th May, 2016



Chair:

Kuntal Dave (India)

Panel:

Emile Bongers (UAE)

Craig Elliffe (New Zealand)

Miranda Stewart (Australia)

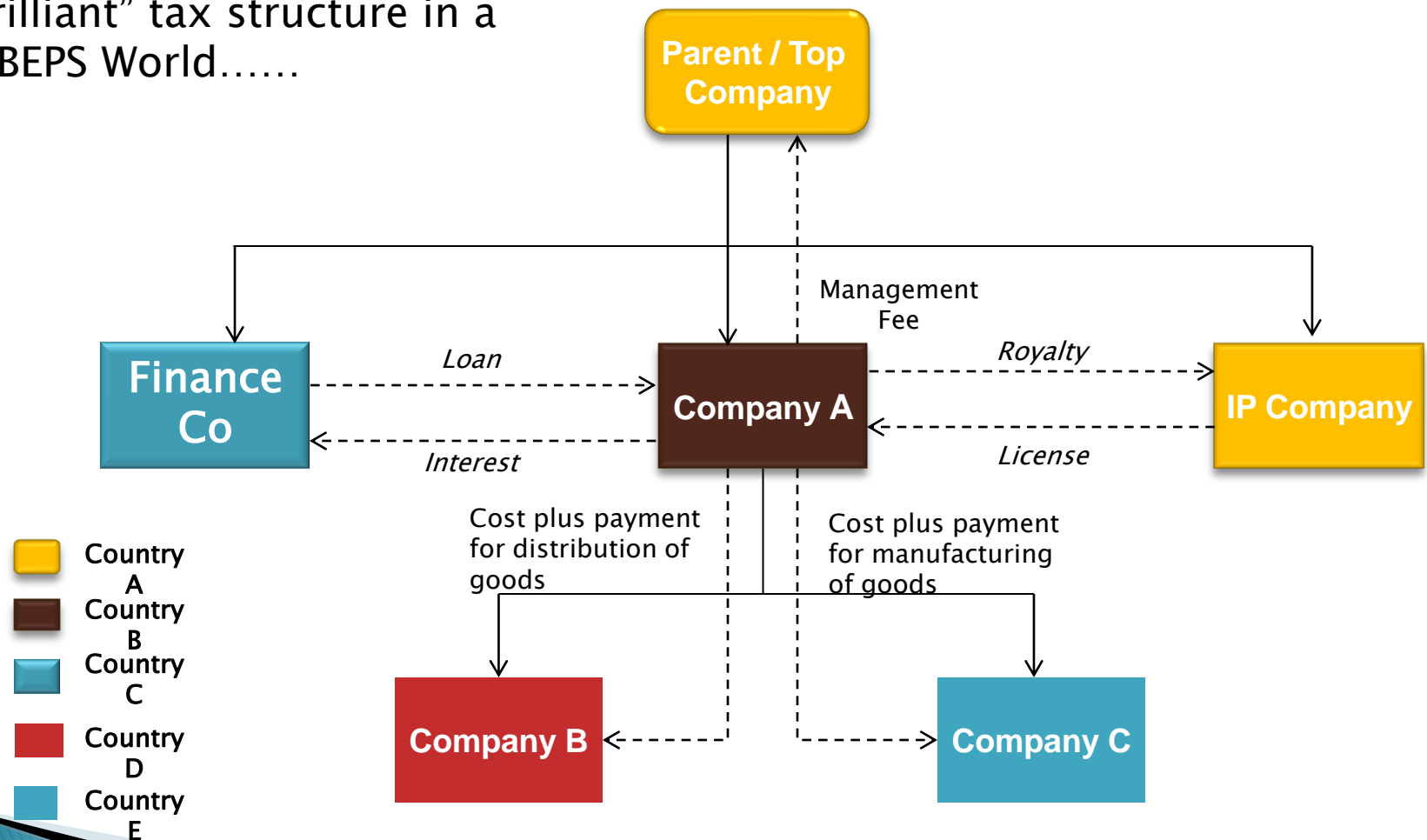
Kalyani Dahanayake (Sri Lanka)



Business Model of a Typical MNC Structure



A “brilliant” tax structure in a pre-BEPS World.....



Reaction from OECD

And reaction from the OECD.....

Loss of 1/4th Trillion dollars of tax revenue per annum



Potential BEPS impact

- Immediate
- Medium term
- Longer term;

- Increased risk of place of management PE
- Increased reporting and disclosure requirement
- Increased TP documentation requirement
- Increased risk of intra-group management charge
- Increased use of CFC rule in more jurisdictions

- Alignment for substance and return
- Treaty abuse
- Level of substance
- TP arrangement
- Taxation of income from online sale
- Use of hybrid entities
- Treaty abuse

- Risk of Hybrid structure
- TP alignment with value creation and exploitation of intangibles
- R&D arrangement
- Level of substance, particularly where preferential ruling obtained

- Increased tax authority aggression
- Focus on PEs – commissionaire, place of management
- Disclosure requirements for TP
- Threat of re – characterisation increase

Parent / Top Company

Finance Co

Company A

IP Company

Company B;

Company C

Harm to Govt.
Harm to individual tax payers
Harm to business



Country A



Country B



Country C



Country D



Country E

Overview of BEPS Action Plan



- Action 1: Address the tax challenges of digital economy

- Action 15: Development of a multilateral instrument for amending bilateral treaties

- Action 2: Neutralise the effects of hybrid mismatch arrangements
- Action 3: Strengthen CFC rules
- Action 4: Limit base erosion via interest deductions and other financial payments
- Action 5: Counter harmful tax practices more effectively, taking into account transparency and substance



- Action 11: Establish methodologies to collect and analyse data on BEPS and actions addressing it
- Action 12: requires taxpayers to disclose their aggressive tax planning arrangements
- Action 13: Re-examine transfer pricing documentation
- Action 14: Making dispute resolutions more effective

