

Think Ahead

ACCA

ACCA

31st August 2015

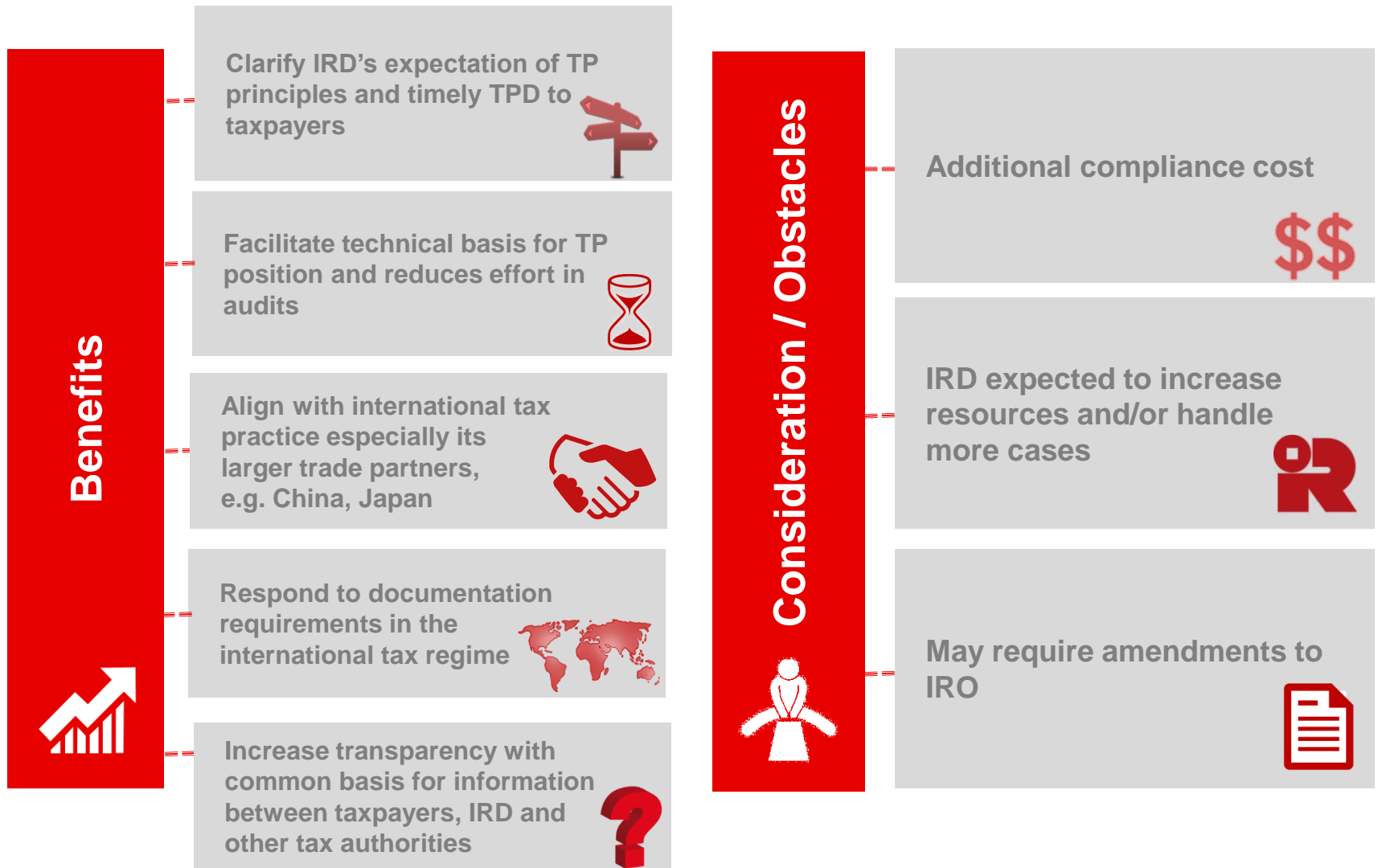
Transfer pricing



Background

- Objective: to enhance services to Hong Kong taxpayers and to align with international practice
- Topics:
 1. Transfer Pricing Documentation
 2. Unilateral APA
 3. Double Taxation Relief
 4. Additional Transfer Pricing Administration Measures
 5. Introduction of Arm's Length Principle in the IRO
 6. Base Erosion and Profit Shifting (“BEPS”)

