THESIS

INTERNATIONAL LEGAL ANALYSIS TOWARD TAX EVASION PRACTICES IN TAX HAVEN COUNTRIES

Written and submitted by:

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INTERNATIONAL LAW DEPARTMENT
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MAKASSAR

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TITLE PAGE

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As a Final Project in Completing the Undergraduate Studies in the Department of International Law, Legal Studies Program

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INTERNATIONAL LEGAL ANALYSIS TOWARD TAX EVASION PRACTICES IN TAX HAVEN COUNTRIES

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ABSTRACT

MOH. RIFLI MUBARAK (B011191022) with the title International Legal Analysis toward Tax Evasion Practices in Tax Haven Countries supervised by **Juajir Sumardi** and **Birkah Latif.**

This study aims to examine the variety of international regulations related to the way of tackling tax evasion practices in tax haven countries as the tax issues worldwide and the implications of tax evasion toward economic and legal aspects.

The type of research used by the author is normative research using statutory, conceptual, and comparative approaches. The legal materials used consist of primary legal materials, namely laws and regulations; and secondary legal materials, namely literature, books, scientific papers, journals, documents, and relevant archives. The entire legal material is then analyzed qualitatively.

The results of this study are: 1) International regulations in this thesis are segmented into two approaches in tackling tax evasion practices in tax haven countries which are Soft Approach and Hard Approach; 2) The implications due to the tax evasion in tax haven countries result in the reduction of government tax revenues and as part of the shadow economy where the manipulation of the financial report consists of unreported income of the company. While in the legal aspect, the implication also touches the respective national law reformation to adapt with the current situation either country makes the *lex specialis* law or puts the related clauses into the variety of their derivative regulations.

Keywords : ***Double Taxation, Tax Evasion, Tax Haven.***

FOREWORD

Assalamualaikum Warahmatullahi Wabarakatuh
Shalom,
Om Swastiastu, Namo Buddhaya,
Best wishes for all of us

First and foremost, all praise and thanks for the endless presence of Allah SWT for the abundance of gifts and His grace that we can carry out all activities smoothly and in good health, especially for the blessings, guidance, abundance of knowledge and guidance so that I can compile and complete this thesis with the title "International Legal Analysis toward Tax Evasion Practices in Tax Haven Countries" which in this case is the final assignment in order to complete the study for a Bachelor of Laws degree at the Faculty of Law, Hasanuddin University, Makassar.

With all humility, on this occasion, I would like to express a massive thank you and the highest appreciation to those who have provided prayers, accompanied, and supported me either directly or indirectly during the writing process of this thesis. Especially to my parents, Mr. Suhyar Mahmud, Alm. Zuraidah, and Aunt Uni. As well as Kak Putri, Kak Dani, and Zahra as my lovely younger sister who always support me so that I can finish this thesis solemnly.

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I am aware that in the writing process, there are still many shortcomings and limitations that are owned so that this thesis still has rooms to be improved. Hence, I really hope for constructive criticism and suggestions from all parties. Finally, I hope this thesis is useful for me, Faculty of Law, Hasanuddin University, and in particular to the readers and the general public in general in comprehending the tax issues within the perspective of international law as an interesting topic to be discussed.

Author,

Moh. Rifli Mubarak

TABLE OF CONTENTS

PAGES

LIST OF TABLES

LIST OF PICTURES

CHAPTER I

INTRODUCTION

A. Background

The International Consortium of Investigative Journalist (ICIJ) unveiled the association of nearly thousands of companies in tax haven countries with a number of 336 high-level politicians, public officials and businessmen from various countries through secret documents that reveal all the facts of the crimes of various famous figures called Pandora Papers. Among others, Russian President Vladimir Putin to Jordanian King Abdullah II, then for Indonesia, it is the Indonesian Coordinating Minister for Maritime Affairs and Investment, Luhut Binsar Pandjaitan. In the report, Luhut was linked to a company from the Republic of Panama, namely Petrocapital S.A.[1]

The Pandora Papers contain 2.94 terabytes of confidential information from 14 foreign service providers. With the distribution of 6.4 million files, 2.9 million images and photos, 716 e-mails, as well as other documents in the form of presentations, sound recordings, videos, to spreadsheets.[2] The Pandora Papers reveal financial

[1] Endaryati, Eni. "Pandora Papers, Praktik Penggelapan Pajak Internasional|D4 Komputerisasi Akuntansi S.Tr.Kom." *Program Studi Jurusan Komputerisasi Akuntansi Universitas STEKOM*, Universitas Stekom, 8 November 2021, http://komputerisasi-akuntansi-d4.stekom.ac.id/informasi/baca/Pandora-Papers-Praktik-Penggelapan-Pajak-Internasional/3413b8533e826b3f881a50cef818b60da3c23659. Accessed 28 November 2022.

[2] *Ibid.*

transactions in the last five decades, which occurred between 1996 and 2020. This investigation provides an overview of tax evasion practices on an international scale. Not only heads of state, political figures, officials and businessmen, Pandora Papers also mention a number of world-renowned celebrities, such as Julio Iglesias, Claudia Schiffer, Ringo Star, Elton John and Shakira.

The thing that needs to be highlighted from this phenomenon of Pandora Papers is where the illegal activities that have been done in tax haven countries by mentioned figures known as tax evasion is the one of the biggest issues on the international taxation atmosphere. The questions raised on the jurisdictions to the economic and legal implication due to the tax evasion practices toward respective countries are interesting things to be examined further as the way to expand the richness of international law research especially within the context of international taxation. The effort to do the tax evasion by those figures in Pandora Papers itself is eased by creating shell companies or Special Purpose Vehicle (SPV) in tax haven countries.

Briefly, tax haven is any low-tax country with a goal of attracting capital, or simply any country that has low or non-existent taxes on capital income.[3] Tax haven countries are also proven to be a place for illicit financial flows from other countries, especially

[3] Gravelle, Jane G, "Tax Havens and International Tax Avoidance", National Tax Journal, Vol. LXII, No. 4 December 2009, p. 728.

developing countries. Countries which are known as tax havens include the Cayman Islands and the British Virgin Island as well as Switzerland and Singapore.[4]

Tax haven is also known by its lack of transparency.[5] This is a common fact and factor to the identification of tax havens and harmful preferential tax regimes. This characteristic indicates the secrecy in unveiling the identity of the company's beneficial ownership located in tax haven countries.[6] In addition, another important factor in determining if a country is a tax haven is the lack of effective information exchange, which prevents tax authorities from accessing the information required for the correct and timely application of tax laws. As a result, the most obvious effect of not providing information is that it makes tax evasion and money laundering easier.[7]

From its practicality of the tax evasion done by several countries, it is known that the SPVs or shell companies are used as investment vehicles to avoid taxes in the home country. With SPVs, they can invest worldwide and the investment returns are not subject to income tax in a tax-free country. Because investment

[4] Surya Tan, Paper: "Hubungan antara Tax Haven dengan Tindak Pidana Money Laundering sebagai Suatu Kejahatan Terorganisir Internasional", Universitas Sumatera Utara, Medan, 2010, p. 31.

[5] Gilmore, William, "The OECD Harmful Tax Competition and Tax Havens: Towards an Understanding of the International Legal Context", Commonwealth Law Bulletin, Vol. 27, No. 1 August 2001, p. 550.

[6] *Ibid.*

[7] *Ibid.*

returns are usually not reported in the country of origin, where income that is not reported to the tax authorities will certainly violate the national tax regulations such as in Indonesia where any income earned by Indonesian taxpayers both from within and outside the country must be reported to the Directorate General of Taxes (DGT).[8]

For several cases stated in the Pandora Papers, the potential of doing the tax evasion where it is an effort made by taxpayers by violating applicable tax rules, such as reporting income that is not in accordance with the facts.[9] There are several examples such as the case of King of Jordan bought up property in England and the United States worth 70 million pounds sterling, or around IDR 1.35 trillion (exchange rate of IDR 19,300) through a company he owned in secret; Czechoslovakia's prime minister did not report his assets in the form of two villas in France that were purchased using a SPV abroad; and Kenyan President Uhuru Kenyatta's family has secretly owned a network of offshore companies for decades.[10]

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[8] Sembiring, Lidya Julita. "Dapat Penghasilan Dari Luar Negeri, Bayar Pajaknya di Mana?" *CNBC Indonesia*, 1 March 2021, https://www.cnbcindonesia.com/news/20210301145308-4-226938/dapat-penghasilan-dari-luar-negeri-bayar-pajaknya-di-mana. Accessed 28 November 2022.

[9] Lawrence M. Friedman, 1975, *The Legal System (A Social Science Perspective)*, Russel Sage Foundation, New York, p. 12-13.

[10] Aliya, Angga. "Penjelasan Sederhana Pandora Papers, Skandal Orang Kaya Punya 'Tabungan' Rahasia." *detikFinance*, 4 October 2021, https://finance.detik.com/berita-ekonomi-bisnis/d-5751768/penjelasan-sederhana-pandora-papers-skandal-orang-kaya-punya-tabungan-rahasia. Accessed 28 November 2022.

There is no exact amount, but ICIJ estimates that the total money hidden offshore is around US$5.6 trillion to US$32 trillion or around IDR 7,952 trillion to IDR 454,400 trillion.[11] The International Monetary Fund previously said that the utilization of this tax haven area would result in world governments experiencing potential tax losses of up to US$600 billion or around IDR 8,400 trillion per year.[12]

The complexity of these negative implications toward international and national economic circumstance triggers the author's interest to know more about the way to overcome these ongoing cases through international law approach. Besides that, it gives a legal implication where it is important to question the dispute settlement mechanism of international tax evasion cases.

Based on the background of the problems above, the author is interested in constructing a thesis titled "International Legal Analysis toward Tax Evasion Practices in Tax Haven Countries" through normative research with statute, conceptual, and comparative approaches. This research will seek more of how international laws or regulations seeing this issue legally that is also contextualized by scrutinizing its implications toward countries' economic respective

[11] Fauzia, Mutia. "Apa Itu Pandora Papers yang Ungkap Skandal Pajak Orang Kaya Dunia? Halaman all - Kompas.com." *Money Kompas.com*, 4 October 2021, https://money.kompas.com/read/2021/10/04/131831126/apa-itu-pandora-papers-yang-ungkap-skandal-pajak-orang-kaya-dunia?page=all. Accessed 28 November 2022.

[12] *Ibid.*

interest that will be taken into account for the future constructive insights for the advancement of international law research.

