

## *The Application of the Most-Favored-Nation Principle to the 'Over Top' Companies in Investment Activities of Indonesia*

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### **ABSTRACT**

The Most-Favored-Nation (MFN) principle is one of international consensus, especially for countries registered as members of the World Trade Organization (WTO). The principle is related to investment and international trade within the framework of economic liberalization. At its core, the MFN principle ensures equitable treatment of all parties economically active within a country. Recently, in Indonesia, the Over Top company conducted business activities without paying taxes to the government. The case of the Over Top company highlights an unfair business situation in Indonesia, enabled by the Indonesian government through a poorly established monitoring system and codification of laws. This study argues that the absence of taxation, regulation, and fraud laws for the Over Top Companies in Indonesia, and the Indonesian government is responsible for the enforcement and maintenance of tax laws and the MFN principle for all entities conducting business in the state.

**KEYWORDS:** Most-Favored-Nation Principle, The Over Top Company, Investment.



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## I. INTRODUCTION

The rapid pace of the development in the past decade has increasingly disguised the non-physical boundaries of countries, leading to seemingly borderless states. This is undoubtedly a consequence of globalization. Moreover, today, global industrialization is ongoing, often referred to as Industry 4.0. Angela Merkel, German chancellor since 2005, revealed that such a thing is a form of comprehensive transformation of all aspects of production in the industrial world, brought about by combining conventional production processes with digital technology and supported by widespread use of the internet.<sup>1</sup>

Globalization and industrialization's impact on economics also includes investment and international trade. Trade and investment become a complementary unit, and much like two sides of a coin, cannot be separated from each other.<sup>2</sup> According to the World Trade Organization (WTO) foreign direct investment and international trade together are the main driving force of the world economy.<sup>3</sup>

Investment can be sourced domestically or abroad. Investment from outside of a state, or foreign investment, is the flow of assets and funds from one country to another to earn profit.<sup>4</sup> The flow of assets can be in the form of a physical property building, often foreign considered direct investment or FDI, and the flow of assets in the form of funds for the acquisition or purchase of shares in other state companies often occurs in the form of portfolio investments.<sup>5</sup>

The contemporary world of investment amid economic liberalization is an increasingly tempting business field, because it can be said that almost all countries in the world are opening up to foreign investors. It is no longer excessive if each country competes to attract potential investors, especially foreign investors.<sup>6</sup> Despite debates characterizing foreign investment as an infringement upon state sovereignty, international trade and investment are unavoidable in a largely liberalized global economy. As high funding requirements for development cannot be entirely mobilized from state budgets, including that of Indonesia, foreign investment and trade are not only unavoidable, but necessary.

Indonesia is one of the countries that is considered quite friendly with foreign investors. This is due to the country's geographical location, which is favorable for the distribution of products, natural resources, and abundant human resources. Coupled with the large population, Indonesia is considered full of potential business

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<sup>1</sup> Hoedi Prasetyo, dkk., *Industri 4.0: Telaah Klasifikasi Aspek dan Arah Perkembangan Riset*, (J@ti Undip: Jurnal Teknik Industri, Vol.13 No.1 Tahun 2018) at 19.

<sup>2</sup> Acep Rohendi, *Prinsip Liberalisasi Perdagangan World Trade Organization (WTO) Dalam Pembaharuan Hukum Investasi di Indonesia (Undang-Undang Nomor 25 Tahun 2007)*, (Padjadjaran Jurnal Ilmu Hukum, Volume 1 - No 2 - Tahun 2014) at 387.

<sup>3</sup> Renato Ruggiero, "WTO News: 1996 Press Releases", [http://www.wto.org/english/news\\_e/pres96\\_e/pr042\\_e.htm](http://www.wto.org/english/news_e/pres96_e/pr042_e.htm) Terakhir last access on 19 September 2018 at 21.38 WIB.

<sup>4</sup> Acep Rohendi, *supra* note 2 at 387.

<sup>5</sup> *Ibid.*

<sup>6</sup> Sentosa Sembiring, *Hukum Investasi: Pembahasan Dilengkapi Dengan Undang- Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal Edisi Revisi*. (Bandung: Nuansa Aulia, 2010) at 2.

opportunities for outside investors.<sup>7</sup> Assumptions that the population of Indonesia is a wasteful society that likewise attracts the interest of businesses to engage with Indonesia. One area of strong attraction is information and telecommunications, or more specifically the internet.

