Main Articles

Indonesia's Response to Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (BEPS MLI)

Bayu Sujadmiko, Rudy Natamihardja, Intan Fitri Meutia, Resma Dwi Heldiyanti

Faculty of Law Universitas Lampung
Corresponding e-mail: bayu.sujadmiko@fh.unila.ac.id

Abstract

The expanding global economy, which states have practised, raised a new obligation: imposing tax where the entity conducts business or business activities and in the entity's origin, also known as the international tax. MLI is established as an instrument that generally regulates international taxes without imposing double taxes. Based on the Permanent Establishment in Indonesia, it will impose taxes like other Indonesian business entities under domestic regulation. MLI proposes flexibility in its ratification by providing the freedom regarding adoption or reservation that promotes and is suitable to the states' interests without violating international law. The position of Indonesia on MLI and other signatory states has been set by the documents deposited to the Organization for Economic Cooperation and Development (OECD). Nevertheless, the problem of determining the exact tax payment still exists due to the difference in domestic regulation; hence, this study will analyze the state practice of MLI ratification and the impact of MLI on the existing bilateral tax treaty. This study used the statute approach, which refers to domestic regulation and international agreement legal norms. The study results show that Indonesia has ratified the MLI and entered into effect after the legalization of the MLI by domestic regulation, Presidential Regulation No 77 of 2019 regarding the Ratification of MLI, and harmonized with the other tax payment regulations.

Keywords: Tax Treaty, Base Erosion, Profit Shifting, Indonesia

I. INTRODUCTION

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting or MLI is a convention regarding international tax regulation that reduces the possible tax evasion by multinational corporations. It has been applied in 99 state jurisdictions after they ratified the MLI.[1] The number of signatory states of this Convention is less than that of a member state of WTO, which has 164 members.[2] Hence, 64 state members did not sign the MLI. The United States of America (U.S.) is one of the states involved in the negotiation process but did not sign the Convention, as it already has its international tax regulation, which has been practised for decades. [3]

Far from the establishment of MLI, practice regulating international tax has been conducted by many states, [4] The purpose of a tax treaty is to avoid the imposition of double tax on the same income and the same subject by two or more different states. A tax treaty also aims to eliminate tax avoidance and tax evasion and enhance the trade and investment flow between the signatory states due to tax incentives by reducing tax tariffs—for instance, the U.S., western European, and Russian tax treaty regulations. Hence, the Organization for Economic Cooperation and Development (OECD) is an international organization that aims to develop policy standards to encourage sustainable economic growth and establish an instrument. It shall be used as a general legal basis to apply in any bilateral agreement regarding tax treaties.

The first attempt to establish a general instrument of a tax treaty by the OECD failed due to its side to developed states; hence, it could not be implemented due to the tax problem experienced by all states. In response to this failure, the OECD collaborated with G20 states to re-establish the multilateral instruments listed in one of the Action Plans of Base Erosion and

[1]"Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS," OECD, accessed 1 December 2022, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

[2]"WTO members and observers," WTO, accessed 10 September 2022, https://www.wto.org/english/res_e/statis_e/its2011_e/its_mem_obs_e.pdf.

[3]Alston & Bird, "Impact of the Multilateral Instrument on U.S. Taxpayers," 14 July 2017, accessed on 10 September 2022, https://www.alston.com/-/media/files/insights/publications/2017/07/mlionustaxpayers.pdf?rev=ae1f0fde6960453185a46a07a6f727e6&sc_lang=en&hash=4F797C9A9B8138D7C56DCA384C07B9E5.

[4]Pungki Yunita Chandrasari, "The Impact of Tax Treaty on Foreign Direct Investment In Indonesia," *Jurnal BPPK* 14, No 1 (6 December 2021).