The analysis toward the sources of international law will be the main substances on this thesis starting from United Nations Model Double Taxation Convention between Developed and Developing Countries, OECD Model Tax Convention on Income and on Capital, Convention on Mutual Administrative Assistance in Tax Matters, Bali Declaration 2022, Bilateral Tax Treaties, and OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting as the relevant sources in responding to the tax evasion cases in tax haven countries.

B. Research Questions

Based on the background of the problems described above, the authors formulate two research problems, namely:

1. How do the international regulations tackle the tax evasion practices in tax haven countries?
2. What are the implications of tax evasion practices in tax haven countries toward countries' economic respective interest?

C. Research Objectives

Based on the formulation of the problems above, the research objectives are:

1. To examine the variety of international regulations which tackle the tax evasion practices in tax haven countries
2. To comprehend the implications of tax evasion practices in tax haven countries toward countries' economic respective interest

D. Research Usage

Based on the formulation of the problems and the objectives of this study, the uses of this research include:

1. Academic Usage

Academically, this scientific paper is expected to contribute to providing theoretical inputs for the development of international economic law, especially in the field of tax evasion research that could enrich the insights on how the international regulations could see and overcome this phenomenon.

2. Practical Usage

Practically, it is expected that the results of this legal research can provide legal knowledge for parties working in the field of international economic law and the public who wish to do further research about tax evasion and tax haven countries through the perspective of international law.

E. Originality of Research

This thesis with the title "International Legal Analysis toward Tax Evasion Practices in Tax Haven Countries" has never been

conducted before based on the results of the literature searching. The searching is also carried out through the repositories of other institutions and universities as well as online searches such as on the lis.unhas.ac.id and Google Scholar pages. There are only similarities in some of the prior research, but the similarities are only located in the object of research which is the tax evasion practices or tax haven countries but differ in the essence of fields, objectives, and research methods. Some of the prior research which have some intersection with this thesis are:

1. Journal article entitled “The Concept of Tax Haven: A Legal Analysis” by Mykola Orlov in INTERTAX Journal Volume 32, Issue 2 Kluwer Law International 2004 has big similarity on the legal analysis part. In spite of that, this article exposes more on the future policymaking side in responding tax haven countries rather than elaborating further about the current international law’s perspective toward tax evasion practices in tax haven countries;
2. Journal article entitled “Panama Papers and the Phenomenon of Tax Smuggling and Its Implications on Indonesian Tax Revenues” in *Jurnal Reformasi Administrasi* Volume 4 No. 2 2017 is more focusing the research on the tax smuggling and its impact toward Indonesian economic circumstances and tax revenues,

hence the taxation analysis gets more exposure in this article rather than the legal analysis either it is national or international law beside the object of the study is on the tax smuggling and Panama Papers cases which are also exposing the tax haven countries;

3. Journal article entitled “The Effect of Transfer Pricing, Intangible Assets, and Multinationality on the Utilization of Tax Asylum (Tax Haven)” in *Jurnal Informasi Akuntansi* Volume 1 No. 1 2021 is more focusing on its quantitative analysis toward transfer pricing and economic activity by the countries’ utilization on the economic activity in the tax haven countries. Hence, it still has less exposure on the legal analysis;
4. Journal article entitled “Tax Havens: International Tax Avoidance and Evasion” in National Tax Journal Vol. LXII No. 4 2009 has a similarity since the writing comprehends the comparative study and analysis about the list of tax haven countries and the recommendations that should be taken into account for the future regulations related to the tax evasion prevention. In spite of that, this writing also has less exposure on the legal analysis and there is no any identifications toward how international regulations

such as conventions which could see and tackle this case holistically.

F. Research Methods

The research methods chosen by the author is the normative legal research method. Normative legal research is a research that examines document studies. The research will be conducted by reviewing various data such as legislation, legal theory, principle, as well as expert opinion. The approach that will be used in this research is as follows:

1. Statute approach

This approach is a research method that focuses on legal materials which are statutory regulations such as laws, conventions, statutes, and others as basic materials and basic references in conducting the research.[13]

2. Conceptual approach

This approach is a research method that provides an analytical point of view on problem solving in legal research seen from the aspects of the legal concepts that remain behind it, or even can be seen from the aspects of the values contained in the norming of a regulation in relation to the concepts used.[14]

3. Comparative Approach

[13] Bachtiar, 2018, *Metode Penelitian Hukum.* UNPAM PRESS. South Tangerang. p. 81

[14] *Ibid.*

Comparative approach involves comparison between the law of one nation to the law of another nation, or the law of one time period to the law of another time.[15] This activity is useful for disclosing the background to the occurrence of legal provisions for the same problem from two or more countries.[16]

[15] Peter Mahmud Marzuki, 2019, *Penelitian Hukum: Edisi Revisi.* Kencana. Jakarta. p. 173.

[16] *Ibid.*

CHAPTER II

LITERATURE REVIEW AND ANALYSIS ON THE INTERNATIONAL REGULATIONS RELATED TO THE TAX EVASION PRACTICES IN TAX HAVEN COUNTRIES

A. The Definition of Tax Evasion

Tax evasion is a manipulative act of subject (perpetrator) and object (transaction) of tax to obtain tax savings unlawfully, and tax evasion can be said to be an inherent virus in every tax system that apply in almost every jurisdiction.[17] Furthermore, Transparency International also defines the tax evasion as:[18]

> "Tax evasion is the illegal non-payment or under-payment of taxes, usually by deliberately making a false declaration or no declaration to tax authorities – such as by declaring less income, profits or gains than the amounts actually earned, or by overstating deductions. It entails criminal or civil legal penalties."

Illegal, deceptive, and fraudulent behavior are the foundations of tax evasion; It frequently contravenes both the letter and spirit of the law.[19] According to a recent Brookings Institute report based on IRS statistics, "tax evasion is responsible for one out of every six federal

[17] Susno Duaji, 2009, *Selayang Pandang dan Kejahatan Asal*, Books Trade Center, Bandung, p. 14.

[18] Transparency International. "Tax Evasion." *Transparency International*, 2022, https://www.transparency.org/en/corruptionary/tax-evasion. Accessed 28 November 2022.

[19] Lenz, Hazrudi, "Aggressive Tax Avoidance by Managers of Multinational Companies as a Violation of Their Moral Duty to Obey the Law: A Kantian Rationale", Journal of Business Ethics, Vol. 165, No. 4 December 2018, p. 685.

tax dollars owed but not paid."[20] Generally, tax evasion is an activity by reducing the number of taxes that must be paid, especially if there are individual taxpayers who do not pay their taxes at all by not reporting income or manipulating the contents of their income reports.[21] This is a violation, because the taxpayer manipulates this transaction to incur costs to reduce income and even losses. To make it clearer, it could be seen from the description of tax evasion in a simplified manner as a contrasting point between tax avoidance through the picture below seen from its legality and morality:[22]

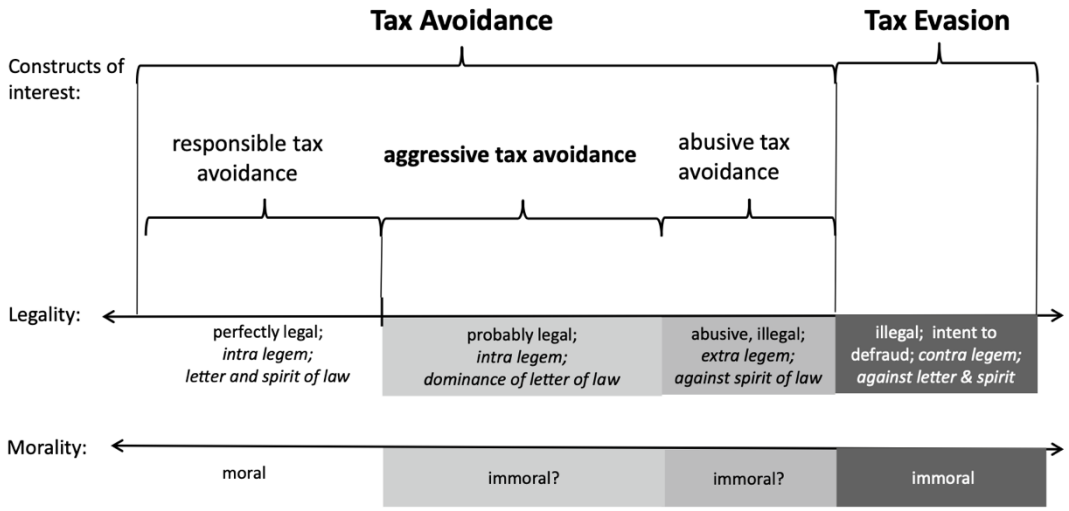

Figure 1. Definition of Tax Avoidance and Tax Evasion Based on Legality and Morality

[20] Fedor, Robert J. "Tax Evasion--a Growing Crisis." *Fedor Tax*, 20 August 2019, https://www.fedortax.com/blog/tax-evasion-a-growing-crisis. Accessed 28 November 2022.

[21] Redaksi PajakOnline. "Seperti Ini Perbedaan Kasus Penghindaran dan Penggelapan Pajak." *PajakOnline.com*, 11 October 2021, https://www.pajakonline.com/seperti-ini-perbedaan-kasus-penghindaran-dan-penggelapan-pajak/. Accessed 28 November 2022.

[22] Hansrudi Lenz, Op. cit.

On the other hand, tax evasion is also interpreted when someone deliberately misrepresents or hides facts in order to avoid paying the rightful tax.[23] Tax havens can be used by tax evaders to conceal income or as part of a complex scheme to conceal a transaction's true nature. In the first scenario, the government might not be able to show how much money or property is in an account. In the second scenario, the taxpayer intends to obfuscate the true nature of the transaction and restrict the government's access to information necessary to support its burden of proof in order to avoid criminal prosecution.[24]

B. The Definition of Tax Haven

The fact that no consensus exists regarding the meaning of the term "tax haven" is a central issue in the debate regarding tax havens. The term typically refers to nations or territories with favorable tax policies for foreign investors.[25] Nearly every work on tax havens begins with the author acknowledging the practical impossibility of clearly defining a tax haven (also known as a "tax paradise" in French or a "tax oasis" in German) and resorting to a

[23] Workman, Douglas J., "The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes", The Journal of Criminal Law and Criminology, Vol. 73, No. 2 1982, p. 677.