In 2017, it was estimated that there are 143 million Indonesians connected to the internet, meaning that there are <50% or half of the total 262 million residents who are internet service customers.<sup>8</sup> With such a large percentage of users, of course, internet service companies—which in fact are dominated by transnational companies or transnational companies (hereafter referred to as TNC) such as Google, Grab, Uber, Yahoo, Facebook, Instagram, Whatsapp—enjoy great success in Indonesia.

But among companies providing internet services, some indicated that they have carried out unethical business practices. Within this group are Over Top companies—including Whatsapp, Youtube, and Instagram—cannot be taxed domestically. This is possible because they are indeed not included as taxpayers in Indonesia even though companies similar to them are considered Permanent Forms of Business (from now on referred to as BUT) which must pay operational taxes to the government, such as Grab, Lazada, and Uber.

The case of Over Top companies in Indonesia seems to portray an imbalance in the treatment of business actors by the government, which is contrary to the norms embodied in the MFN principle. The MFN principle affirms that there is no distinction between business actors, therefore requiring equal treatment of all business actors or investors from all WTO member countries. Article 1 of the General Agreement on Tariffs and Trade (GATT) states that trade policy must be carried out based on non-discrimination. All member countries are bound to provide equal treatment to all other countries in the implementation of trade policies.<sup>9</sup> Several strategic steps are needed to realize equality and ensure the implementation of the non-discrimination and the MFN principle in Indonesia. Addressing the violation of these international norms will ultimately suppress the potential for state losses from the existence of Over Top companies.

In this article, the authors will strive to answer the following questions: can the principle of MFN be applied to Over Top companies' investment activities in Indonesia? Secondly, what is the role and effort of the Indonesian government in overcoming losses caused by Over Top companies' fraud in conducting business activities in Indonesia? Furthermore, to achieve concrete results, the authors use normative juridical research, focusing on the assessment rules or norm application in relevant positive law. This article likewise employs the statute approach and the

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<sup>7</sup> Abdul Jabbar Yoesoef, *Kunci Surveyor Membidik Perkembangan Industri Domestic Meningkatkan Penerimaan Pajak dan Royalty*, (Jakarta: PT. Gramedia, 2013) at 1.

<sup>8</sup> Fatimah Kartini Bohang, *Berapa Jumlah Pengguna Internet Indonesia?* <https://tekno.kompas.com/read/2018/02/22/16453177/berapa-jumlah-pengguna-internet-indonesia> terakhir last access on 24/09/18 at 21.19 WIB.

<sup>9</sup> Masaaki Kotabe, Kristan Helsén, *Global Marketing Management*, USA: John Wiley & Sons Inc., 2008 at 56.

conceptual approach to problem-solving. The statute approach is an approach that is carried out by examining all laws and regulations related to the legal issues being addressed.<sup>10</sup> The conceptual approach originates from views and doctrines that develop in law. Through studying the opinions and theories that form in law, the authors will highlight and construct ideas that give birth to legal notions, legal concepts, and constitutional principles relevant to the issues at hand.<sup>11</sup>

## II. APPLICATION OF THE MOST-FAVORED-NATION PRINCIPLE IN THE OVER TOP COMPANIES' INVESTMENT ACTIVITIES IN INDONESIA

The growth of the world economy has a significant influence on the progress and development of individual countries, in turn which affecting the welfare of everyday people. This is reinforced by the fact that non-physical boundaries between states are waning as a result of globalization.

The most noticeable and even indisputable impact of globalization is the increasingly mobilized flow of goods and services from one place to another. In addition, the rapid stream of information flow can no longer be dammed from day to day. This is quite reasonable, because today for anyone and especially for business people, information is an absolute necessity. The more information an individual or entity obtains, especially with regard to market needs, will significantly aid business productivity.

Rapid mobilization of information is also supported by technology that continues to develop and promote accessibility. This trend is paralleled by a growing understanding of Industry 4.0 and its digitalization of conventional production processes.