- Action 6: Prevent treaty abuse
- Action 7: Prevent the artificial avoidance of permanent establishment status
- Action 8: Consider transfer pricing for intangibles
- Action 9: Consider transfer pricing for risks and capital
- Action 10: Consider transfer pricing for other high-risk transactions

AIM

- Establishing international coherence of corporate tax systems
- Restoring the full effects and benefits of international standards
- Ensuring transparency
- Certainty and predictability
- Establishing multilateral instrument



Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)

► Kuntal Dave (India)

Action 6: Prevent treaty abuse, Action 8: Consider transfer pricing for intangibles, Action 9: Consider transfer pricing for risks and capital, Action 10: Consider transfer pricing for other high-risk transactions

- Strongly adopts 'substance vs form principle'
- Strongly adopts source based taxation
- Coining the concept of "location savings" and "value creation"
- Transfer Pricing adjustment for AMP Expenses – setting precedent **would** over and R & D Expenses.
- Wide definition of "Royalty"
- Circular on R&D raised by CBDT which provided safe harbour norms by the same time it provided clear understanding on who controls risk (TP's paper on CTC journal)

Non applicability

- Action 2: Neutralise the effects of hybrid mismatch arrangements
 - Exchange Regime
 - Not recognising different tax treatment for hybrid instruments
- Action 3: Strengthen CFC rules
 - Absence of CFC
 - Strong view on PoEM
- Action 4: Limit base erosion via interest deductions and other financial payments
 - Absence of thin capitalisation rules
 - India has GAAR
 - Provisions of Section 14A

Inforce

- Action 6: Prevent treaty abuse
 - Aggressive tax administration e.g. India-Mauritius treaty
 - LoB clause in recent treaties
 - Submission of TRC
 - Quote PAN
 - Structure Withholding Norm
 - Robust reporting request – 285BA, GAAR
 - Tax treaties – US, Singapore, UK
- Action 11: Establish methodologies to collect and analyse data on BEPS and actions addressing it
 - Disclosure of financial statements
 - Audit reports, Valuations, etc.

Action 7: Prevent the artificial avoidance of permanent establishment status

- Even single day presence of employee or a personnel in India can trigger PE
- Indian treaties have service PE clause in general.
- These are the existing domestic rules to prevent artificial avoidance of PE status
- OECD model has been very well known
- PEs more strict than many other countries

Advocates Practice

- Action 14: Making dispute resolutions more effective
 - AAR, APA & DRP regime
- Action 5: Counter harmful tax practices more effectively, taking into account transparency and substance
 - OECD
 - EoI & FATCA
 - Cyprus
- Action 15: Development of a multilateral instrument for amending bilateral treaties

Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)



► Emile Bongers (UAE)

- Coverage area/ geography
- In Middle East currently no income taxes and VAT levied
- Most countries (such as the UAE) currently levy no or limited corporate income taxes, while a few (such as Saudi Arabia and Kuwait) do levy some corporate income taxes
- Also given its limited tax history, the Middle East has generally been passive in terms of BEPS
- However, countries in the Middle East are very active in extending the tax treaty network but no tax treaties between the 6 GCC countries currently in place
- Low oil prices substantially affect the economies, demand to diversify economy amongst others by introducing taxes
- Introducing VAT within the 6 GCC countries on short notice is much more likely than introducing corporate income taxes

Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)



► Craig Elliffe (New Zealand)

- Major newspaper investigation has found the 20 multinational companies most aggressive in shifting profits out of New Zealand overall paid virtually no income tax, despite recording nearly \$10 billion in annual sales to Kiwi consumers.
- New Zealand foreign trusts have been exposed as a popular “tax friendly” vehicle for foreign investors as part of the “Panama Papers Leaks”

Panama Papers: IRD says it has probed foreign trusts as experts fret

TOM PULLAR-STRECKER
Last updated 11:15, April 5 2016



TOM PULLAR-STRECKER/FAIRFAX NZ

The form to set up a foreign trust in New Zealand is one of Inland Revenue's shortest.

The Government's defence of lax foreign trust rules has put Inland Revenue in a tight spot, a leading law professor says.



Matt Nippert Matt Nippert is a business investigations reporter

Top multinationals pay almost no tax Zealand

8:15 AM Friday Mar 18, 2016

Company Taxation

Taxation



f 8.1k



A major *Herald* investigation has found the 20 multinational companies most aggressive in shifting profits out of New Zealand overall paid virtually no income tax, despite recording nearly \$10 billion in annual sales to Kiwi consumers.

The analysis of financial information of more than 100 multinational corporations and their New Zealand subsidiaries showed that, had the New Zealand branch of these 20 firms reported profits at the same healthy rate as their parents, the combined income tax bill would have been nearly \$490 million.

herald.co.nz/business/news/article.cfm?c_id=3&objectid=11607336

Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)



▶ Miranda Stewart (Australia)

- Chair of G20 in 2014; on troika in 2013
- Senate Inquiry into Multinational Tax Avoidance
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance
 - Has been going for last 2 years; report due 22 April 2016
- ATO audit; transfer pricing investigations and litigation
 - Chevron Australia Holdings Pty Ltd v CoFT [2015] FCA 1092
- High wealth individuals
 - “Project Wickenby” – offshore financial accounts; Liechtenstein leaks – several Australians involved
 - Project “Do IT” – amnesty for voluntary disclosure, offshore
 - Now... Panama Papers
 - Inspector-General of Tax, Inquiry into Tax Information Exchange

Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)



► Kalyani Dahanayake (Sri Lanka)



Introduction & Quick Response

(Pre BEPS Scenario Comments/Concerns)



► Kalyani Dahanayake (Sri Lanka)

- Hybrid mismatches.
- Treaty shopping , and other forms of treaty abuse .
- Abuse of transfer pricing .
- Non availability of Information

Measures & Policy Announcements



► Kuntal Dave (India)