Profit (BEPS). The results of a general tax treaty instrument drafted by OECD and G20 states were later called a multilateral instrument or MLI. It offers an accurate and flexible solution to cover the gap in international tax treaties as an instrument that shall be applied to bilateral tax treaties by modifying it based on states' interests.[5] The flexibilities offered by MLI are as follows: First, MLI allows the signatory states to register their bilateral tax treaty modified by the MLI. Additionally, MLI shall modify the bilateral tax treaty, later named the Covered Tax Agreement or CTA. This bilateral tax treaty shall be modified by the MLI only if both states, including their tax treaty, are to be covered by MLI. Second, MLI applies the minimum standard flexibly; hence, the state can opt out of the minimum standard if the application is still conducted in the other way. Third, MLI provides the option to opt out of the optional provision by reservation. Fourth, MLI provides the option to exclude specific characteristics provisions; for instance, reserve Article 6 of MLI and apply the other language on its bilateral tax treaty's Preamble as long as it has the same meaning following the provisions in Article 6. Fifth provides the option to apply the optional and alternative provisions, which shall apply only if both states ratify the same provision, whether to adopt or to reserve.[6]

In the Multilateral Instrument, there are 7 Parts and 39 Articles that regulate the scope of the Tax Treaty, issues to handle a particular imposition of tax tariffs, prevent abuse of tax treaty, handle issues regarding Permanent Establishment Status, and enhance the dispute settlement. The establishment of MLI aims to amend about three thousand existing bilateral tax treaties and simplify the signatory states to establish the bilateral tax treaties without a long negotiation process by applying the MLI to the existing bilateral tax treaty.[7] By 1 February 2022, more than 880 bilateral tax treaties had been established in 68 jurisdictions that ratified, approved, or accepted the MLI, and 940 bilateral tax treaties were modified after signatory states ratified MLI.[8]

[5]Joseph Morley, "Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting," *Northwestern Journal on International Law and Bussines*, 39, no. 2 (2019): 242.

[6]See "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS".

[7]Rusydina Aulianasyah, "Indonesia Ratifies Multilateral Instrument," PWC, January 2020, accessed on 13 December 2022, https://www.pwc.com/id/en/taxflash/assets/english/2020/taxflash-2020-01.pdf.

[8]Deloitte, "Indonesia Tax Alert January 2020: Ratification of Multilateral Instrument in Indonesia," *Deloitte*, 21 January 2020, accessed on 13 December 2022, https://www2.deloitte.com/content/dam/Deloitte/id/Documents/tax/id-tax-alert-en-jan2020.pdf.

Every signatory state's interests shall adopt MLI. Nevertheless, MLI has two mandatory provisions or the minimum standards that have to be adopted by all signatory states, which are:[9]

1. The purpose of a CTA regulated by Article 6 (1) is to eliminate the double tax on the taxes included in this present Convention without creating the possibility of abolishing the tax or tax avoidance.
2. Prevention of tax treaty abuse is regulated by Article 7 by regulating general anti-abuse according to the primary purpose of transactions.

The Mutual Agreement Procedure, regulated by Article 16, defines the settlement of disputes that create double taxation or if there are indications of the partner state's authority that impose the tax that did not exist in the regulation on a tax treaty.[10]

The application of MLI generally divided into five steps, there are: [11]

1. The first step is to approve the MLI, which shall apply in the jurisdiction of signatory states under the Vienna Convention of the Law Treaties that are ratified, accepted, or approved. After the states ratify, accept, or approve the MLI, it has to ensure that MLI shall be applied in its jurisdiction. This practice aligns with the *Pacta sunt servanda* principle; hence, the states that did not sign the MLI have no obligation to obey the provisions regulated on MLI.
2. The second step is regarding the registration of CTA as the bilateral tax treaty that MLI shall cover. This step ensures that the state and its partner state have the same position, including their tax treaty regarding the double tax in their states. If it has ensured the MLI shall be the entry into force to their tax treaty.

[9]Vita Apriliasari, "Interpretation Issue of the Principal Purpose Test," *Jurnal Pajak Indonesia* 3, no. 2 (2020): 12-19.

[10]Joel Cooper, Randall Fox, and Shee Boon Law, "Global Tax Report: The Mutual Agreement Procedure: A Taxpayers' Tool Reinvented,"*Israel Group*, 23 July 2017, accessed on 13 December 2022, http://pdf.dlapiper.com/pdfrenderer.svc/v1/ABCpdf9/GetRenderedPdfByUrl//The Mutual Agreement Procedure. pdf/?url=https://www.dlapiper.com:443%2Fen%2Fus%2Finsights%2Fpublications%2F2017%2F07%2Fthe-mutual-agreement-procedure%2F%3F%26pdf%3D1&attachment=false.