[24] *Ibid.*

[25] Tobin, Gary, "What Makes a Country a Tax Haven? "An Assessment of International Standards Shows Why Ireland Is Not a Tax Haven", The Economic and Social Review, Vol. 44, No. 3 2013, p. 402.

particular grouping of the respective jurisdictions in accordance with the specially adopted meaning of this term.[26]

However in a more simplified definition, the tax haven is defined by Black's Law Dictionary as a country that imposes little or no tax on profits from transactions conducted there.[27] The similar definition also comes from World Populations Review as stated below:[28]

> "A tax haven, or "offshore financial center," is a country (or state) in which foreign investors pay taxes at an abnormally low rate, possibly even zero."

The Organization for Economic Cooperation and Development (OECD)'s definition of a tax haven is probably the most well-known one. There are four key indicators of tax havens:[29]

1. No or only nominal taxes (and offering, or being perceived as offering, a place for non-residents to escape tax in their country of residence);
2. Lack of transparency (such as the absence of beneficial ownership information and bank secrecy);
3. Unwillingness to exchange information with the tax administrations of OECD member countries; and
4. Absence of a requirement that activity be substantial (transactions may be "booked" in the country with no or little real economic activity).

In line with the previous indicators, the OECD also stated that the characteristics of tax were low or no taxes, a lack of effective information exchange and transparency, and no requirement for

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[26] Orlov, Mykola, "The Concept of Tax Haven: A Legal Analysis", Journal INTERTAX, Vol. 32, No. 2 2004, p. 96.

[27] Bryan A. Garner, 2001. Black's Law Dictionary, West Group, New York, p. 1474.

[28] World Population Review. "Tax Haven Countries 2022." *World Population Review*, https://worldpopulationreview.com/country-rankings/tax-haven-countries. Accessed 28 November 2022.

[29] Gary Tobin, Op. cit, p. 403.

significant activity.[30] While low corporate or income tax rates are frequently a feature which are associated as the characteristics of tax haven countries, a number of other aspects, such as bank secrecy laws, are just as important or even more so. In essence, tax havens encourage organized crime, encourage tax evasion, and undermine the rule of law. They contribute to economic inequality, which has undermined people's faith in democracy and fuelled populist uprisings.[31]

C. Historic Development of Tax Havens

It is necessary to trace the history of the respective policies and the rationale for the practices in order to comprehend the logic behind the development of tax havens and their proliferation. Tax havens were not created recently. The state interaction itself must have occurred simultaneously with the use of tax haven policies. Since "state" always refers to taxes and "state interaction" competition, tax policies were frequently utilized by states to advance their objectives—sometimes even to the detriment of their neighbours, as is common in international politics.

1. The Early Beginnings

The earliest written accounts of tax havens probably come from Ancient Greece:[32]

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[30] Jane G. Gravelle, Op. cit.

[31] Shaxson, Nicholas, "How to Crack Down on Tax Havens: Start With the Banks", The Economic and Social Review, Vol. 97, No. 2 March/April 2018, p. 95.

[32] Mykola Orlov, Op. cit.

> " . . the ancient city of Athens imposed a tax on merchants of two percent of the value of exports and imports. Merchants would detour twenty miles to avoid these duties. The small neighbouring islands became safe havens in which to hide merchandise to be smuggled into the country at a later date."

In England, Flanders (present-day Belgium), and numerous other medieval states, such policies were later successfully implemented. Two instances of this state's tax interaction with other states are interesting in the context of the United Kingdom's tax policies. The middle age city of London (as well as different wards) excluded Hanseatic brokers occupant in London from all charges.[33] Flanders, a thriving international commercial center in the fifteenth century, had a very liberal regime for domestic and foreign exchange as well as trade taxes. English merchants therefore preferred to sell their goods in Flanders rather than England, where they would have to pay numerous taxes.[34]

By and large, the kind of duty shelter rehearses embraced by the states and purviews at various timeframes relied upon the elements of the assessment frameworks in the separate timeframe. As a result, prior to the widespread introduction of income taxation at the turn of the twentieth century, the majority of tax havens primarily focused on providing relief from import and excise duties.[35] Admittedly, duty asylum rehearses were utilized not just in that frame of mind between states.

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[33] *Ibid*
[34] *Ibid.*
[35] *Ibid.*

Tax benefits have been actively utilized to accomplish specific developmental goals ever since the Middle Ages. As a result, advertisements for the American colonies frequently utilized terms similar to those currently used to promote tax havens.[36] In addition, tax privileges were always used to gain favor with social or ethnic groups or localities, frequently to the disadvantage of neighboring states in some way.[37]

2. Tax Havens in the Globalization Era

Tax havens were widely used, but they had little effect on cross-border transactions until probably the second quarter of the twentieth century. In addition, the state tax policy's ultimate objective rarely included these practices. The circumstance started to change in the twentieth century.[38] It would appear that a number of factors played a role in the rise in the significance of tax haven practices for the global economy and, as a result, their widespread adoption.[39]

The transaction costs of utilizing various tax planning strategies significantly decreased as a result of the expanding globalization of the global economy and advancements in infrastructure, transportation, and communications. People and large businesses began to think about using foreign jurisdictions to avoid paying taxes on their income from domestic and international transactions. The

[36] Ferdinand H. M. Grapperhaus,, 1989, *Taxes, Liberty, and Property*, Meijburg & Co, Amsterdam, p. 298.
[37] Mykola Orlov, Loc. cit, p. 98.
[38] *Ibid.*
[39] *Ibid.*

number of potential users of tax haven increased dramatically. The overall increase in foreign investment, for which taxation has always been a primary consideration, has also been influenced by globalization.

Many of the so-called "classical tax havens"—countries with no or very low income taxes—were created in indirect response to the massive shift of developed countries toward income taxation as their primary source of tax revenue at the beginning of the 20th century, as well as to the confiscatory income tax rates and strict financial regulation implemented in a number of developed countries after the war, particularly in the United States.[40] The demand for tax planning, tax evasion, and evasion strategies that was met by a variety of tax haven practices was arguably created by such policies.[41]

The development of a complex network of double taxation conventions, which only began in earnest in the second half of the twentieth century, is what makes many of the current tax haven practices possible.[42] Throughout the entire twentieth century, tax havens of generally the same type emerged at various times. With the Anstalt in 1926, Liechtenstein became the first tax haven in the

[40] Richard Anthony Jones, 1983, *Tax Havens and Offshore Finance: A Study of Transnational Economic Development*, Bloomsbury Academic, UK, p. 21.

[41] Larkins, Ernest R, "Multinationals and Their Quest for the Good Tax Haven: Taxes Are But One, Albeit an Important, Consideration", The International Lawyer, Vol. 25, No. 2 Summer 1991, p. 483.

[42] Mykola Orlov, Op. cit,

[42] *Ibid.*

world,[43] while tax haven legislation was enacted in Israel in 1969.[44] From the 1960s to the 1980s, a lot of people switched to using tax havens, like the Cayman Islands, Bahamas, Bermuda, Antigua, British Virgin Islands, Israel, Hong Kong, etc. going into the market.[45]

With a shift in public opinion toward this phenomenon and increased focus on the legality of the existing tax havens and their practices, this development may have slowed down in the 1990s. The general liberalization of national tax regimes and regulatory practices in the 1980s and 1990s may have been even more important in slowing down the development of tax haven practices. This made the use of tax havens less appealing to taxpayers in "high-tax" jurisdictions.[46]

D. Lists of Tax Haven Countries

An initial list of tax havens was compiled by the OECD in the year 2000. A similar list was used in S. 396, which was introduced in the 110th Congress and would have treated businesses formed in certain tax havens as domestic corporations. The only distinction between this list and the OECD list was the absence of the United States Virgin Islands from the list in S. 396. A different list derived

[43] Glos, George E, "The Analysis of a Tax Haven: The Liechtenstein Anstalt", The International Lawyer, Vol. 18, No. 4 Fall 1984, p. 930.

[44] C, Bachrach, "Israel as a Tax Haven", The International Lawyer, Vol. 4, No. 5 1970, p. 853.

[45] Mykola Orlov, Op. cit,

[46] UN Report, 1998, *Financial Havens, Banking Secrecy and Money Laundering*, Global Programme Against Money Laundering, Office for Drug Control and Crime Prevention, New York, p. 33.

from court filings of the Internal Revenue Service (IRS) was used in the 111th Congress' tax haven abuse legislation (S. 506, H.R. 1265) that shared many countries. The OECD's definition did not include low-tax nations like Ireland and Switzerland, some of which are OECD members and were thought by many to be tax havens. Hines and Rice conducted an important study on tax havens that included these nations.[47] Additionally, the Government Accountability Office (GAO) provided a list.[48]

All in all, here is the lists the nations that are included on various lists, sorted by location. These tax havens typically cluster in specific regions, such as the Caribbean, West Indies, and Europe, close to major developed nations which are 50 countries in total and could be described as below:[49]

Table 1.1. Formal Lists of Tax Haven Countries

No.	Regions	Tax Havens (Countries)
1.	Caribbean/West Indies	Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados,

[47] Hines, James & Eric M. Rice, "Fiscal Paradise: Foreign Tax Havens and American Business", The Quarterly Journal of Economics, Vol. 109, No. 1 February 1994, p. 149.

[48] Report to Congressional Requesters, 2008, *International Taxation: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions*, U.S., p. 12.

[49] *Ibid.*

		British Virgin Islands, Cayman Islands, Dominica, Grenada, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Turks and Caicos, U.S. Virgin Islands
2.	Central America	Belize, Costa Rica, Panama
3.	Coast of East Asia	Hong Kong, Macau, Singapore
4.	Europe/Mediterranean	Andorra, Channel Islands (Guernsey and Jersey), Cyprus, Gibralter, Isle of Man, Ireland, Liechtenstein, Luxembourg, Malta, Monaco, San Marino, Switzerland
5.	Indian Ocean	Maldives, Mauritius, Seychelles
6.	Middle East	Bahrain, Jordan, Lebanon
7.	North Atlantic	Bermuda

8.	Pacific, South Pacific	Cook Islands, Marshall Islands, Samoa, Nauru, Niue, Tonga, Vanuatu
9.	West Africa	Liberia

Beside the formal list above, there is also the data from Tax Justice Network 2021 which categorize the countries based on the Corporate Tax Haven Index (CTHI) Value or known as a combination of the Haven Score and the Global Scale Weight that is used to determine how much the jurisdiction makes it possible for multinational corporations to abuse corporate tax which could described based on the table below:[50]

Table 1.2. Top 10 Tax Haven Countries in the World based on CTHI Value from Tax Justice Network 2021

No.	Countries	CTHI Value
1.	British Virgin Island	2,853
2.	Cayman Islands	2,653
3.	Bermuda	2,508

[50] World Population Review. "Tax Haven Countries 2022." *World Population Review*, https://worldpopulationreview.com/country-rankings/tax-haven-countries. Accessed 28 November 2022.