1. Transfer Pricing Documentation



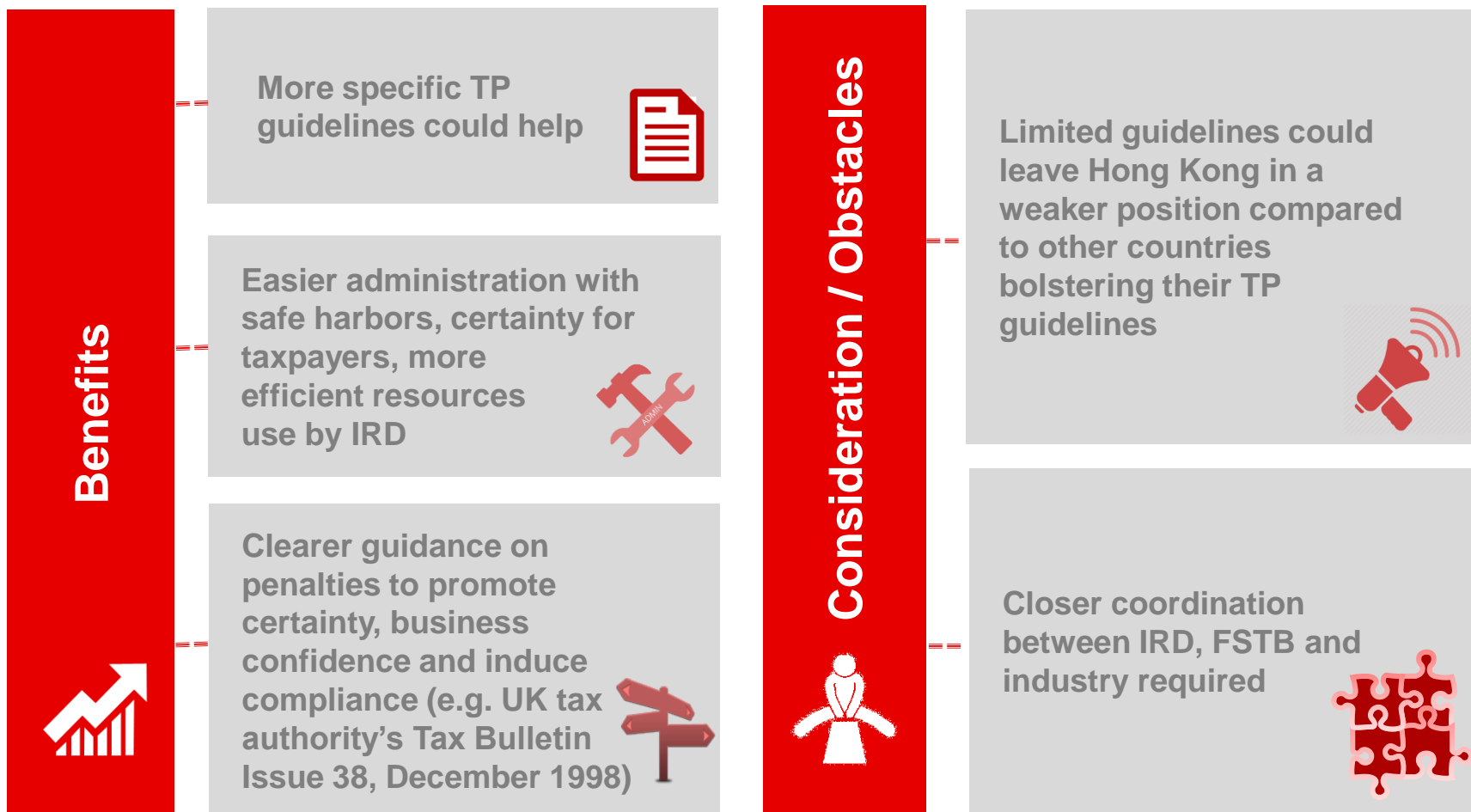
2. Unilateral APA



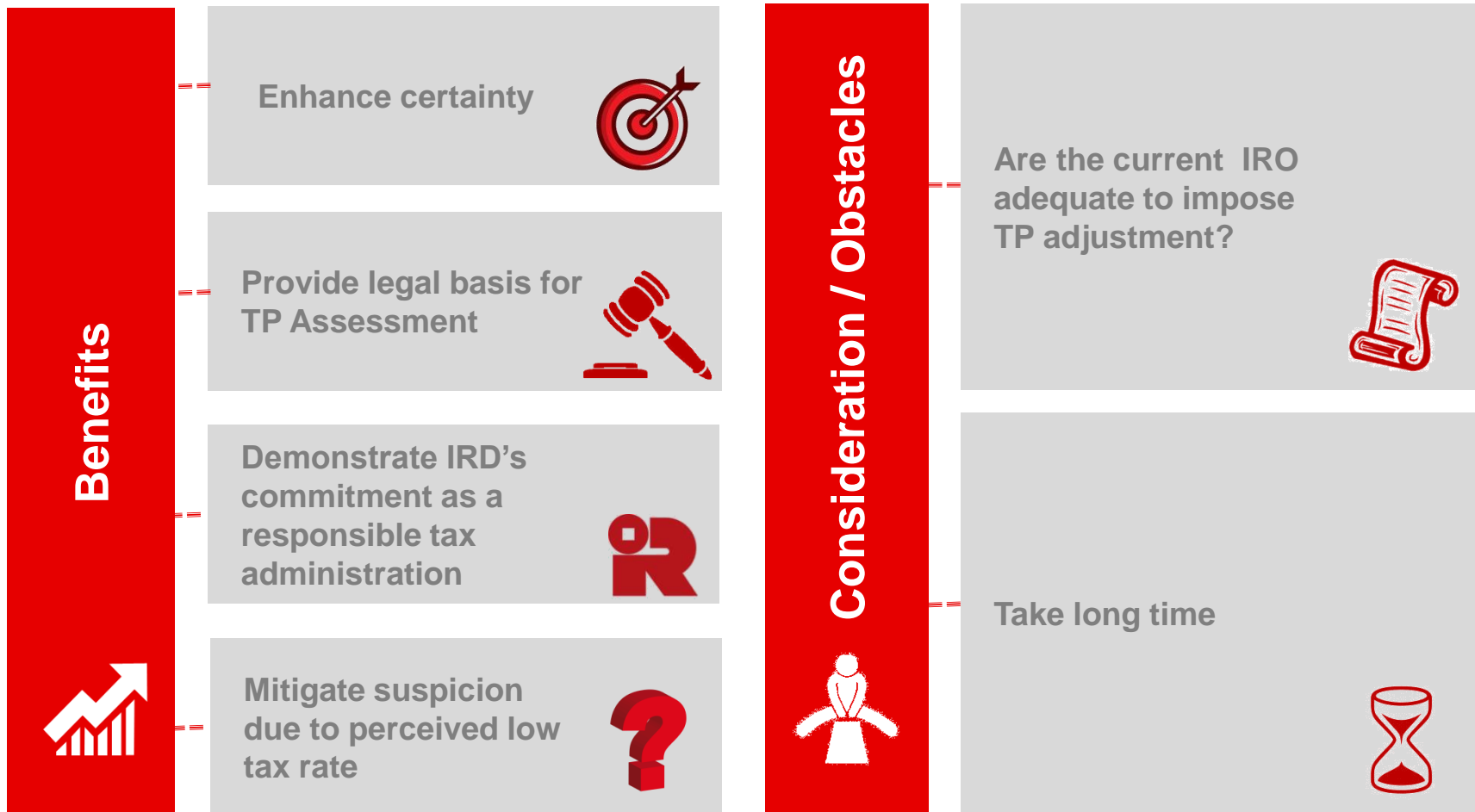
3. Double Taxation Relief



4. Additional Transfer Pricing Administration Measures



5. Introduction of Arm's Length Principle in the IRO



6. Base Erosion and Profit Shifting (“BEPS”)



Appendix – Summary of issues

#	Topic	Benefits / services to Hong Kong taxpayers	Consideration / obstacles	Question to IRD if applicable	Specific proposals from ACCA HK
1	Transfer pricing documentation	<ul style="list-style-type: none"> • Can enhance consistency with global tax authority practice and transparency • Enhanced information availability and technical basis to assess transfer pricing positions • A common template for taxpayers, the IRD and other tax authorities • Risk mitigation by timely documentation and review, and reduced efforts in audits • Respond to the increasing documentation requirements in the international tax regime • Basis of a well-developed transfer pricing administration framework 	<ul style="list-style-type: none"> • Additional compliance cost to taxpayers • Additional resources required at IRD and/or potentially handle more TP cases • May require amendments to IRO to formalise the TP documentation framework • A more formalised TP documentation regime will help some taxpayers in justifying HK profits. Currently, many foreign authorities are suspicious of HK entities simply because of a relatively low tax rate and perception that HKIRD does not look closely at TP. A clear TP doc regime actually allows taxpayer with substance in HK to formally demonstrate that. 	<ul style="list-style-type: none"> • What specific documentations does the IRD expect taxpayers to prepare? Are there templates or streamlined approach the IRD would accept. For instance: • Will the IRD be open to materiality consideration to reduce the burden to small verses large taxpayers. • How frequently should taxpayers prepare TP documentation? Would an update every two to three years be feasible? • Any tentative plan to escalate / further codify the documentation requirement • What incentives will the IRD consider to encourage TP compliance? For instance, would penalty protection (zero penalties) be feasible for taxpayers that prepare TP documentation? • What's IRD's view on adoption of country by country reporting? 	<ul style="list-style-type: none"> • Clarify IRD's position / expectation on TP documentation

Appendix – Summary Matrix (Cont'd)

#	Topic	Benefits / services to Hong Kong taxpayers	Consideration / obstacles	Question to IRD if applicable	Specific proposals from ACCA HK
2	Unilateral APA	<ul style="list-style-type: none"> • Ability to serve taxpayers engaged in trading with non-treaty jurisdictions • Alignment with international tax practice (e.g. Singapore has 40% of its APAs being unilateral, and Australia has 60%) • Some taxpayers would like to prioritize the certainty in Hong Kong by having HK UAPA only. With certainty, it could also help MNC justifies further investment in HK. 	<ul style="list-style-type: none"> • Risk of double taxation still exists [solution: synthetic BAPA, meaning UAPAs on both sides – already in DIPN48] • IRD's capacity to handle many more cases [solution: benefit outweighs the investment] • To achieve acceptance of the unilateral concept perhaps we should make this a subset of (3) Double tax relief and pitch the unilateral option more from the perspective for dealing with non treaty countries to seek harmonization and effective double tax relief. 	<ul style="list-style-type: none"> • IRD's readiness to accept HK UAPA applications with partial fulfillment of UAPA criteria in DIPN48 (i.e. transactions integrally linked with the transactions covered by a BAPA, and UAPA on the other side) 	

Appendix – Summary Matrix (Cont'd)