Action Plan 5

- Section 115BBF – Tax on income from patents.
- Total income of an eligible assessee includes any income by way of royalty in respect of a patent developed and registered in India.
- Concessional tax rate– 10%
- No other deductions or allowances
- Effective from 1st April, 2017 (Assessment year 2017–18 onwards)

Action Plan 13

- Furnishing of documents by specified person.
- Companies with consolidated revenue of more than euro 750 million
- To be implemented from 1st April 2017. to summarise, India would be the first to file the cbc report in the world by November 2017.
- Details rules/clarification is expected

Equalisation levy

- 6% on the specified services on payments made by resident to non– resident
- No credit of the tax of equalisation levy paid
- Specified services involve
 - Online advertisements
 - Provision for digital advertising
 - Provision for any facility or service for online advertisements
 - Other services to be notified

▶ Emile Bongers (UAE)

- Measures so far are very limited
- No specific announcements on BEPS have been made, but Saudi Arabia has participated in the BEPS project as G20 member
- Saudi Arabia and Kuwait are carefully monitoring permanent establishment situations and applying the virtual PE approach
- Although as such transfer pricing rules is a relatively new concept, intra-group transactions and arrangements in Saudi Arabia and Kuwait are now more closely reviewed and challenged

Measures & Policy Announcements Cont'd...

► Craig Elliffe (New Zealand)

- New DTAs
 - Luxembourg, Portugal and Slovak Republic. Renewals with China, Australia, Korea and Norway
- Current legislation
 - GST on online services and intangibles
 - A new withholding tax on non-residents selling residential property within two years of acquisition (short-term capital gains tax)
- Proposed legislation (expected in July and November)
 - Revision to the non-resident withholding tax rules on interest expense to related party lenders
 - Tighter rules for Approved Issuer Levy on third party lending
- Proposed legislation (expected in July and November)
 - Legislation to affect the automatic exchange of information (AEOI)
 - Due diligence and reporting requirements on financial institutions from 1 July 2017 to affect exchange of information with other tax authorities from September 2018
 - Legislation clarifying that the New Zealand general anti-avoidance rule applies to double tax agreements (Action 6)
 - Introduction of new hybrid rules (Action 2)
 - Consideration of earnings stripping thin capitalisation rules to bolster existing balance sheet based rules (Action 4)

Measures & Policy Announcements Cont'd...

▶ Miranda Stewart (Australia)

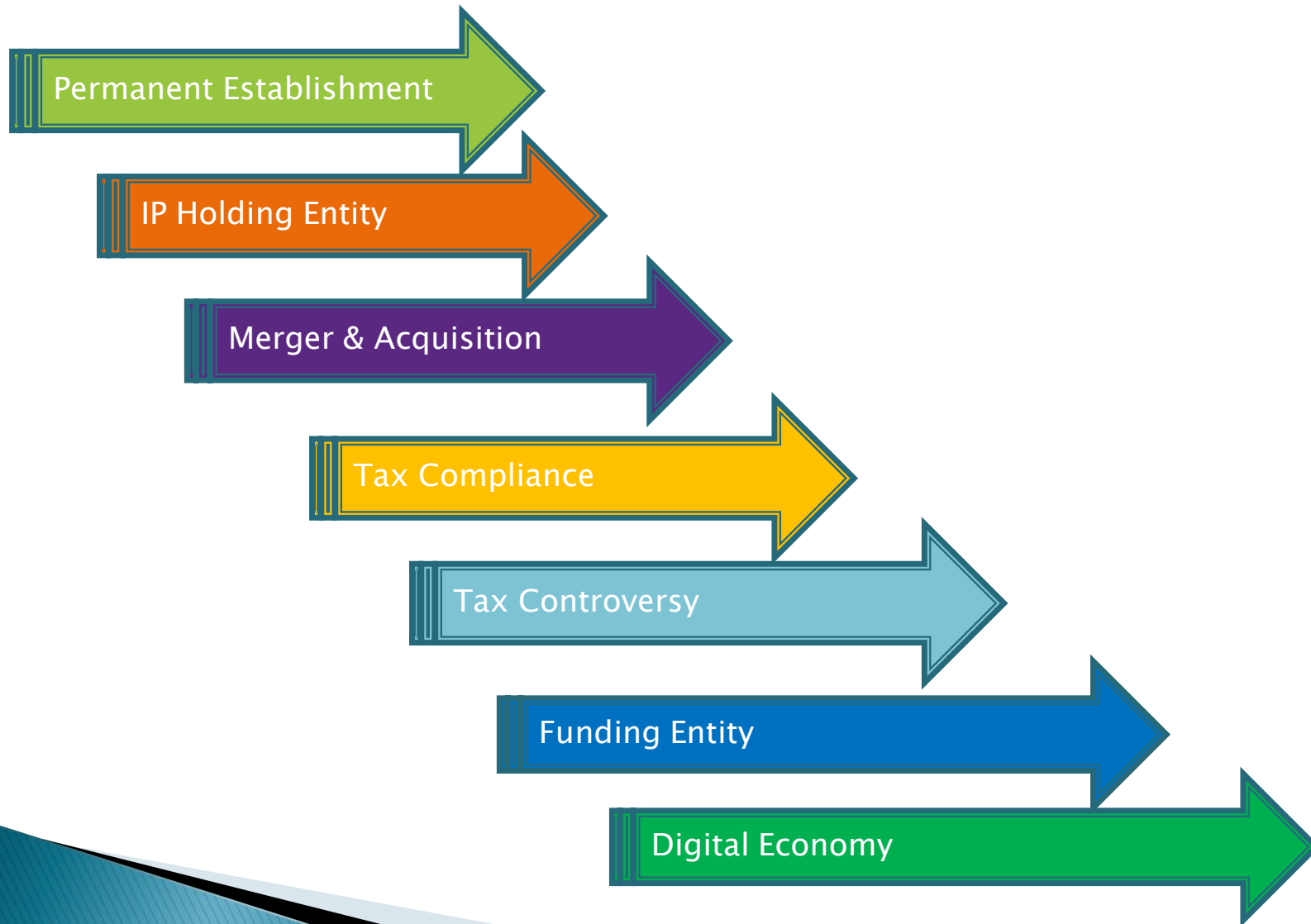
- Unilateral
 - Budget 2016: Diverted profits tax; enforcement; penalties
 - Multinational anti-avoidance law
 - Thin capitalization rules tightened of ratio to 1.5:1; transfer pricing rules review
 - Corporate tax transparency
- Bilateral
 - Renegotiation of DTAs (e.g. Germany, December 2015)
 - Information exchange, audit
- Multilateral
 - Multilateral Administrative Convention; Automatic EoI
 - cBc reporting
 - BEPS multilateral Instrument negotiation
 - Coordinating multilateral investigations e.g. Panama Papers