4.	Netherlands	2,454
5.	Switzerland	2,261
6.	Luxembourg	1,814
7.	Hong Kong	1,805
8.	Jersey	1,724
9.	Singapore	1,714
10.	United Arab Emirates	1,664

E. Category of Tax Haven Countries

In principle, there are several regulatory conveniences in tax haven countries, which are as follows:[51]

1. Ease in the field of tax regulations;
2. Ease of regulation regarding bank secrecy (bank secrets there are very strongly adhered to);
3. Ease of establishing a company or establishing a bank.

Identifying from the ease of taxes, tax haven countries are often divided into five categories as follows:[52]

1. Tax-free Country (No-tax Haven)

[51] Munir Fuady, 2004, *Hukum Perbankan Modern*, PT. Citra Aditya Bakti, Bandung, p. 233.

[52] Irfansyah, 2010, "*Analisis Peran Tax Haven dalam Melakukan Penghindaran Pajak Lintas Batas Negara*", Thesis, Bachelor of Fiscal Administration, Faculty of Social and Political Sciences Universitas Indonesia, Depok, p. 50.

In these so-called tax-free countries, taxes there are free for anyone. There is only a kind of stamp duty (stamp duties). In tax-free countries, there are no types of tax as stated below:[53]

a. Income tax (individual)

b. Corporate/corporate tax

c. Employment tax

d. Gift tax

e. Lottery tax

f. Land and Building Tax

g. Inheritance tax

h. Sales/value added tax

i. Wealth (property) tax

This group of tax-exempt countries includes the following countries:

a. Cayman Islands

b. Bahama

c. Bermuda

d. Anquilla

e. Nauru

f. Turks & Caicos Islands

g. Bahrain

h. Cook Islands

[53] *Ibid.*

i. Djibouti

2. Territorial System of Tax Haven

In countries with this territorial tax system there is tax discrimination, namely the application of different taxes on income from foreign sources with income from domestic sources. On income from foreign sources, taxes are exempt. However, domestic income is also taxed as usual.

One of the countries with a discriminatory or territorial tax system is Singapore. However, according to the tax law in force in Singapore, income from foreign sources is not subject to tax, but if the income from abroad is repatriated to Singapore, the tax liability is still imposed.

Apart from Singapore, countries that are classified as countries with a territorial tax system include the following:[54]

a. Hong Kong

b. Costa Rica

c. Panama

d. Jibraltar

e. Liberia

f. Philippines

g. Venezuela

3. Low-tax Haven

[54] *Ibid*. p. 51.

The countries in this third group impose taxes at very low rates. So, the rate that is applied is not the normal rate that applies in most other countries. Countries that fall into this category of countries with low taxes include:[55]

a. Barbados: with a maximum corporate/corporate tax of 0%-1%.

b. Netherlands Antilles: with corporate/company tax of 0% - 1%.

4. Countries That Only Charge Certain Taxes

There are also countries that only exempt certain taxes, so not all types of taxes are exempt. For example, it can be mentioned that Ireland is exempt from taxes for manufacturing and export processing.[56]

5. Countries That Charge Taxes for Certain Companies Only

There are also countries in the world that exempt taxes or at least provide tax incentives for certain companies. For example, the countries of Luxembourg, the Netherlands Antilles or Singapore which provide tax incentives for offshore & holding companies that meet certain qualifications. Or the countries of Jamaica, Barbados, Granada or Antigua which reduce taxes for offshore financial companies.[57]

[55] *Ibid*. p. 52.
[56] *Ibid.*
[57] *Ibid.*

In addition to tax relief in tax haven countries, it can also attract foreign companies to invest in these countries. Or companies record patents or other intellectual property rights. Furthermore, this tax convenience is also the reason why many international companies have holding companies domiciled in these tax haven countries.

F. The Definition of Special Purpose Vehicle

SPV has its similar term such as letterbox company and shell company. However, there is no universal consensus that differentiate each of the term,[58] hence it is more likely to be interpreted as the same. Author will raise the usage of SPV in this thesis which as expressed by Robert L. Symonds, Jr., as follows:[59]

> "A Special Purpose Vehicle (SPV) is a company with a limited purpose or focus. It is created by a corporation to conduct a specific or temporary activity. It is normally, but not necessarily, owned almost entirely by the sponsoring corporation. It must be distanced from the sponsor both in terms of management and ownership (not 100%), because if the SPV were to be owned or controlled by the sponsor, there is no difference between a subsidiary and an SPV."

The SPV was created with a very specific/limited function, primarily to limit the financial risk of the SPV owner concerned (and in

[58] There are variety of terms used in several references which also has the same interpretation with SPV such as in Indonesia it is known as "Shell Company" or "*Perusahaan Cangkang*"; in Swiss it is known as "Letterbox Company"; and other references also mention "Brass Plate Company".

[59] Ridovi Kemal, 2013, "*Regulation of Special Purpose Vehicle Legal Entity and Alienation of State Owned Asset in Law Number 19 Year 2008 on Sovereign Syariah Securities and According to Islamic Law*", Thesis, Bachelor of Law, Faculty of Law Universitas Indonesia, Depok, p. 8.

certain contexts, the interests of the SPV's creditors).[60] Therefore, the SPV has several special characteristics that are quite easy to identify, including: not having employees, not having a physical location, and not making substantive business/economic decisions (not carrying out business activities).[61] The mentioned characteristics clearly distinguish the role of SPV from a corporation, which in principle carries out business activities actively for profit.[62]

In practice, SPV can be used to disguise the identity of the owner through the concept of separating the owner from the corporate legal entity.[63] This disguise of identity is generally done by establishing dozens, tens or maybe more SPVs and creating a multi-layered ownership structure over these SPVs in various jurisdictions (which of course involves many countries).

SPV is usually a subsidiary, or controlled company, or affiliated company. SPV is created for a specific purpose, and is created to protect the legal entity that created it from unlimited liability by the SPV. Hence, the liability stops limited to the SPV, not to the Legal Entity above which formed it.[64] The disguise of identity through this SPV, coupled with the existence of the concept of limited liability, can

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[60] Pearce, John, "Special Purpose Vehicles in Bankruptcy Litigation", Hofstra Law Review, Vol. 40, No. 1 2011, p. 195.

[61] Oktavinanda, Pramudya, "Special Purpose Vehicles in Law and Economics Perspective", Journal of Indonesia Corruption Watch, 2013, p. 2.

[62] Dennis Mueller, 2003, *The Corporation: Investment, Mergers, and Growth*, Routledge, London, p.63.

[63] OECD, 2001, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*, OECD Publications, France, p.25.

[64] Ridovi Kemal, Op. cit, p. 8.

provide negative incentives to certain parties to violate the law, including in the form of money laundering, corruption, insider transactions, tax evasion, and so on.[65]

Furthermore, the perils of SPV that could lead to a negative incentive since we must return to the initial assumption in legal and economic approaches that humans are rational beings. As a rational being, a person will commit a crime if the benefits of the crime exceed the costs that must be incurred by someone in connection with the crime.[66]

This formula is generally applicable to all types of criminal acts, including theft, murder, rape, to corruption and money laundering. Establishing numerous complex layers of ownership through SPV does not require large capital. In practice, US$ 100 is sufficient to establish a corporation in certain countries that are specialized in doing business in the field of corporate establishment.[67]

In addition, the operational costs of running SPV are also not large because in accordance with their limited functions, SPV does not require manpower, physical offices and business activities. In Indonesian law, SPVs can be classified in the category of corporations with the type of Permanent Business Entity based on

[65] *Ibid.*

[66] Gary, Becker, "*Crime and Punishment: An Economic Approach",* Journal of Political Economy, 1968, p. 176.

[67] OECD, Op. cit, p. 23-24.

Law No. 36 of 2008 on the Fourth Amendment to Law No. 7 of 1983 on Income Tax.

G. List of International Regulations Related to the Tax Evasion Practices

This thesis will have a further research on how the international law could see the tax evasion in tax haven countries as a phenomenon where it could be scrutinized through the perspectives of several conventions, protocols, declarations, to the source of laws that are not legally binding but still in the scope of legal analysis. Author will highlight the sources of international law based on the Article 38 paragraph (1) of Statute of the International Court of Justice which states:[68]

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In addition, author also recognizes the international law specifically to the international treaty,[69] from the statement in Article 1 letter (b) of Yearbook of the International Law Commission, 1962:[70]

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[68] Statute of the International Court of Justice.

[69] International treaty are part of the sources of international law and have a more detailed position in the argument for the contents of obligations for the parties. See Birkah Latif & Kadaruddin, 2013, Hukum Internasional, Pustaka Pena Press. Also see Birkah

> *"Treaty* means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation)."

Hereby, the list of the conventions, declarations, treaties, and frameworks related to the tax evasion practices based on author's analysis and compilation could be seen in the table below:

Latif & Kadaruddin, 2013, Hukum Perjanjian Internasional, Pustaka Pena Press., Birkah Latif, 2020, Pengantar Hukum Lingkungan Internasional, Pustaka Pena and see also Birkah Latif, 2020, Pengantar Hukum Lingkungan Internasional, Pustaka Pena.

The position of the treaty in relations between countries has also developed not only in the form of multilateral, regional and even developed into a direct form between countries, namely bilateral agreements. See Birkah Latif, Integrasi Prinsip Ekonomi dan Lingkungan dalam Perdagangan Bebas (Analisis terhadap Perjanjian Masyarakat Ekonomi Asean (MEA), Dissertation Fakultas Hukum Universitas Hasanuddin, 2020, Birkah Latif, Mining in Indonesia: A Business and Human Rights Approach, University of Washington, LLM Paper, 2014 and Birkah Latif, Kedudukan Bilateral Investment Treaties (Bits) dalam Perkembangan Hukum Investasi di Indonesia, Thesis Universitas Airlangga, 2009.

[70] Documents of the fourteenth session including the report of the Commission to the General Assembly, 1962, *Yearbook of the International Law Commission New York*, p. 31.