The Indonesian community's internet consumption need is indisputable. Infographics about people's internet usage illustrate that it has become an inseparable part of daily life. As much as 87.13% of internet users in Indonesia use it for chat needs, the largest percentage category of internet usage.<sup>12</sup> Meanwhile the lowest category was use for banking services at 7.39%.<sup>13</sup>

Even from this small picture of internet usage in Indonesia, we can imagine how much profit is obtained by entrepreneurs who become providers of internet-based content and services. The significantly utilized chat activities, are provided mostly by companies such as Facebook, WhatsApp, Line, Snapchat, and others. Social media is mostly provided by companies such as Google, Youtube, Yahoo!, Uber, Grab, Lazada, and so on. In this network of internet usage, there are at least three interrelated

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<sup>10</sup> Peter Mahmud Marzuki, *Penelitian Hukum, Cetakan Ke-12*, (Jakarta: Kencana Prenada Media Group, 2016) at 133.

<sup>11</sup> *Ibid* at 136.

<sup>12</sup> Infographics Penetrasi & Perilaku Pengguna Internet Indonesia Tahun 2017, [https://web.kominfo.go.id/sites/default/files/Laporan%20Survei%20APJII\\_2017\\_v1.3.pdf](https://web.kominfo.go.id/sites/default/files/Laporan%20Survei%20APJII_2017_v1.3.pdf) downloaded on 25/09/18 at 08.43 WIB.

<sup>13</sup> *Ibid*.

components: (1) the internet user; (2) the internet network or service provider, such as Telkomsel, Indosat, Axiata, Vodafone, AT&T, and Singtel; and (3) the internet-based content provider, which in this case is the Over Top company, including Google, Facebook, and WhatsApp, among others.

The existence and operations of Over Top companies is not widely recognized by the public. The community only knows that they are consumers and participants in the business activities carried out by Over Top companies. The actual income generated by these companies is quite fantastic. Take, for example, Google's operations in Indonesia. In 2015, Google had a tax payable to the government which is estimated at more than USD 400,000,000 or around IDR 6,200,000,000,000 (exchange rate of 1 USD to 15,500 IDR) covering the past five years.<sup>14</sup> With this amount, it can be estimated that the average Google tax debt to the Indonesian government over the past five years, ending in 2015, was USD 80,000,000 or around IDR 1,240,000,000,000. From these numbers, we can imagine that if the tax owed, which should be included in the state treasury, is of that size, the income generated by Google in Indonesia far exceeds the figure of 1.24 trillion rupiahs per year.

Based on one example above we can imagine, if only one Over Top company generates a potential tax that can be collected by a country of that size, then a great deal of potential tax revenue is generated by other Over Top companies such as Instagram, YouTube, Netflix, WhatsApp, Snapchat, and Yahoo!, all of which are currently operating in Indonesia. But it is quite unfortunate that while Over Top companies can reap huge income and profits in Indonesia, they cannot and are not all subject to income taxes. This is caused by the absence of regulations regarding income tax in Indonesia. Referring to Article 2 paragraph (1) of Law No. 36 of 2008 concerning the Fourth Amendment to Law No. 7 of 1983 concerning Income Tax (from now on referred to as the Income Tax Law), there is currently no subject that requires the Over Top companies to pay taxes in Indonesia.

Given the absence of a clause classifying Over Top companies as taxpayers in Indonesia, we can ascertain that there are no income tax regulations for all such companies in Indonesia. Indeed, the status of regulations on BUT companies are quite different. Over Top and BUT companies are similar enterprises, insofar as BUT companies are also foreign entities engaged in providing internet-based services or content. Examples of companies classified as BUT in Indonesia include PT. Uber Indonesia Technology, Lazada.co.id, and PT. Indonesian Transportation Solutions (parent company of Grab Indonesia). Their chief difference, however, is the company's position in Indonesia. Although Over Top companies are not considered taxpayers in Indonesia, BUT companies are classified as such.<sup>15</sup> BUT type companies are foreign

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<sup>14</sup> Hidayat Setiaji, *Indonesia has reached tax deal with Google for 2016, finance minister says.*, <https://www.reuters.com/article/us-indonesia-google/indonesia-has-reached-tax-deal-with-google-for-2016-finance-minister-says-idUSKBN1940EM> last access on 09/01/2019 at 10.08 WIB.