Measures & Policy Announcements Cont'd...

▶ Kalyani Dahanayake (Sri Lanka)

- External Audits
- Internal Audits
- Information branch
- Clearance Certificate
- Tax clearance
- Presently working out a policy with the Ministry associate with the OECD framework for the implementation of the BEPS measures

Implementation Challenges / Areas of Concern



Implementation Challenges / Areas of Concern Cont'd...



Permanent Establishment

IP holding entity

Merger & acquisition

Tax compliance

Funding entity

Digital economy

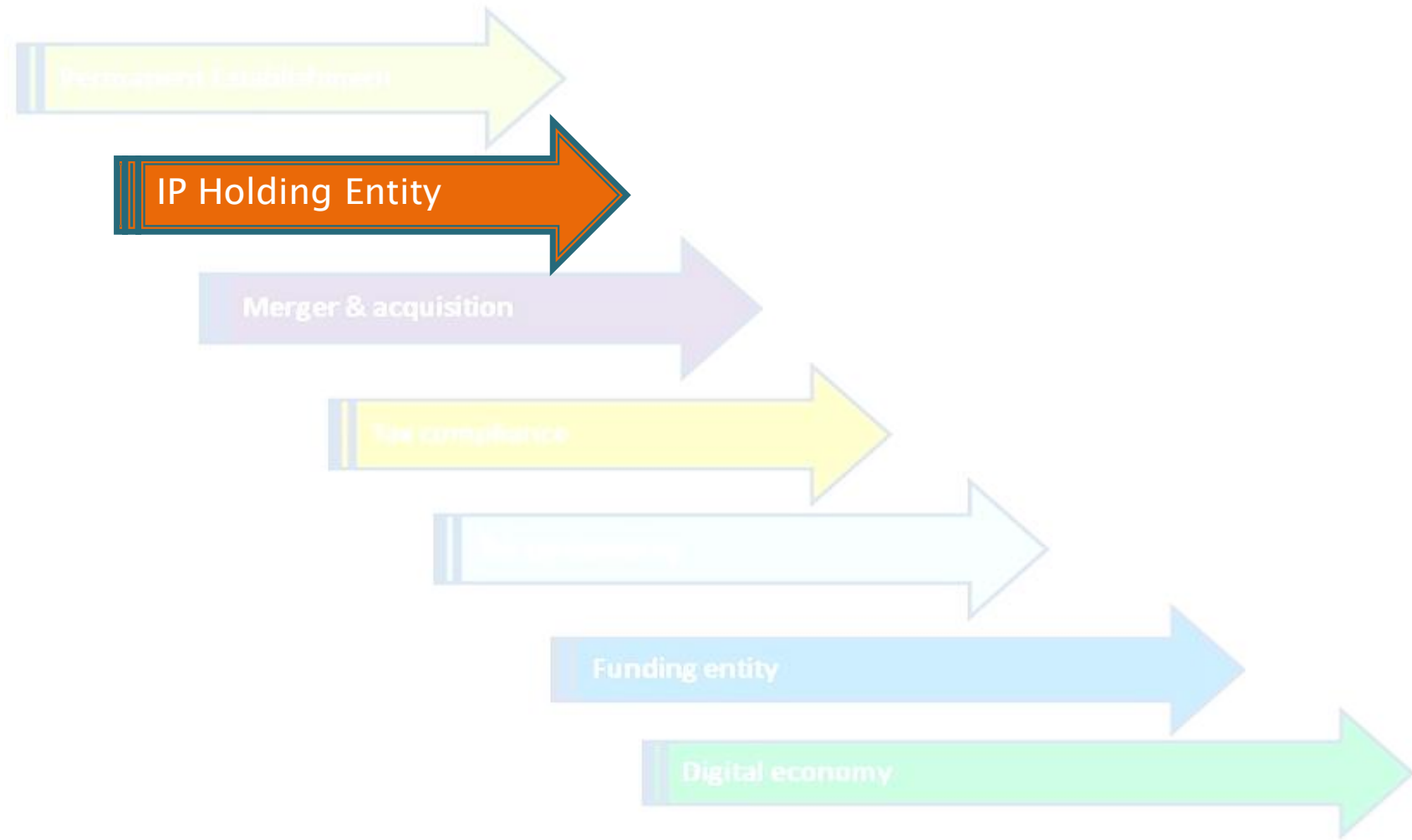
Implementation Challenges / Areas of Concern Cont'd...



PERMANENT ESTABLISHMENT

- Unable to avoid PE status by fragmentation a cohesive operating business into small operations– “anti fragmentation”
 - MNCs to provide reasons of allocating functions and risks along value chains
 - non-promote Commissionaire arrangement
 - Check on classification/characteristic of activities (e.g. Inventory arrangement)
- ▶ Kuntal Dave (India)
 - ▶ Emile Bongers (UAE)
 - ▶ Craig Elliffe (New Zealand)
 - ▶ Miranda Stewart (Australia)
 - ▶ Kalyani Dahanayake (Sri Lanka)

Implementation Challenges / Areas of Concern Cont'd...