Table 1.3. List of International Regulations Related to the Tax Evasion Practices in Tax Haven Countries

Convention	Declaration	Treaty	Framework
United Nations Model Double Taxation Convention between Developed and Developing Countries	Bali Declaration 2022 (Asia Initiative Declaration)	Double Tax Treaty	OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting
OECD Model Tax Convention on Income and on Capital		Agreement on Exchange of Information on Tax Matters	
Convention on Mutual Administrative Assistance in Tax Matters		Treaty on Mutual Legal Assistance in Criminal Matters	

Furthermore, the list of international regulations above should be examined since some of the articles inside the conventions have its own regulation and perspective in tackling tax evasion practices in tax haven countries.

H. International Legal Analysis on the International Regulations Related to the Tax Evasion Practices

1. United Nations Model Double Taxation Convention between Developed and Developing Countries

The United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations Model Tax Convention) exists due to the ongoing commitments to eliminate double taxation. It is designed to make double tax treaty's negotiations easier and to avoid any complications for nations whose laws require ratification.

This convention acknowledges that the international economic, financial, and fiscal environment had undergone significant changes. Likewise, this convention puts attention on the tax impacts of new financial instruments, transfer pricing, the growth of tax havens, and globalization influencing worldwide financial relations.[71]

Bilateral treaties are emphasized in this convention as a means of preventing tax evasion and avoidance. States ought to likewise consider whether their prospective treaty partners are willing and ready to execute the provisions of double tax treaties concerning administrative assistance, for example, the capacity to exchange tax information, this is a key aspect that ought to be considered while choosing whether or not to go enter into a bilateral tax treaty.[72]

[71] Paragraph (10) on the Introduction of The United Nations Model Double Taxation Convention between Developed and Developing Countries.

[72] Paragraph (15.6) on the Introduction of The United Nations Model Double Taxation Convention between Developed and Developing Countries.

As far as answering the tax evasion case in tax haven countries, this convention regulates the role of the exchange of information in accommodating the importance of transparency in preventing tax evasion among countries, especially in tax haven countries. It is stated in Article 26 paragraph (1) on Exchange of Information which states:[73]

> "The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by Articles 1 and 2."

Based on author's analysis toward this article, this article related to the exchange of information which requires: (1) There are mechanisms for exchange of information that is "foreseeably relevant" to the administration and enforcement of the treaty partner's domestic laws when requested; (2) There are no restrictions on such exchange due to requirements for domestic tax interest or bank secrecy; (3) Accessibility of reliable information (ownership, identity, and accounting information) and powers to get and give such data in light of a particular solicitation on time; and (4)

[73] Article 26 of The United Nations Model Double Taxation Convention between Developed and Developing Countries Number.

Adherence to strict confidentiality guidelines for information exchanged and respect for taxpayer rights.

In light of multiple factors, Article 26 could not, without amendment, be used as a basis for securing the effective exchange of information with some, at any rate, of the countries and territories in the tax havens list. This can, thusly, be all around represented by reference to the limitations on the obligation to exchange information contained in Article 26 paragraph (3). Paragraph (3) directs itself to three situations of the options to refrain from giving the exchange of information: where there is an absence of reciprocity; where there is a risk of the disclosure of business and professional secrets; and in situations where doing so would be against public policy.[74]

These reasons for refusing assistance can significantly limit the scope of the obligation to cooperate, either on their own or when combined. In the present context, for example, where there may well be significant differences in the tax laws and national administrative practices of OECD and tax haven longer mandatory. In this regard, it is important to note that there is no international obligation to exchange tax-related information,[75] unless a country has signed a relevant international treaty or agreement, exchange

[74] Article 26 paragraph (2) on the United Nations Model Double Taxation Convention between Developed and Developing Countries.

[75] Garufi, Sebastiano, "Tax Havens and Exchange of Information: Is Uncooperative Behaviour a Violation of International Law?", Bocconi Legal Studies Research Paper No. 2355679, 18 December 2018, p. 13.

of information cannot be considered as a legal obligation established by international law.

Countries are free to decide whether and with whom they want to share information as long as they do not enter into an international treaty that imposes such an obligation.[76] Therefore, in essence, this convention emphasizes the significance of information exchange between states; however, it is still the responsibility of states to implement the mandate provided by this convention in their respective bilateral double tax treaties.

Thus, countries not having concluded any international treaty in this respect might legitimately decline requests of information by other States. However, such uncooperative attitude does not constitute any breach of international law.[77] Every jurisdiction is free to decide whether or not to exchange information, and tax policies are solely the responsibility of national parliaments.[78] Financial capital diversion from high-tax countries to low-tax countries is not governed by international law, and there are no public international law grounds for a state to demand a particular tax system from another state. As a consequence of this, it would appear that there is no basis for the conclusion that any nation that refuses to cooperate or comply with this convention commits any internationally wrongful act.

[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*

For instance, countries that do not adhere to the call to be open about the right to information exchange exhibit segmentation in terms of transparency. With regards to tax havens, the OECD compiles a list of tax haven countries or territories based on three categories as follows: (1) Countries that are prepared to share information or have properly implemented tax and banking standards (white list); (2) Countries that are prepared to act or have committed yet have not completely executed tax and banking standards appropriately (grey list); (3) Countries or territories that have declined to commit to or have not agreed to implement the transparency principle (black list).[79]

In the exchange information scheme, countries on the black list do not adhere to the principle of banking transparency or tax information. So for this situation, author analyzes that as far as handling tax evasion in tax haven countries, it actually appears to be grey seeing the disparity of nations to mutually focus on having the option to focus on the straightforwardness of worldwide tax transparency, particularly in regards to the identity of beneficial owners which can be a gap between a country with tax haven countries as a moment to manipulate financial statements that lead to tax evasion.

[79] Pohan, Chairil Anwar, "Panama Papers dan Fenomena Penyeelundupan Pajak serta Implikasinya terhadap Penerimaan Pajak Indonesia", Jurnal Reformasi Administrasi, Vol. 4, No. 2 September 2017, p. 151.

This information exchange was agreed upon as a first step toward controlling tax haven countries. The G20 has threatened to impose severe sanctions on nations that refuse to cooperate on taxes in relation to the sanctions that are regulated in this context. Membership in the World Bank and the International Monetary Fund (IMF) can be excluded from the country.[80] However, this clarity and firmness are not regarded as binding or obligatory in this convention, but instead the parties to the treaty entered into a bilateral tax treaty to regulate double taxation and its taxation rights.

In this context, the convention is also in line with the Financial Action Task Force (FATF) Standards to collaborate in responding to the case of beneficial ownership's secrecy since FATF emphasizes the importance of the disclosure of information for tax purposes so that taxpayers around the world comply with the applicable tax rules where the taxpayer's identity is registered.

This action considered as the way to overcome the possibility of money laundering due to the tax evasion practices as interconnected causes and this prompt would be the manifestation of Recommendation 33 and 34 of FATF Standards.[81] Hence, based on author's analysis where the convention itself would be bolstered by the involvement of this intergovernmental body and prevailing international standards of tax transparency.

[80] Chairil Anwar Pohan, Op. cit, p.156.

[81] Financial Action Task Force, 2003, *FATF Standards: FATF 40 Recommendations*, FATF, Paris, p.11-12.

This convention also offers the Contracting States a means of resolving the international tax dispute. Article 25 of the United Nations Model Tax Convention provides a mechanism for the competent authorities of the Contracting States to resolve disagreements or difficulties regarding the interpretation or application of the Convention on a mutually agreed-upon basis. To ensure that taxpayers who are entitled to the benefits of the treaty are not subject to taxation by either of the Contracting States that are contrary to the terms of the treaty, this mechanism, known as the Mutual Agreement Procedure (MAP), is crucial to the proper application and interpretation of tax treaties.[82]

The resolution of specific vertical tax treaty disputes is outlined in Article 25 of the United Nations Model Tax Convention on Mutual Agreement Procedure. Regardless of any available domestic remedies, any private person who believes their rights under the applicable tax treaty have been violated may present their case to the "competent authority" of the contracting state.[83] Representatives of the state agency in charge of tax treaties, typically the Ministry of Finance, who has the authority to negotiate on the state's behalf are referred to as competent authorities.

[82] OECD. “Action 14 Mutual Agreement Procedure” *BEPS Inclusive Framework on Profit Shifting*, 22 May 2023, https://www.oecd.org/tax/beps/beps-actions/action14/. Accessed 22 May 2023.

[83] Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries.

According to the author's analysis, MAP encourages dialogue and cooperation among the involved competent national tax authorities in order to facilitate dispute resolution. This is generally because of a request by the taxpayer affected by the double taxation. In brief, tax treaties that adopt Article 25 of the United Nations Model Tax Convention contain a *pactum de negotiando*, a duty to negotiate where the competent authorities are obliged to look to determine the case in a fair and objective way, on its benefits, as per the particulars of the convention and applicable principles of international law on the interpretation of the treaties or agreements.[84] However, the competent authorities are not obligated to achieve the situation where the agreement must be reached.[85]

In accordance with international law, a mutual agreement between states is legally binding if it is reached successfully. The specific domestic system determines its legal effect in the domestic context, such as whether it is directly binding on tax authorities implementing the agreement.[86] The classification of MAPs as negotiations is central to the assessment of the Court's consensual jurisdiction over tax treaty disputes. This type of tax dispute resolution will have an impact on the procedure for encouraging tax transparency in bilateral tax treaties, particularly double tax treaties,

[84] Braumann, Céline, "The Settlement of Tax Disputes by the International Court of Justice", Leiden Journal of International Law, Vol. 1 May 2023, p. 8.
[85] *Ibid.* p. 9.
[86] *Ibid.*

which are meant to prevent tax evasion by dividing up taxation rights and including relevant clauses related to the relevant method of information exchange.

2. OECD Model Tax Convention on Income and Capital

In principle, the OECD Model Tax Convention on Income and Capital (OECD Model Convention) is more oriented toward the interests of developed nations, which have greater tax rights in nations that receive income. In the meantime, the United Nations Model Tax Convention focuses on greater taxation rights in source countries. Nonetheless, some of the articles from these two conventions are mostly the same.

In the OECD Model Convention, the point is to increase trade between nations that sign tax treaties by wiping out international double taxation, and in this convention, more tax rights are given to the country of residence. Members of the OECD Model Convention consist of developed countries, which are generally European countries such as Britain, France, Germany, Japan, Australia, the United States, Canada, and 19 other developed countries.