<sup>15</sup> Lihat Pasal 2 ayat (1) dan Pasal 2 ayat (5) Undang-Undang Nomor 36 Tahun 2008 tentang Perubahan Keempat atas Undang-Undang Nomor Tahun 1983 tentang Pajak Penghasilan (Untuk selanjutnya disebut UU PPh).

companies, but have a representative office based in Indonesia functioning as the management office of the company while operating in Indonesia. Over Top companies, on the other hand, are foreign companies operating in Indonesia but not establishing representative offices in Indonesia.

In connection with this situation, the government has taken several steps, including the issuance of several circular letters regarding the existence of Over Top companies in Indonesia. Circular letters referred to by the authors include the Minister of Communication and Information Circular No. 3 of 2016 concerning Provision of Application Services and / or Internet Content (Over Top) and the Directorate General of Tax Circular No. SE-04 / PJ / 2017 concerning Determination of Permanent Business Forms Foreign Tax Subjects that Provide Application Services and / or Content Services Through the Internet. Despite the issuance of the circular letter, this authors do not see such a step as the proper solution. The strength or binding power of these circular letters still needs to be questioned. Indeed, debate is ongoing in some circles, including academics, regarding the binding capacity, position, and mechanism of testing.<sup>16</sup> So to deal with such a problem, the government must produce a stronger legal instrument with strict sanctions to realize justice for business people and investors in Indonesia as soon as possible. Of course, the legal instrument referred to by the authors is a legal instrument, as stated in Article 7 paragraph (1) of Law No. 12 of 2011 concerning the Establishment of Legislation.<sup>17</sup>

Of the various forms of legislation above the government can still invoke the Income Tax Law, but the authors believe that there must be a renewal or revision in it because over time, the Income Tax Law has become outdated. As a result, it is quite challenging to realize the application of the MFN principle optimally at this time through the Income Tax Law. Revision to the law should contain instructions that require every Over Top company that wishes to operate and has operated in Indonesia to convert it into BUT. In doing so, Over Top companies can be eventually be categorized as taxpayers in Indonesia.

In connection with the above, all instructions for the conversion of Over Top companies into BUT companies must be directed by Article 2 paragraph (5) of the Income Tax Law regarding the characteristics of BUT companies. If the entire conversion process has been passed by Over Top companies, they will automatically become foreign direct investors rather than a foreign company simply conducting their business in Indonesia. As such, they would be actively attached to all the extant rules related to investment. This is particularly the case with Law No. 25 of 2007 concerning Investment, which is loaded with the principles of economic liberalization, including the MFN principle.

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<sup>16</sup> Surat Edaran, 'Kerikil' Dalam Perundang-Undangan, <https://www.hukumonline.com/berita/baca/lt54b1f62361f81/surat-edaran-kerikil-dalam-perundang-undangan> last access on 14/01/2019 at 20.05 WIB.

<sup>17</sup> Lihat Pasal 7 ayat (1) Undang-Undang nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.

In the revised Law on Income Tax, the government must also include strict sanctions on Over Top companies if a violation of the new rules is found. Sanctions would serve as a manifestation of the government's solemn commitment to applying the MFN principle and overcoming problems such as fraud or unethical business activities. Sanctions, as intended by the authors, can be in the form of blocking or revoking Over Top companies' ability to enter Indonesia. The authors believe that the government does not need to worry about economic or political consequences of this approach, as the high population of internet users makes Indonesia one of the most significant cash contributors to Over Top companies. Therefore, we can be sure that if the government provides an ultimatum to Over Top companies operating in Indonesia for their access rights to be revoked, of course, their income will be significantly affected.

The renewal of the Income Tax Law, the authors argue, is a competent and instant enough step to solve the problem of tax evasion against internet-based service providers in Indonesia. In renewing extant tax regulations, the government will realize justice through the application of economic liberalization, and most importantly, the MFN principle.

### III. GOVERNMENT'S RESPONSES TO LOSSES FROM THE POTENTIAL DISPUTES CAUSED BY OVER TOP COMPANIES

The mobilization of information sharing and rapid globalization cannot be separated from the participation and the existence of Over Top companies as content providers, as explained in the previous section. Of course, the consequences of these global phenomena have positive and negative impacts in local contexts, some of which have been experienced in Indonesia. As we have seen, among these positive impacts are e-government, e-commerce, and so on. But the adverse effects are not celebrated; the negative consequences of these phenomena have likewise impacted Indonesia.