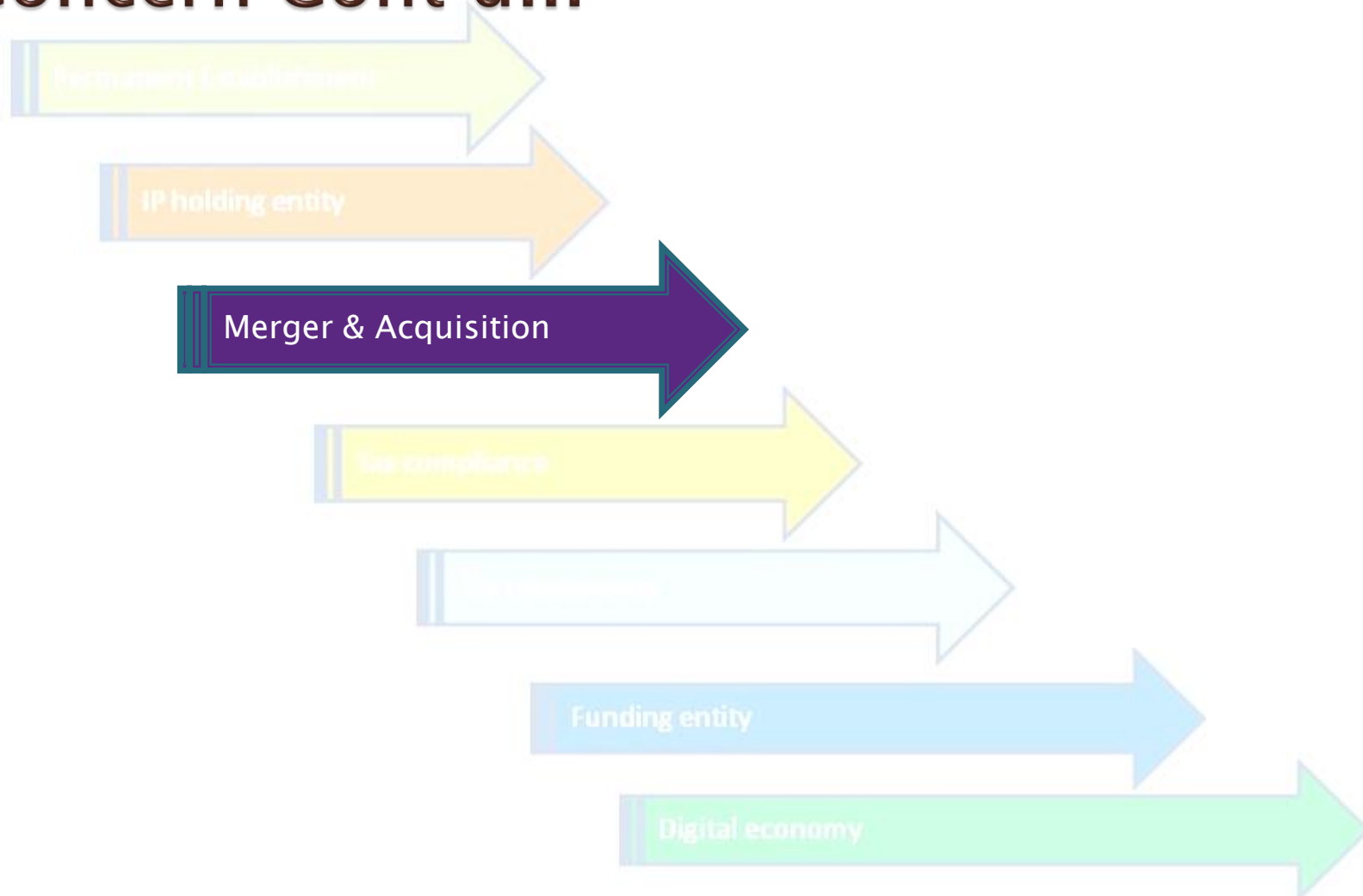
Implementation Challenges / Areas of Concern Cont'd...



IP HOLDING ENTITY

- IP owner needs to carry out
 - Funding for development
 - Decision -making
 - Control over development enhancement
 - Maintenance, protection
 - Exploitation of IP proportion of
 - Execute substantial proportion of R&D
- ▶ Kuntal Dave (India)
- ▶ Emile Bongers (UAE)
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Implementation Challenges / Areas of Concern Cont'd...