#	Topic	Benefits / services to Hong Kong taxpayers	Consideration / obstacles	Question to IRD if applicable	Specific proposals from ACCA HK
3	Double taxation relief	<ul style="list-style-type: none"> Put Hong Kong on a par with other places in the region Promote competitiveness in attracting foreign investment An efficient double tax relief program is critical in a BEPS world, especially for HK – a relatively low tax jurisdiction tends to attract adjustments from foreign tax authorities, inefficiency of double tax relief program turns a competitive advantage into a disadvantage 	<ul style="list-style-type: none"> The IRO is regarded as main legislation, while DTA is sub-legislation. Hence, from legislative perspective, IRO takes precedence over DTA, therefore it is uncertain whether MAP under DTA is also subject to the 6-year statutory time bar under the IRO. Under section 79 of the IRO, tax refund claims lodged by taxpayers have to be proved to the satisfaction of the Commissioner within 6 years of the end of a year of assessment or within 6 months after the date on which the relevant notice of assessment was served, whichever is the later. However, such notice of assessment may not be issued by the competent tax authority until the tax audit is settled, which sometimes are multi-year process causing taxpayers to miss right of relief for older year(s). 	<ul style="list-style-type: none"> Is MAP subject to domestic time bar limitation? What form of notification is required to be submitted to the IRD for keeping years open under CA/MAP? Any plan to add more resources to handle MAP? Under what circumstance would IRD seek to involve tax authority of a third jurisdiction (where the entrepreneur is located) in a MAP? Any plan to add arbitration clause in DTA to address situation where no agreement can be reached under MAP? 	<ul style="list-style-type: none"> Consider to change the legislation to exempt MAP from the 6-year statutory limitation. Consider to accept the first notice issued by competent authorities notifying the launch of transfer pricing audit as a satisfactory document for purpose of lodging a CA/MAP application. Establish a dedicated team to handle CA/MAP applications. Consider to include arbitration clause in the DTA to be negotiated in the future.

Appendix – Summary Matrix (Cont'd)

#	Topic	Benefits / services to Hong Kong taxpayers	Consideration / obstacles	Question to IRD if applicable	Specific proposals from ACCA HK
3	Double taxation relief (cont'd)		<ul style="list-style-type: none"> Under the circumstance that HK entity is a middleman with routine profit margin in the supply chain, double taxation cannot be fully eliminated if it cannot find a way to push back the transfer pricing adjustment to the entrepreneur. In the absence of arbitration clause in the DTA, taxpayers will not get double tax relief if competent authorities of both states cannot reach an agreement under MAP. 		

Appendix – Summary Matrix (Cont'd)

#	Topic	Benefits/ services to Hong Kong taxpayers	Consideration/ obstacles	Question to ask the IRD if applicable	Specific proposals from ACCA HK
4	Additional transfer pricing administration measures	<ul style="list-style-type: none"> • Safe harbors for ease of administration • Specific DIPN for intercompany finance transactions given the importance of finance industry in Hong Kong • DIPN clarifying with examples how IRD's penalty regime applies in the context of transfer pricing (<i>cf</i> UK tax authority's Tax Bulletin Issue 38, December 1998) 	<ul style="list-style-type: none"> • Efforts to introduce new measures 	<ul style="list-style-type: none"> • Any new measures already being discussed 	<ul style="list-style-type: none"> • Re Financial transactions, given the FSTB is constantly working at bringing new cross border products to HK market, a level of coordination between IRD, FSTB and Industry will be vital

Appendix – Summary of issues (Cont'd)

#	Topic	Benefits / services to Hong Kong taxpayers	Consideration / obstacles	Question to IRD if applicable	Specific proposals from ACCA HK
5	Introduction of arm's length principle in the IRO	<ul style="list-style-type: none"> Enhanced certainty / legal basis for transfer pricing assessment and adjustment 	<ul style="list-style-type: none"> May take long to do so 	<ul style="list-style-type: none"> Whether the current sections (S16, 20(2), 61A) are adequate to impose transfer pricing adjustment 	<ul style="list-style-type: none"> Where formal TP documentation is not possible, introduction of arm's length principle in the IRO may demonstrate IRD's commitment as a responsible tax administration in the international community (to mitigate any suspicion due to the perceived low tax rate)
6	Base Erosion and Profit Shifting ("BEPS")		<ul style="list-style-type: none"> Can consider addressing intangibles issues (e.g. definition, beneficial ownership) among other topics can embed/cross reference BEPS aspects within the other initiative items (particularly documentation) or at least refer to the corresponding BEPS action items. Important to add emphasis flagging what are the most pertinent issues/aspects for HK and why HK should enact/release any specific guidance 		<ul style="list-style-type: none"> IRD may want to consider issuing DIPNs to clarify its view with respect to some of the finalized actions

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Thank You

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