There are some Articles and Commentaries of the OECD Model Convention that could be considered as responses toward tax haven countries and tax evasion phenomena. For instance, Article 25 of the OECD Model Convention which is also the same as the United Nations Model Tax Convention, also provides

complementary information about MAP where it is a special dispute resolution outside the realm of domestic dispute resolution, such as objections or appeals.

MAP is considered special because it is a non-litigation procedure in the consultation process to find equilibrium through double tax treaties. This is also emphasized in the Commentary on Article 25 paragraph (8) on the Mutual Agreement Procedure of the OECD Model Convention where it is clearly a special procedure outside the domestic law.[87]

One of the Base Erosion and Profit Shifting Project's actions (Action 14) also included efforts to improve the effectiveness of the dispute settlement mechanism through MAP and arbitration.[88] However, this does not imply that MAP lacks of flaws. For instance, it does not obligate the tax authorities to reach an agreement, hence MAP is regarded as not providing certainty.[89]

Article 26 of the OECD Model Convention is the same as the United Nations Model Tax Convention which regulates the exchange of information which, in addition to regulating the exchange of information based on requests, also regulates the exchange of information automatically and spontaneously. This is explained through the Commentary on Article 26 paragraph (9.1)

[87] Article 25 paragraph (8) of the OECD Model Tax Convention on Income and Capital.

[88] OECD, Op. cit.

[89] Commentary on Article 25 paragraph (37) of the OECD Model Tax Convention on Income and Capital.

where on request and automatic forms of information exchange can also be combined.[90]

It is important to emphasize that this article does not limit the methods of information exchange; rather, the Contracting States may employ other methods, such as simultaneous examinations, tax examinations abroad, and industry-wide information exchange, to obtain information that may be relevant to both Contracting States.[91]

In addition, related to the option of request-based information exchange mechanism needs to be supported by general provisions to run effectively. These general provisions are based on the principles of subsidiarity, reciprocity, and equivalence.[92] The principle of subsidiarity is the most important principle in the information exchange mechanism on request. Based on this principle, before making a request for information, the tax authority that will request the information has used all available methods in its own territory to obtain the information, unless this will cause disproportionate difficulties.[93] The rationale behind this principle is to avoid making unnecessary requests for information to other countries and

[90] Commentary on Article 26 paragraph (9.1) of OECD Model Tax Convention on Income and Capital.

[91] *Ibid.*

[92] Darussalam & Danny Septriadi, 2017*, Perjanjian Penghindaran Pajak Berganda: Panduan, Interpretasi, dan Aplikasi*. DDTC. Jakarta. p. Avi-Yonah, 2007, *International Tax as International Law.* Cambridge University Press. Ann Arbor. p. 608.

[93] *Ibid.*

consequently creating an administrative burden for all the tax authorities involved.

The next principle is reciprocity as set forth in the OECD Commentary Article 26. This principle emphasizes its relevance in the mechanism of exchanging information based on requests. According to this principle, the tax authorities of a country are only required to provide information to the extent that the information can be collected by means of the laws and administrative procedures of the country requesting the information (as long as there are differences in the rules and administrative procedures of each country). This principle must be applied in a broad and pragmatic way. That is, any distortion that may lead to steps in providing information, does not have to be an argument for rejecting the request submitted.[94]

Lastly, the principle of equivalence states that the state providing the information must use all measures available at the domestic level as if the information requested must be collected for its own purposes. Thus, the instruments used to provide information are based on domestic provisions and may not be applied differently from the procedures for providing information for the purpose of exchanging information with treaty partner countries. Therefore, despite the fact that the information requested may not be relevant

[94] *Ibid.*

for the country the information is requested for, this should not be used as a reason for refusing to provide information.[95]

Therefore, the exchange of information is intended as a means of detecting and preventing tax evasion efforts at the international level.[96] Jurisdictions that are usually places of transit for global funds (offshore financial centers) located in tax havens, for example Switzerland, are now increasingly opening up and participating in the information exchange cooperation framework.[97] This openness clearly makes taxpayers lose a place to store their funds in secret and could be the way to reduce the possibility of tax evasion practices worldwide due to the international cooperation to comply with the convention and bilateral tax treaty.

3. Convention on Mutual Administrative Assistance in Tax Matters

The Convention on Mutual Administrative Assistance in Tax Matters (CMAAT) was first held in 1988 in light of the OECD with Council of Europe arrangements and went through amendments in 2010.[98] Amendments were made to give different types of assistance in the field of taxation, specifically to tackle tax avoidance and evasion.[99] In this CMAAT, tax assistance can come in the form of

[95] Article 26 paragraph (4) of OECD Model Tax Convention on Income and Capital.
[96] Darussalam & Danny Septriadi, Op. cit. p. 597.
[97] *Ibid.* p. 647.
[98] *Ibid.* p. 706.
[99] *Ibid.*

information exchange between participants to aid in the recovery of tax claims. CMAAT contributes in speeding up information exchange networks due to its attractive legal framework, broad scope, and multilateral nature where there are currently approximately 140 countries and jurisdictions that have signed the CMAAT.[100]

In the Anti-Base Erosion and Profit Shifting (BEPS) Project, 96 nations have signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) regarding the exchange of Country-by-Country (CBC) Reports.[101] For information, CbC MCAA fundamentally refers to Article 6 of the CMAAT which requires the competent authority to jointly agree on the scope and procedures for automatic exchange of information. In addition, Terms of Reference (TOR) and methodologies for conducting peer reviews of CbC reports have been published by the OECD, as well as standard electronic formats (CbC XML Schema) that serve as a reference format for exchanging reports per country.

The whole analysis of these three conventions above, it is seen from all articles of the conventions are the same substances which emphasize two main aspects: (1) Transparent exchange of information; and (2) MAP as the international tax dispute settlement

[100] OECD, 2023, *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters Status – March 2023*, OECD, Paris, p.6.

[101] OECD, 2023, *Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports and Signing Dates*, OECD, Paris, p.1.

interconnected to the making of double tax treaties to prevent double taxation and regulate taxation rights between Contracting States.

4. Bali Declaration 2022 (Asia Initiative Declaration)

The current Bali Declaration 2022 (Asia Initiative Declaration) as a call to enhance the use of tax transparency for a sustainable mobilization of domestic resources is one of the progressive initiatives to realize the cases of tax evasion in international realm should be addressed especially in concerning the tax haven issues. With 16 countries as the signatories of the Bali Declaration and members of the Asia Initiative (as of 14 October 2022),[102] could be a sign of optimism that in overcoming the illicit financial flows internationally which leads to the corruption, [103] and money laundering needs international commitments.

Within this declaration, it can be seen from its preambulatory clauses which affirm the commitments to fight against tax evasion and prompt for international tax transparency as the way forward to adapt with the current situation. Some of the related preambulatory clauses in the context of tackling tax evasion could be seen as below:

[102] Bali Declaration 2022.

[103] The orientation for such corrupt practices is to maximise profits without consideration for the consequences that may lead to losses for the communities involved and the country, on a larger scale, Birkah Latif, SM. Noor, Juajir Sumardi, Irwansyah, Environmental Damage Caused by Corruption Cases Involving Trade and Investment: Rock to Bottom View, International Conference on Law, Environment and Society (ICLES)-The European Proceedings of Social & Behavioural Sciences (EpSBS) 2018, p. 198. See Birkah Latif, Dara Indrawati, Kadarudin, Padma D. Liman, Russian Law Journal Volume XI (2023) Issue 3.

> "**Recalling** the commitment of the Addis Ababa Action Agenda to redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion through strengthened national regulation and by scaling up international tax co-operation, including to support access to beneficial ownership information for competent authorities and progressively advance towards automatic exchange of tax information among tax authorities as appropriate."

This declaration really emphasizes the commitment to improve transparency and exchange of information for tax purposes, including supporting access to beneficial ownership information for competent authorities, implementing tax transparency standards, and strengthening national regulation related to tax cooperation. It also collectively emphasizes the importance of international community to embrace one another in tackling the tax evasion and illicit financial flows.

It is also stated in the preambulatory clause where the goal to improve transparency and exchange of information for tax purposes through the internationally agreed standards of the Global Forum which are a prerequisite for effectively tackling tax evasion and other illicit financial flows.

Afterwards, for the declaration itself has been a call to the participated countries with the details of operative clauses as follow:

> "**1.** We reaffirm the important role of the Global Forum in bringing about tax transparency and in assisting jurisdictions, in particular developing jurisdictions, in the implementation of the tax transparency standards and the use of the administrative co-operation instruments in their domestic resource mobilisation strategy;

2. We reiterate our commitment to fully and effectively implement the internationally agreed tax transparency standards of the Global Forum (tax transparency standards);
3. We welcome and join the Global Forum's Asia Initiative to facilitate the implementation of the tax transparency standards, maximise their effective use to tackle tax evasion and other illicit financial flows, and increase tax co-operation among Asian members;
4. We encourage Asian jurisdictions to join the Global Forum and its Asia Initiative, and to become party to the Convention on Mutual Administrative Assistance in Tax Matters to rapidly implement and fully benefit from tax transparency standards to support the fairness of their tax system and their domestic resource mobilisation strategy;
5. We invite all global and regional development partners and technical partners to participate and contribute in the Asia Initiative and its capacity-building activities to promote tax transparency and support effective use of administrative co-operation instruments;
6. We resolve to lead by example in effectively using the powerful global infrastructure which has been built in the past decade and to continuously improve our co-operation, both at the global and regional levels;
7. We commit to explore the full range of possibilities for co-operation provided by the Convention on Mutual Administrative Assistance in Tax Matters, including, where relevant, through enhanced co-operation between interested Asia Initiative members."

Based on the author's analysis towards this declaration, this declaration is a soft law which is considered only morally binding because it does not place obligations and authorities on the parties involved in international treaties and soft law is a legal instrument that contains norms that are expected to one day be enforced and be a guide for international actors without coercive legal force.