One of the negative impacts faced by the state for this development is the increasingly complex problems relating to taxation to content service providers and internet-based applications. The increasingly complex issues related to taxation of internet-based content and service providers is but one of the factors that led to the existence of a regulatory vacuum in Indonesia's tax regulations, as explained earlier. Indeed, the emptiness of tax regulations seems unavoidable because such things are a reaction global development phenomena, which change rapidly but cannot be balanced by the prevailing laws and regulations. Several massive strategies are needed to fully address the tax issues faced by Indonesia on an institutional level, and in particular legislation is needed to maintain a healthy business and investment climate.

Some strategies to resolve Indonesia's taxation issue are intended to ensure legal certainty in business activities and investment in-state while at the same time giving some agency to Over Top companies. Potential actions for Over Top companies include, tax collection, legal business registration, and dispute resolution. In this case, the

authors would like to highlight dispute resolution, should a later dispute be found between the business entity and the state.

It is crucial to construct regulations relating to dispute resolution immediately. Doing so would enable the Indonesian government to know if the problems regarding taxation of Over Top companies are faced also in other countries such as France, Britain, and Australia. Of even greater concern, in previous instances of tax avoidance, the Indonesian government has only been able to conduct limited negotiations.<sup>18</sup> In the long run, negotiation processes established for Over Top companies will become the spearhead of the government action in overcoming taxation problems. Aside from that, the authors argue that the government must also carry out some punitive actions against Over Top companies, which have admitted to various fraud attempts. Doing so would create a deterrent effect for business entities that can and do commit fraud.

In connection with the provision of punitive actions, the authors would like to suggest and analyze strategic steps which may be suitable to implement. In this case, the authors suggest that the Indonesian government employs strategies utilized by the UK in taxing Google, Starbucks, Amazon, and other Over Top companies engaged in tax avoidance. The two strategies adopted by the UK are known as tax shaming and the implementation of a diverted profit tax.

The first strategy is tax shaming, which requires strong synergy from all stakeholders to suppress the image or good name of the brand in the market. In this case, the application of tax shaming in Indonesia requires active collaboration between the executive and legislative institutions to achieve success. The partnership can begin with consolidation and deepening of issues concerning the existence of Over Top companies in Indonesia. The strengthening and deepening of this issue is a significant first step because the output of the tax shaming strategy will be to provide a concrete understanding of Over Top corporate tax evasion and the consequences it has on the public.

The same thing happened in England, as expressed by Murray Worthy. He argues that in dealing with such conditions in the UK, the public must be given a deep understanding of tax evasion. Knowledge creates room for public anger or discontent regarding actions of Over Top companies, whose behavior is both morally and materially detrimental.<sup>19</sup> Consolidation and deepening of this issue can be done through forum group discussions (FGD), as well as seminars conducted in general by cooperating with experts, practitioners and academics alike, from a variety of fields related to tax evasion. Later on from the consolidation and deepening of the issue, conclusions will be ready to be published and presented to the public.

Presentation and publication are the culmination of the tax shaming strategy, in which the role of the media is vital. The announcement of the existence of Over Top

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<sup>18</sup> China Gpagesiya Quddus, *Ditjen Pajak Bersiap Hadapi Sengketa Pajak Dengan Google*, <https://ekonomi.kompas.com/read/2017/03/16/103928326/ditjen.pajak.bersiap.hadapi.sengketa.pajak.dengan.google>. last access on 10/10/2018 at 19.37 WIB.

<sup>19</sup> Vanessa Barford, *Google, Amazon, Starbucks: The rise of 'tax shaming'* <https://www.bbc.com/news/magazine-20560359> last access on 06/02/19 at 17.26 WIB.



companies should be done by the President as head of state and head of government, and could be carried out at a press conference. The expected outcome is an increased public understanding of the tax evasion-foreign investment situation in the country. Alongside growing general knowledge of the practices of fraud, it is hoped that there will be clear sense of belonging or love and ownership of the state among the public, where the sense of belonging is hurt by unethical acts of business people who have brought significant losses to the country.

In line with this expectation, the final component of the tax shaming strategy is to suppress the image, reputation, or good name of the brand produced by the target company in front of consumers. Attack of a brand's good name will have a systemic impact on the market. This was also the case in England when the people there volunteered to boycott brands that admitted to tax avoidance, an act rooted in their disappointment with Over Top companies.<sup>20</sup> The Indonesian government should follow in the footsteps of the UK in emphasizing the reputation of the Over Top through tax shaming as an effort to collect taxes.