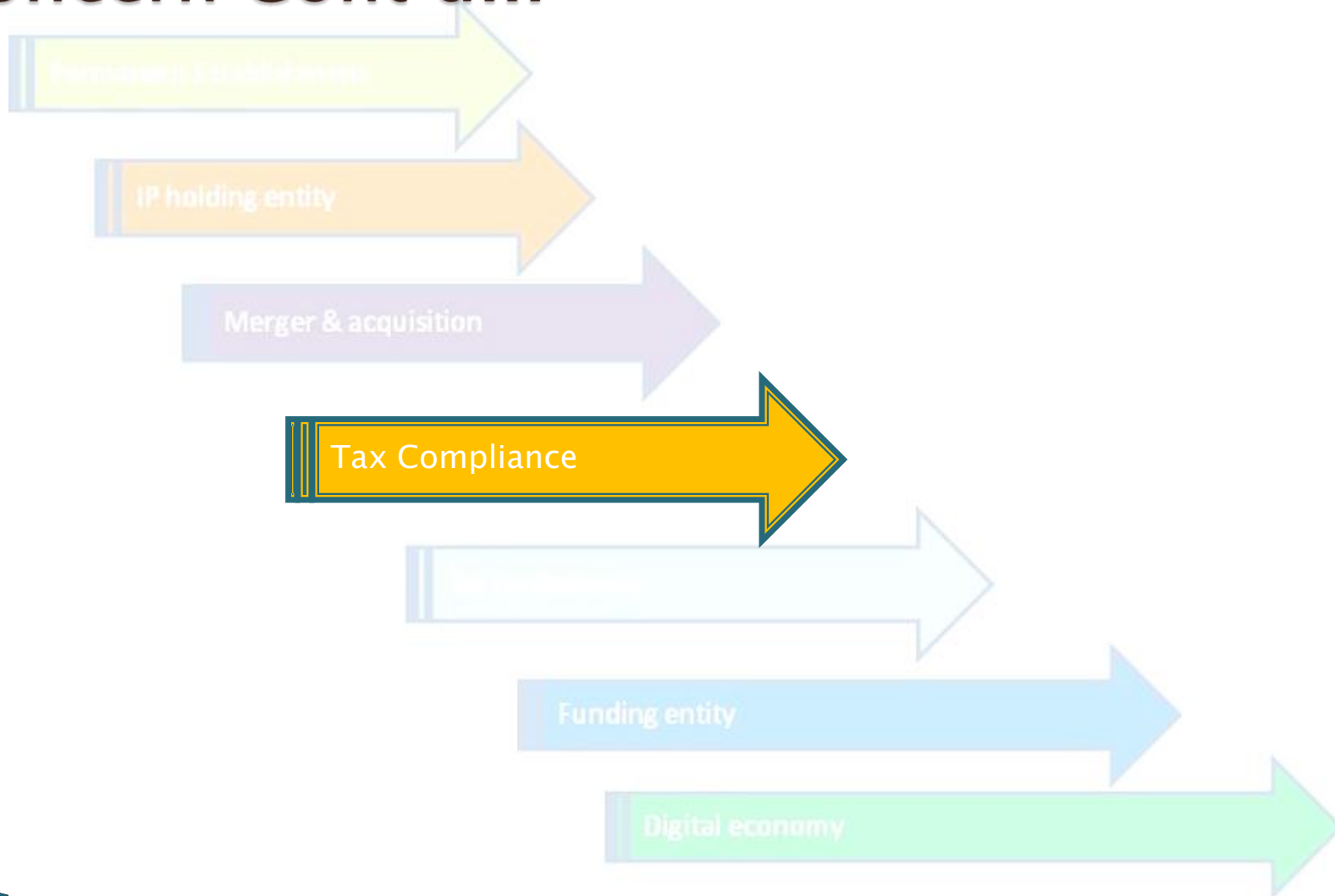
Implementation Challenges / Areas of Concern Cont'd...



MERGER & ACQUISITION

- Uncertainty to determine the tax of the target co.
 - Due diligence, transaction structuring, deal valuation
 - Compliance and reporting operation & maintenance of structure
- ▶ Kuntal Dave (India)
 - ▶ Emile Bongers (UAE)
 - ▶ Craig Elliffe (New Zealand)
 - ▶ Miranda Stewart (Australia)
 - ▶ Kalyani Dahanayake (Sri Lanka)

Implementation Challenges / Areas of Concern Cont'd...



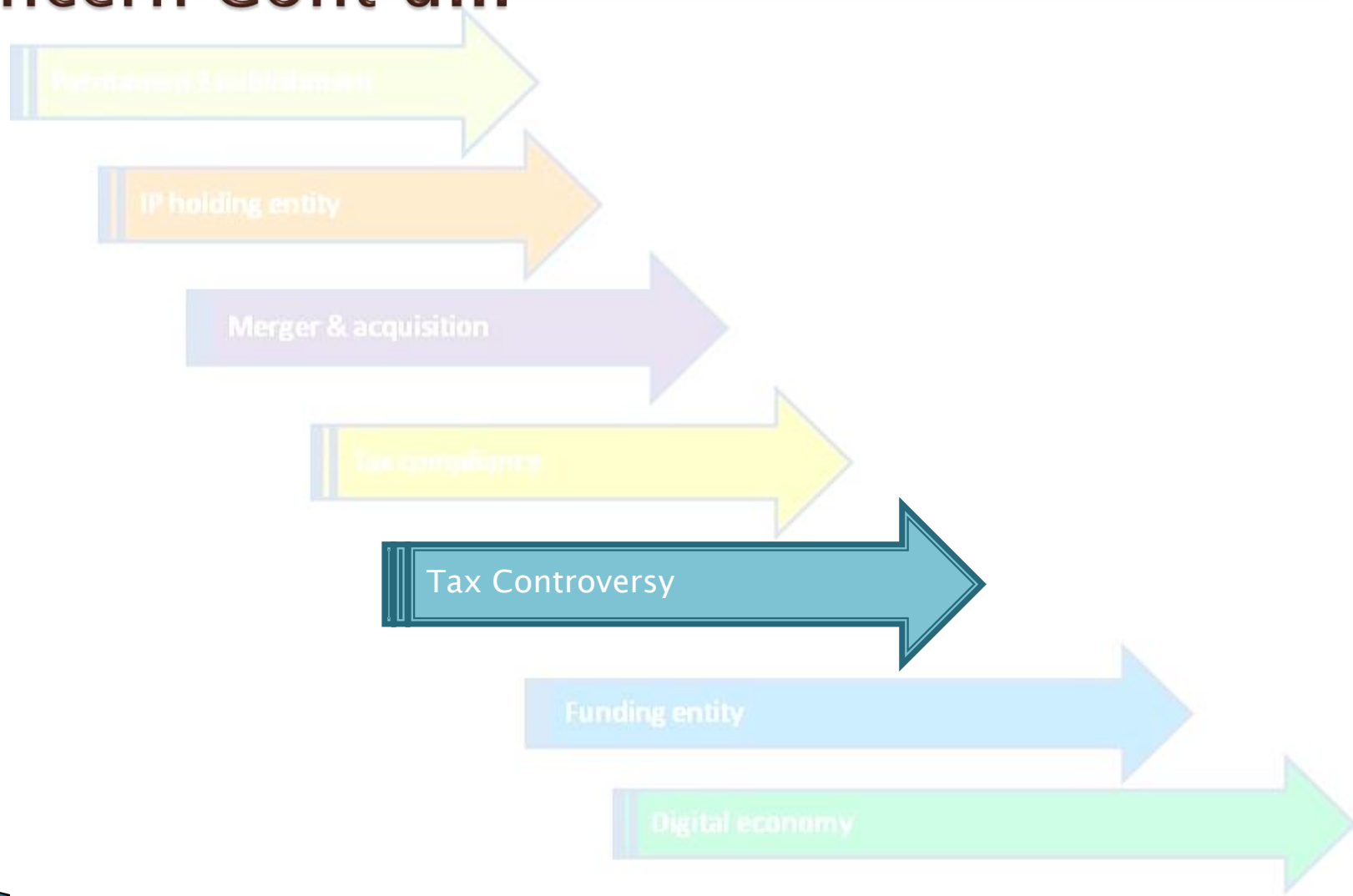
Implementation Challenges / Areas of Concern Cont'd...