Author's optimism on this side where it has been followed by action and massive participation after the declaration which could be seen through Asian countries especially in partaking the role on

the Global Forum on Transparency and Exchange of Information for Tax Purposes as the leading international body working on the implementation of global transparency and exchange of information standards around the world with around 167 members (countries) who have participated with.[104]

Specifically to tax haven issues, Global Forum on Transparency and Exchange of Information for Tax Purposes as the practical and collective actions after the Bali Declaration also put an end to offshore tax evasion by monitoring the implementation of the international standards; conducting peer reviews to assess the effectiveness of the implementation; and organizing capacity building and technical assistance to support its members.[105]

Since the G20 declared the end of banking secrecy in 2009, the international community has made extraordinary progress in tackling offshore tax evasion by working through the Global Forum, countries have carried out vigorous principles that have prompted an unprecedented level of transparency in tax matters where more specifically, they are the Exchange of Information on Request (EoIR) and Automatic Exchange of Information (AEoI) as stated in the previous explanation where United Nations Model Tax

[104] OECD. "Putting an End to Offshore Tax Evasion." *Global Forum on Transparency and Exchange of Information for Tax Purposes,* 22 May 2023, https://www.oecd.org/tax/transparency/. Accessed 22 May 2023.

[105] *Ibid.*

Convention, OECD Model Convention, CMAAT, and this declaration should go forward harmoniously toward the implementation.[106]

Furthermore, this declaration puts the pivot on Global Forum on Transparency and Exchange of Information for tax purposes as the actionable steps to actualize the commitments declared in the declaration to combat the tax evasion practices including offshore tax evasion based on the way to prioritize the transparency on information starting from EoIR, AEoI, and capacity building and technical assistance on the international tax standards implementation for the participated countries.

4. Bilateral Tax Treaties

a. Double Tax Treaty

Treaties are subject to customary law and find their binding force over the contracting parties on the grounds of the customary rule "*pacta sunt servanda*".[107] They can regulate a particular aspect of international relations, or form the constitution of international organisations.

For decades, Double Tax Treaties (DTTs) have been developed to prevent double taxation on the income of natural or legal persons who meet the attachment criteria abroad. As a result, the international promotion of economic activities relies heavily on these DTTs. Although the phenomenon of double taxation has been

[106] *Ibid.*
[107] Sebastiano Garufi, Op. cit, p.17.

recognized and condemned for a considerable amount of time, there is no unconditional obligation for countries to resolve this kind of issue. Afterwards, within the framework of international organizations like the OECD and the United Nations, the drafting of model tax treaties has been initiated in order to address these issues, which have a significant impact on the global economy.[108]

The internationalization of tax matters and the rise of worldwide tax treaties create mechanisms for a coordinated activity of the sovereign power of the countries to be imposed, considering the situation of people or companies between two fiscal sovereignties and the battle against tax avoidance and evasion. Through DTTs, states have essentially established the groundwork for a helpful climate that ought to advance the increase of worldwide trades that are helpful for development and improvement.

In overcoming and continuing the mandate, guideline, and progress based on the previous conventions and Bali Declaration, DTT is one of the main actors in tackling tax evasion practices in tax haven countries since it gives the legally binding aspect between nations and the way of tax transparency to manifest either the EoIR or AEoI as the fundamental things to be applicated in this case.

The example of the DTT taken in this thesis is the Agreement between the Government of the Republic of Indonesia and the

[108] *Ibid.*

Government of the Republic of Singapore for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance. In this DTT, it intends to reach an agreement to eliminate double taxation on income taxes without providing opportunities for tax evasion or avoidance—including treaty-shopping arrangements aimed at obtaining reliefs provided in this treaty for the indirect benefit of residents of third jurisdictions—to reduce or eliminate taxes.

In this treaty, author scrutinizes where the treaty implies the implementation of Arm's Length Principle to avoid the transfer mispricing which potentially leads to the tax evasion practices. Hence, it is important to put the emphasis on Arm's Length Principle as the manifestation of fairness and customary business, transactions carried out by related parties should be the same/comparable to transactions carried out by parties who are not related. Therefore, in accordance with the Arm's Length Principle, the group's multinational corporations will be regarded as separate entities and not as business entities.[109]

Related to the exchange of information in enforcing the transparency between two states, it is totally same with the clauses of Article 26 on the United Nations Model Tax Convention and the OECD Model Convention. Additionally, the MAP rules for tax case

[109] Darussalam, Denny Septriadi, and B. Bawono Kristiaji, 2013, *Transfer Pricing: Ide, Strategi, dan Panduan Praktis dalam Perspektif Pajak Internasional.* Danny Darussalam Tax Center, Jakarta, p. 160.

dispute resolution in this treaty are also the same to those outlined in Article 25 of the United Nations Model Tax Convention and the OECD Model Convention.

However, in DTT itself, there's no specific clause about tax haven. Consequently, based on author's analysis, the case will be based on complaint offence derived from the result of investigation report where the complexity of tax evasion is on the complex financial schemes due to the secrecy and lack of transparency, thus the prior conventions, Bali Declaration, and DTT are seen as the preventive regulations on tax evasion by encouraging countries to make their own bilateral treaty. Hence, it totally depends on every states' policy and national act to give the punishment if there's an allegation of tax evasion even though it is cross-border and transnational.

Lastly, about the avoidance on double taxation itself, the consensus between two nations in this bilateral treaty emphasized on regulating the distribution of taxation rights so that later on certain types of income, a country's taxation rights will be limited by the DTT itself where in case of DTT between Indonesia-Singapore, one example can be found in the Article 7 on Business Profits. This means by having the DTT, it will create clearer taxation rights and transparent exchange of information which contributes to the

prevention of tax evasion through its intention on manipulating financial report.

b. Agreement on Exchange of Information on Tax Matters

The Agreement on Exchange of Information on Tax Matters aims to promote international cooperation in tax matters through the exchange of information. It was developed by the OECD Working Group Global Forum. This agreement outgrew the work done by the OECD to address harmful tax practices. One of the most important factors in determining harmful tax practices is the absence of efficient information exchange.

This agreement facilitates the exchange of information with countries that do not have DTT, which is usually found in tax haven countries.[110] It is hoped that this agreement will play an important role in reducing the effects of tax havens so that the information questioned by the tax authorities of a particular country can be accessed through the consensus made in this bilateral agreement.

As derivations, a number of bilateral agreements related to this have emerged which have been negotiated and signed between the two countries to establish a formal system for the exchange of tax-related information. For example, tax haven countries that have made bilateral agreements related to information transparency, namely the Cayman Islands, which have continued to develop

[110] Darussalam & Danny Septriadi, Op. cit. p. 600.

information exchange networks since 2010.[111] The Cayman Islands have signed a further five tax information exchange agreements that comply with international standards namely with Canada, Mexico, Japan, India and South Africa.[112]

Another example could be seen from the Agreement between the Government of the Republic of Indonesia and the Government of Republic of San Marino for the Exchange of Information Relating to Tax Matter. The essence of this agreement is reflected from the Article 1 where the competent authorities of the Parties shall provide assistance through the exchange of information deemed relevant to the administration and domestic law enforcement of the Parties regarding the taxes covered by this agreement.

Such information must include relevant information related to tax imposition, tax audit, or tax criminal prosecution in relation to that person/entity. Information will be exchanged in accordance with the provisions of this agreement and kept confidential as regulated in Article 8. Related to the article that has a correlation with the prevention of tax evasion through this agreement, matters regarding taxation crimes are also regulated which in Article 4 letter (o) on General Definition means taxation issues involving intentional actions, both before and after the entry into force of this agreement,

[111] *Ibid.*
[112] *Ibid.*

which may be prosecuted under the criminal law of the Requesting Party.

It is also further emphasized that this agreement adheres to the standard of exchange of tax information based on EoIR stated in the Article 5 paragraph (1) on Exchange of Information Based on Request where the authorized official of the requested Party must provide, at the request of the Requesting Party, information for the purposes referred to in Article 1. Such information shall be exchanged regardless of whether the requested Party requires such information for its own tax purposes or the act under investigation constitutes a criminal offense according to the law of the requested Party if the said act occurred in the territory of the requested Party.

The interesting thing about this agreement can also be seen that there is Article 6 on Overseas Tax Examination as a holistic form of inspection, especially in the context of potential tax evasion through transfer mispricing motives to manipulation of financial statements which of course can be a progressive step for the two countries to mutually transparent and prevent future tax evasion practices.

c. Treaty on Mutual Legal Assistance in Criminal Matters

The Mutual Legal Assistance Treaty (MLAT) in Criminal Matters makes it possible for prosecutors and law enforcement to obtain foreign evidence, information, and testimony that can be used in the

courts of the Requesting State.[113] If the conditions of the treaty are met, MLAT generally mandates that the Requested State provide the Requesting State with particular forms of assistance or evidence, such as documents, records, and testimony.

The process is streamlined through the existence of a Central Authority within each country to make, receive, and facilitate the execution of requests for evidence expected for use in criminal investigations, prosecutions, and related proceedings.[114] In brief, MLAT is a system of international cooperation in the field of prevention and eradication of crime, especially against transnational crime.

The existence of this treaty in tackling the tax frauds including tax evasion is essential. This bilateral treaty is a bit different with the previous treaties such as DTT and an Agreement of Exchange of Information on tax matters which predominantly prioritize the tax transparency as the preventive actions toward tax evasion based on countries' cooperation in tackling tax cases. This treaty more focuses on criminal aspects, hence it has stricter prompts to tackle the criminal acts through investigations toward the received allegation report.

For the concrete example of how MLAT works in tackling tax evasion cases, it could be seen through The Treaty on Mutual Legal

[113] Mutual Legal Assistance Treaties of the United States, 2022, *Office of International Affairs Criminal Division U.S. Department of Justice*, p. 2.
[114] *Ibid.*

Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation which has officially entered into force in 2021.[115] So far, Swiss is indeed known as a tax haven, and is often used by many groups to hide their assets from the pursuit of tax authorities and has the potential to give rise to indications of tax evasion due to the lack of tax transparency in that country.

This treaty was signed by the Indonesian Minister of Law and Human Rights, Yasonna H. Laoly and the Swiss Minister of Justice, Karin Keller-Sutter in Bern, Switzerland on February 4, 2019.[116] The ratification process in Indonesia has been completed by Law No. 5 of 2020 on Ratification of the Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and the Swiss Confederation. In the meantime, Swiss finished its internal process in July 2021. The two countries further inform the completion of the process through the exchange of diplomatic notes.

Given the fact that Swiss is regarded as a tax haven and the global financial center, hence by enforcing the Indonesia-Swiss MLAT is a significant accomplishment. This treaty directs legitimate collaboration and expected to strengthen the tracking, freezing, confiscation of assets as the proceeds of crimes. This wide extent of

[115] Ministry of Law and Human Rights of the Republic of Indonesia. "The Treaty on Mutual Legal Assistance between Indonesia and Switzerland is Officially Enforced." *Ministry of Law and Human Rights of the Republic of Indonesia*, 14 September 2021.