The next strategy is the application of profit transfer tax (from now on referred to as DPT) outside the provisions of the Income Tax Law. This strategy is effective in strengthening Indonesia's legal position to tax the Over Top companies. In connection with the explanation in the first section, the implementation of the DPT was the second option in the field of legislation offered by the authors to tax Over Top companies. As explained in the Diverted Profit Tax Guidance issued by Her Majesty's Revenue & Customs (from now on referred to as HMRC),<sup>21</sup> DPT is an essential new tool used to counteract the practice of profit or profit transfer.<sup>22</sup> The percentage of the tax rate applied in DPT is much higher than the local company tax. This is intended to encourage non-BUT business people to change the shape of their company and pay corporate tax from profits related to their economic activities.

This step is quite applicable to Indonesia. In the UK the percentage of tax on the DPT is 25% of the income transferred coupled with a various inherent interest. This figure far exceeds the corporate income tax that has been registered in the UK, which is only around 19% and is likely to be reduced to 17% by the UK government in 2020.<sup>23</sup> With a high percentage margin, the assumption is that Over Top companies are threatened by DPT and will prefer to change the type of company to become a permanent establishment, or BUT, to avoid higher taxation.

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<sup>20</sup> *Ibid.*

<sup>21</sup> Her Majesty's Revenue & Customs merupakan department pemerintahan Inggris yang bertanggungjawab Dalam birding Peranakan. Dalam pemerintahan Inggris, HMRC in mengumpulkan Pajak melalui dua jalur, yaitu back Pajak langsung (seperti Pajak pendapatan dan Pajak Perusahaan atau corporate), maupun Pajak tidak langsung seperti *value added tax* (VAT); dan Pajak pertambahan Nilai dan Pajak terhadap Barang dan Jasa; HM Revenue & Customs, *Diverted Profit Tax Guidance*, 2015, at 3.

<sup>23</sup> Paul Fay, *INSIGHT: The U.K. Diverted Profit Tax – Is it working?* <https://www.bna.com/insight-uk-diverted-n73014483427/> last access on 12/02/2019 at 08.18 WIB.

In its implementation, the DPT uses two requirements which are considered by HMRC, as the department that regulates UK taxation, prior to imposing the tax on a company. The first condition is insufficient economic substance, and the second is sufficient tax mismatch.<sup>24</sup>

Insufficient economic substance is a condition in which a transaction is carried out in an area that has a greater tax incentive than another region.<sup>25</sup> It is thus reasonable to assume that the outcome of such transactions are designed to secure tax deductions for producers in certain regions. An alternative explanation is a condition in which a person or company makes a transaction to one or more subjects, and the value of the economic contribution generated by that person or company is smaller than the tax incentive. This is assumed if the person or company is involved in designing transactions to secure themselves from tax deductions.<sup>26</sup>

The second condition, sufficient tax mismatch, takes place after insufficient economic substance conditions occur.<sup>27</sup> If one area, used as the location of the previous transaction, turns out to have a tax percentage smaller than the other regions, in this case, the less than 80% of the region's corporate income tax rate can be imposed by the DPT. Based on the general description of both the first and second conditions, the authors will provide illustrations to widen understanding should DPT be applied in Indonesia, using Google as an example.

As we all know, Google does not have a permanent establishment in Indonesia even though its legal existence in Indonesia should be categorized as BUT, as stipulated in Article 2 paragraph (5) of the Income Tax Law, because it has an operational office in Jakarta. However, in Indonesia there is no instrument that explicitly regulates the Over Top companies. As a result, Google still argues that it is not a BUT in Indonesia.

On the one hand, Google did not officially establish BUT in Indonesia; instead, it officially established a permanent establishment office in Singapore. On these grounds, we can assume that Google is included as a taxpayer subject in Singapore, but not in Indonesia. Please note that in Indonesia by Article 17 paragraph (1) of the Income Tax Law, the percentage of BUT tax that is equal to the income tax rate is set at 25%.<sup>28</sup> Whereas in Singapore, the corporate tax rate is set at only 17% since 2010.<sup>29</sup> With the tax rate of only 17%, Singapore is one of the lowest taxing countries in the world, earning it the nickname "business friendliness country." Behind the cost benefits of permanent establishment in Singapore there is extreme suspicion that Google also

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<sup>24</sup> Pinsent Masons, Diverted profits tax regime, <https://www.out-law.com/en/topics/tax/corporate-tax-/diverted-profits-tax-regime/> last access on 12/02/19 at 11.13 WIB.