TAX COMPLIANCE

- Re-Examination of existing TP Documentation
 - Shifting focus to economic reality of the transaction
 - Functional contribution by people to key processes in MNE
 - Additional resources required
- ▶ Kuntal Dave (India)
 - ▶ Emile Bongers (UAE)
 - ▶ Craig Elliffe (New Zealand)
 - ▶ Miranda Stewart (Australia)
 - ▶ Kalyani Dahanayake (Sri Lanka)

Implementation Challenges / Areas of Concern Cont'd...



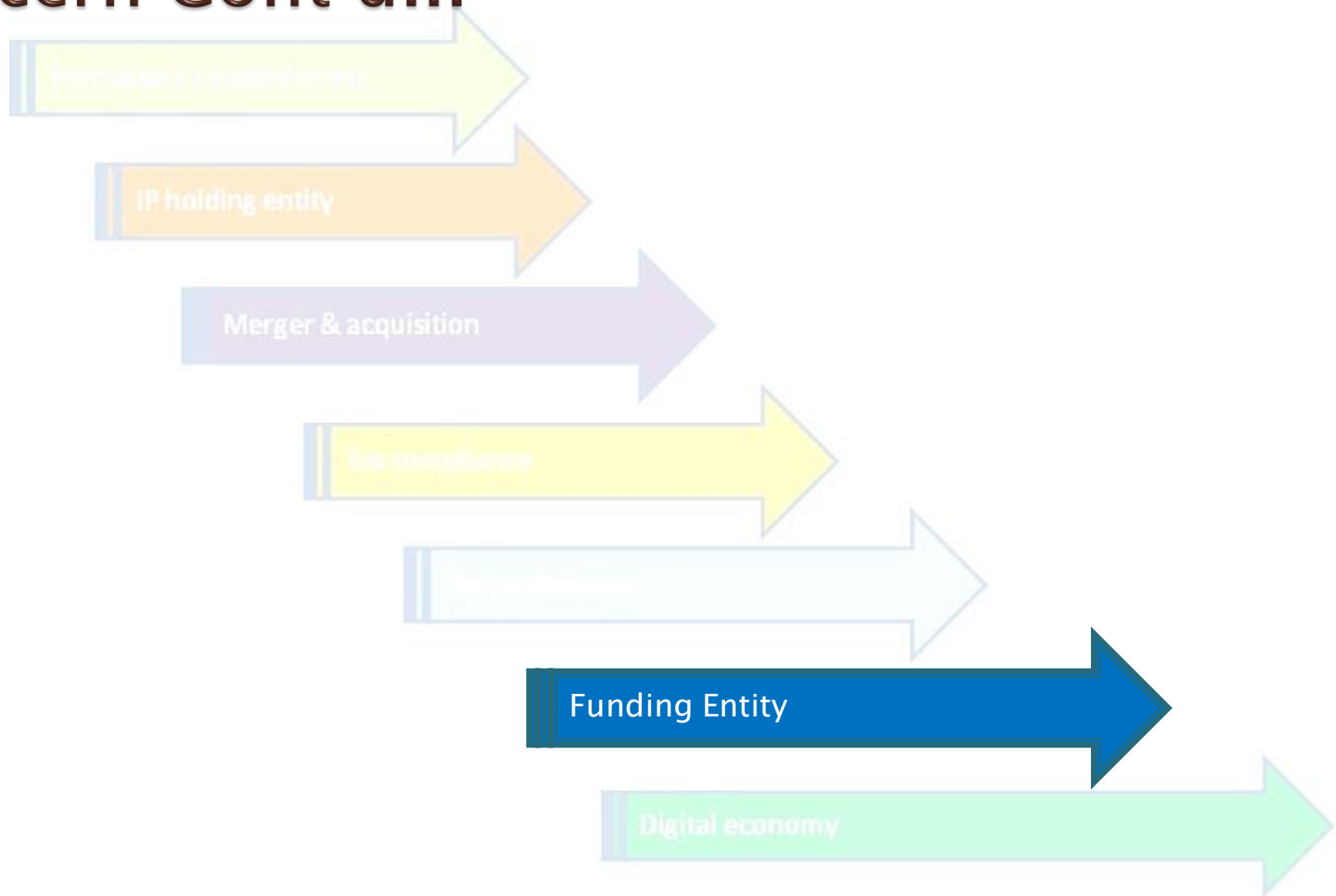
Implementation Challenges / Areas of Concern Cont'd...



TAX CONTROVERSY

- Double taxation– dispute between countries on the Taxation of revenue
 - Domestic dispute resolution
 - No Erosion of local country tax
 - Audit and settlement
 - International dispute resolution
 - APA
 - International and commercial arbitration
 - Mutual agreements
- ▶ Kuntal Dave (India)
 - ▶ Emile Bongers (UAE)
 - ▶ Craig Elliffe (New Zealand)
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Implementation Challenges / Areas of Concern Cont'd...