[116] *Ibid.*

MLAT is a significant part in supporting the criminal law process in the Requesting State.

In line with tax cases, the Indonesian government is trying to ensure that Indonesian citizens or legal entities comply with Indonesian tax regulations and do not commit tax evasion or other tax crimes by using this MLAT to combat fiscal crimes, including tax fraud. The retroactive principle that allows requests for mutual legal assistance for criminal acts whose legal process began prior to the entry into force of this treaty is another important aspect of the Indonesia-Swiss MLAT.[117]

The existence of this agreement can go in parallel with AEoI, EoIR, and DTT in suppressing tax avoidance and the potential of tax evasion through profit shifting. This can be a complementary action which is a derivation of the 39 articles in the Indonesian-Swiss MLAT, including regulating legal assistance regarding helping to present witnesses; [118] requesting documents, records and evidence; [119] handling objects and assets for the purpose of confiscating or returning assets; [120] providing judicial record and information related to a crime,[121] searching for the whereabouts of a

[117] *Ibid.*

[118] Article 19 paragraph (1) of The Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation.

[119] Article 12 of The Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation.

[120] Article 15 of The Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation.

[121] Article 14 of The Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation.

person and their assets,[122] searching for the location and personal data of a person and his assets,[123] where all of which are related to profit shifting motives, tax avoidance and tax evasion loopholes, to the main problem to be resolved, namely money laundering.

The Indonesia-Swiss MLAT has also become interesting because so far, Swiss has been known worldwide as a tax haven that implements a banking secrecy system. For example, the Swiss Federal Law has special rules regarding the confidentiality of customer data so that these rules become an attraction for its customers, including for perpetrators of corruption, money laundering, and tax evasion.[124]

Cooperation between the two countries through MLAT can narrow the space for criminals who want to hide the proceeds of their crimes abroad. In addition, even though the scope of this agreement is related to criminal acts in general, if it turns out that there is a connection with tax evasion efforts by Indonesian citizens in Swiss, the tax authorities can do the follow up.

So far, MLAT can be used in eradicating tax crimes in order to ensure that there are no Indonesian citizens or legal entities who commit tax evasion or other tax crimes. This agreement will help

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[122] Article 2 of The Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and The Swiss Confederation.

[123] *Ibid.*

[124] Zetri, Mohamad Rosyidin & Muhammad Faizal Alfian "Melampau Kepentingan Nasional: Kerjasama Mutual Legal Assistance (MLA) antara Swiss dan Indonesia dalam Menangani Kejahatan Pencucian Uang", Journal of International Relations, Vol. 8, No. 4 2022, p. 1072.

DGT investigate tax crime cases based on allegation reports obtained so that they can be followed up immediately. This source of law is also expected to encourage taxpayer compliance which has so far gone undetected.

5. OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS)

Nearly 140 countries, including the tax haven countries, participate in the OECD/G20 Inclusive Framework today, a platform that was unavailable a decade ago.[125] In light of the new structure for multinationalism and administrative cooperation, countries can plan and implement tax systems more freely without being limited by tax sovereignty and administrative jurisdiction limitations.

Working together in the OECD/G20 Inclusive Framework on BEPS, over 142 countries and jurisdictions,[126] are implementing 15 actions to combat tax evasion, enhance international tax coherence, guarantee a more transparent tax environment, and address tax issues brought on by the economy's digitization.[127] The specification for all of the actions included in this inclusive framework are:[128]

1. Addressing the Tax Challenges of the Digital Economy

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[125] Naoki, Oka, "Fight against Tax Havens and International Tax Law — New Taxing Right and a Global Minimum Tax—", Public Policy Review, Vol. 17, No. 1 April 2021, p. 2.

[126] OECD, 2022, *Members of the OECD/G20 Inclusive Framework on BEPS*, OECD, Paris, p.1-2.

[127] OECD. "Action 1 Tax Challenges Arising from Digitalisation" *OECD,* 22 May 2023, https://www.oecd.org/tax/beps/beps-actions/action1/. Accessed 22 May 2023.

[128] OECD. "BEPS Actions", *OECD,* 22 May 2023, https://www.oecd.org/tax/beps/beps-actions/. Accessed 22 May 2023.

2. Neutralizing the Effects of Hybrid Mismatch Arrangements
3. Designing Effective Control Foreign Company Rules
4. Limiting Base Erosion Involving Interest Deduction and Other Financial Payments
5. Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
6. Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
7. Preventing the Artificial Avoidance of Permanent Establishment
8. Addressing Transfer Pricing Issues relating to Controlled Transactions Involving Intangibles
9. Addressing Transfer Pricing Issues relating to Risks and Capital
10. Addressing Transfer Pricing Issues relating to High-risk Transactions
11. Measuring and Monitoring BEPS
12. Mandatory Disclosure Rules
13. Transfer Pricing Documentation and Country-by-Country Reporting
14. Making Dispute Resolution Mechanisms More Effective
15. Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

The OECD/G20 Inclusive Framework on BEPS provides the tools necessary to guarantee that economic activities that generate profits and value are taxed in those locations. These tools additionally give businesses more noteworthy assurance by decreasing disputes over the application of international tax rules and standardising compliance requirements.

All countries that are interested in implementing and applying the rules in a consistent and coherent manner, particularly those whose capacity building is an important issue, are being supported by this framework. With the help of the Inclusive Framework on BEPS, interested countries and jurisdictions can collaborate with

members of the OECD and G20 on the development of standards for issues related to BEPS as well as review and monitor the BEPS Package's implementation.

The OECD/G20 Inclusive Framework on BEPS actively monitors on how each of the BEPS Actions is being carried out and submits annual progress reports to the G20.[129] Each of the BEPS Minimum Standards is the subject of a peer review process that evaluates the implementation by each member state and provides clear recommendations for improvement. The implementation of the BEPS Minimum Standards is of particular importance.

Based on author's analysis, the action plans on the OECD/G20 Inclusive Framework on BEPS focusses largely on legal tax planning techniques in general rather than tackling offshore tax evasion specifically. However, the OECD/G20 Inclusive Framework on BEPS aims to neutralize all schemes that artificially shift profits offshore and put an end to SPVs used to hide profits in tax haven countries or falsely claim tax treaty protection. However, since this framework is known as the soft law, the BEPS Project does not aim to dictate whether countries should have a specific corporate income tax rate.

In addition, it is still dependent on whether or not each nation is sovereign and has the authority to choose its own tax policy. The

[129] OECD, 2020, *OECD/G20 Inclusive Framework on BEPS Progress Report July 2019-July 2020*, OECD, Paris, p.2.

author, on the other hand, examines the fact that this framework also provides companies to have a minimum level of substance to stop SPVs and important transparency rules so that tax administrations can effectively apply their tax rules.

The OECD/G20 Inclusive Framework on BEPS's Pillar Two, which outlines the Statement, will now ensure that those businesses pay a minimum effective tax rate of 15% on their booked profits.[130] The perception of tax havens as they currently would no longer exist as a result of the cumulative effect of these initiatives.

Hence, as a whole, this framework could be categorized as the prompt to control the BEPS itself which is an interconnected way to evade tax by utilizing SPVs in tax haven countries. This framework provides the legal planning as the encouragement to increase countries' tax compliance and it is deemed as the preventive actions toward the possibility of tax evasion through the manipulative financial reports in profit shifting activities.

As a proof, some of the actions related to the tax haven and tax evasion prevention could be seen through the Action 5, OECD through this framework also contributes on emphasizing the standard for the exchange of information on tax rulings for the years 2021-2025, as approved by the Inclusive Framework on BEPS.

[130] OECD, 2021, *Statement on a Two-pillar Solution to Address the Tax Challenges Arising from the Digitalisation of Economy – 8 October 2021*, OECD, Paris, p.5.

Next action that is also related to the tax avoidance and evasion practices in on the Action 12: Mandatory Disclosure Rules where in preventing tax aggressive planning that could lead to the possibility of tax evasion practices, this action gives a framework that can be used to get more quickly information about possible aggressive tax planning schemes, including the possibility of tax avoidance or evasion, so that each country can make its own balanced rules based on what it needs.

As a result, the mandatory disclosure rules must be simple to understand, effective in achieving goals, accurate in countering existing schemes, flexible enough to allow the tax administration to adapt to the system when responding to new risks, and ensure that the information collected is utilized effectively.

The main objective of mandatory disclosure rules is also linear with increasing transparency by providing tax administrations that give fast information regarding the possibility/potential of aggressive tax planning schemes. Another objective is to make companies think twice about getting involved in the complex scheme; to put it another way, it gives a deterrent effect.

In addition, the key to the form of this regulation that is considered for introducing mandatory disclosure rules is a rule that encourages countries to have a strict rule in unveiling relevant information from taxpayers, has legal force so that it will make its

existence an incentive to disclose confidential information. There is; to implement a system of penalties and sanctions, including non-monetary ones, to guarantee compliance with regulations and keep them in line with domestic regulations.

6. Conclusion on the International Legal Analysis toward Tax Evasion Practices in Tax Haven Countries

Based on the author's analysis toward the existing international law (convention, declaration, treaty, framework) related to the way of tackling tax evasion practices in tax haven countries, author has concluded two main points to be delivered in this chapter.

First, international law provides several tools, guidelines, and international standards related to the tax transparency and tax dispute settlement method in non-litigation way called MAP through the DTT where respective countries have their own autonomy to applicate those of it. Those regulations put the focus more on preventive actions toward tax evasion practices rather than in the perspective of criminal acts such as punishment and sanction toward the tax evaders itself. Hence, author implies this point as "Soft Approach" of the existing international law in preventing tax evasion practices in tax haven countries through the enforcement of tax transparency and avoidance of double taxation through DTA.

Second, international law provides the stricter regulation in preventing and tackling tax evasion case within the transnational

realm through the Treaty on Mutual Legal Assistance in Criminal Matters. This existing regulation could be a bridge in tackling the tax evasion cases in the perspective of criminal acts where the treaty exists as a medium for two nations to commit with the investigation process toward tax evasion allegation report. Hence, author implies this point as “Hard Approach” of the existing international law in tackling tax evasion practices in tax haven countries where two countries have the commitment to tackle tax crimes based on the cooperation to one another and their respective national criminal law enforcement.