<sup>25</sup> Insentif pajak merupakan fasilitas yang diberikan oleh pemerintah di suatu negara kepada pengusaha atau investor untuk menanamkan modalnya di wilayah tersebut. Umumnya insentif pajak ini berupa pengurangan tarif pajak, penangguhan tarif pajak, dan lain-lain.

<sup>26</sup> Pinsent Masons, *supra* note 24.

<sup>27</sup> *Ibid.*

<sup>28</sup> See Article 17 (1) UU PPh.

<sup>29</sup> Singapore Corporate Tax Guide, <https://www.guidemesingapore.com/business-guides/taxation-and-accounting/corporate-tax/singapore-corporate-tax-guide> last access on 12/02/2019 at 20.16 WIB.

avoids taxation in Indonesia, because, in plain view, there is a very high margin between corporate income tax rates in Indonesia and Singapore.

The United Kingdom's approach to taxing Google can be used as a reference. If in the UK the taxation percentage of DPT is 25%, maybe in Indonesia it can set 28% to 30% depending on further calculations from experts in the field of economics and taxation. And the percentage used as a reference to ensnare the subject in the implementation of the DPT can be equated with the United Kingdom or whatever the rate, also depending upon expert calculation. In this case, the writer only wants to give a general picture regarding the technical implementation of DPT. But to be more easily understood in this example, the authors will equate the reference percentage with the UK, which is equal to 80%.

If the authors use a benchmark of 80%, from the BUT income tax rate/agency in Indonesia is equal to 25%, any non-BUT company that is known to operate in Indonesia but establishes BUT in other countries whose tax percentage is below 20% means he allegedly made a tax break and should be subject to DPT. Like the example above, Google established BUT in Singapore with a corporate income tax rate of 17%, which is clearly below 20%, but not establishing BUT in Indonesia means that Google can be subject to DPT in Indonesia.

Drawing upon examples from the global community, specifically the UK's use of tax shaming and DPT as a response to Over Top companies' tax evasion, the authors are optimistic that utilizing these tools will positively and significantly impact Indonesia. Indeed, these measures may seem aggressive, but we must not forget that Over Top companies have also caused great losses in Indonesia, despite the country's ongoing development efforts. Over Top companies' fraudulent activities create a leakage of state revenues in the fiscal sector; addressing these activities through legislation and economic measures is a step taken in protecting national interests.

#### IV. CONCLUSION

Based on the discussion above, some conclusions can be drawn from this research. First, the MFN Principle is an absolute agreement that must be applied in any country, especially in Indonesia. With the lack of tax regulations related to the existence of Over Top companies in Indonesia, the government must immediately take serious action. Action can take the form of revising the applicable Income Tax Law by requiring all The Over Top Companies that have and will operate in Indonesia to convert their business forms into BUT. This method is the most practical for government implementation. Revising the Income Tax Law would reify the MFN principle in domestic legislation and create business equality for all investors and business people in Indonesia. To prevent greater losses from the potential fraud committed by Over Top companies, the government needs to take the right steps and have a systemic impact. Aggressive taxplanning in Indonesia on behalf of Over Top companies necessitates a strong, systemic response from the government. In this case, tax shaming as a first step

to attack Over Top companies' reputations. This method can be likened to shock therapy. Next, the state must make special regulations governing the existence of Over Top companies in Indonesia. Regulations can take the form of revisions to the Income Tax Law, or the implementation of DPT. Some of these steps need to be implemented as soon as possible by the government to prevent higher leakage of income in the fiscal field.

There are several suggestions that the authors want to put forward, including (1) for the government to immediately revise the Income Tax Law to maintain a balanced business and investment climate in Indonesia and (2) to carry out tax shaming and implement DPT as restrictive or even punitive measures for Over Top companies. For the public, there must be an awareness of losses occurring in Indonesia coupled with a sense of belonging and a high level of concern for the country's welfare. For investors and potential investors, compliance with all regulations that are currently in force in Indonesia is necessary, such that they uphold ethical business norms and principles.

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