Implementation Challenges / Areas of Concern Cont'd...

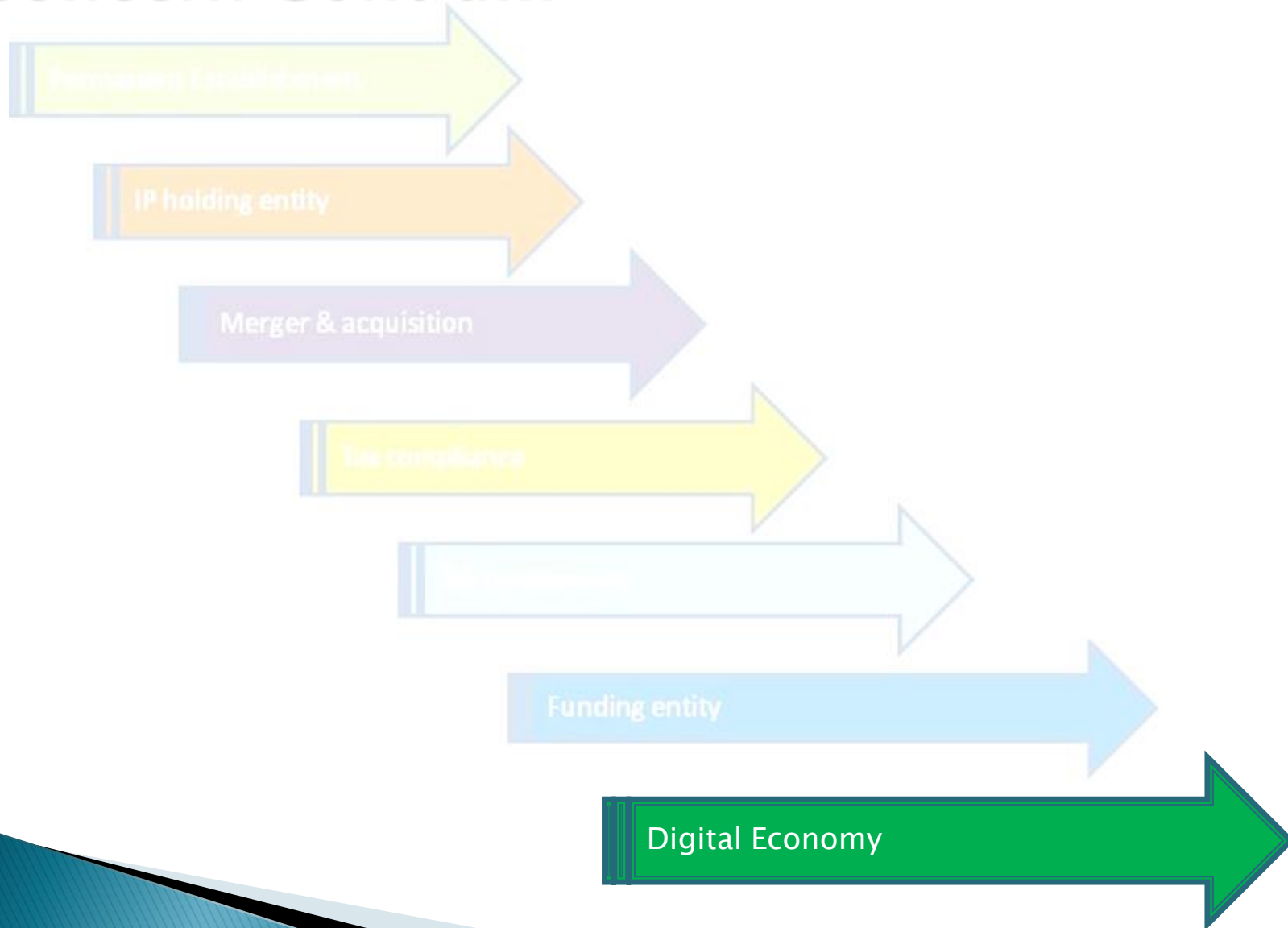


FUNDING ENTITY

- Mismatch between substance of operation and profitability
- Funding entity should not only have financial capacity to invest but also functional capacity to manage related risk

- ▶ Kuntal Dave (India)
- ▶ Emile Bongers (UAE)
- ▶ Craig Elliffe (New Zealand)
- ▶ Miranda Stewart (Australia)
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Implementation Challenges / Areas of Concern Cont'd...



Implementation Challenges / Areas of Concern Cont'd...



DIGITAL ECONOMY

- Taxation– Most challenging issue across the globe
 - 3 recommendation
 - Nexus in form of significant economic presence
 - Withholding tax
 - Equalisation levy to tax a non-resident
- ▶ Kuntal Dave (India)
 - ▶ Emile Bongers (UAE)
 - ▶ Craig Elliffe (New Zealand)
 - ▶ Miranda Stewart (Australia)
 - ▶ Kalyani Dahanayake (Sri Lanka)

Parameters for Implementation – BEPS in General



- Involvement of the tax authorities or Government into BEPS project
- Legal framework to administer BEPS
- Alignment of existing tax policies and the approach
 - Accounting Norms
 - Income Computation Norms
- Infrastructure and skilled manpower
 - Expertise (Tax authorities & Tax advisors)
 - Knowhow – use of information
 - Confidentiality
- Favourable tax regime vs. Tax regime proposed by action plans
- Whether BEPS will be successful/failure

Parameters for Implementation – Multilateral Treaties



- Scope (60 Countries, 3000 plus tax treaties)
- Language
- Minimum standard
- Tax fraternity – capacity & ability
- National sovereignty?
- Time horizon (first draft in end 2016)
- Tax litigation philosophy

THANK YOU