[11]OECD, "Applying the Multilateral Instrument Step-by-Step," June 2017, accessed on 13 December 2022, https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf.

3. The third step regarding the provision of MLI is to signatory states that consist of reservation and determine to apply the optional provisions. Hence, the provisions that are reserved cannot be applied to the signatory states and will not modify the CTA that has been registered. If the states do not reserve any provisions in MLI, the provisions will be applied and modified by the CTA. The reservation is conducted unilaterally by the signatory state. It raises legal effects on the inapplicability of that provision whether the partner state makes the same reservation to the same provision or not. The provisional protocol shall be applied and modified if the state party adopts the same optional provisions.
4. The fourth step is regarding the notification of provision, which shall be applied and modified. This step provides clarity and transparency to applying MLI to the other signatory states. The signatory state must also attach the compatibility or clause regarding the settlement or conflict prevention between the existing provisions. The notification will provide different effects depending on every term used in the provisions. Some terms are "in place of," "applies to," "modifies," "in the absence of," or "in place of or in the absence of ."If many provisions do not match the partner state, the state shall make a notification mismatch.
5. The fifth step is the last step of the MLI's entry into effect. After the state ratifies and deposits its documents to the OECD by following the previous steps, generally, the imposition of tax tariffs will be conducted by the CTA that has been listed.

Indonesia became one of the signatory states of MLI on 7 June 2017 and entered into effect on 1 August 2020. By this signatory, there are 47 tax treaties (Perjanjian Penghindaran Pajak Berganda/P3B) listed by the Indonesia amendment and shall be covered by MLI. This signatory is followed by reservation and modification of some provisions on the MLI. It aligns with the state's interest between Indonesia and their state partner; hence, it shall be included in their CTA.[12] MLI ratification was legalized to enter into effect in Indonesia by Presidential Regulation No 77 of 2019 (PR 77/2019).

[12]OECD, "Indonesia Deposits Its Instrument of Ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS," accessed 10 September 2020, https://www.oecd.org/tax/beps/indonesia-deposits-its-instrument-of-ratification-for-the-multilateral-beps-convention.htm.

The MLI ratification shall be said in a small number, although one of its goals is to assist the states in establishing a tax treaty. Including the U.S. and other Western countries that admitted to the MLI concept but did not ratify it, raising a new problem of tax tariff imposition between signatory states and the non-signatory states of MLI. For instance, the tax imposition on a digital service, *Zoom Meeting,* owned by *Zoom Video Communications, Inc*. This case began with the spread of Covid-19. Hence, the number of times they use the Zoom application is in line with their income. In the first quarter of 2021, zoom received revenue of US$ 956 million or Rp 13,8 trillion (exchange rate of Rp 14,499.US$). This value increased by 191% compared to the previous year. [13] Indonesia's society has downloaded 681 million times throughout 2020, an increase of 134% from before the Covid-19 pandemic.[14] In this situation, the Minister of Finance of Indonesia, Sri Mulyani, imposed digital tax under Government Regulation 1 of 2020 (Perppu 1/2020) regarding the Financial Policy to Deal with the Threat of COVID-19. This regulation stipulated that Indonesia's government shall impose a tax on Trading Through Electronic Systems (PMSE) activities from foreign tax subjects who meet the provision of significant economic presence.

In response to a new tax imposition policy in Indonesia, the U.S., as Zoom's state of origin, protested this policy, mainly when many states started to impose electronic transactions. Through the United States Trade Representative (USTR), the U.S. conducted investigations of several states that were considered unfair and discriminated against their digital companies for imposing a tax on Indonesia. This case was settled by negotiation. However, the U.S. and Indonesia could not find a solution, and WTO unilaterally assisted in settling the dispute between the U.S. and Indonesia. There are two subjects of dispute that the U.S., through USTR, is objecting to the substance of Perppu 1/2020, which is considered discriminating against the tax subject of a non-resident. [15]

[13]Cindy Mutia Annur, "Imbas Pandemi Covid-19, Pendapatan Zoom Meroket 191% Pada Kuartal I-2021," accessed 10 September 2022, https://databoks.katadata.co.id/datapublish/2021/07/14/imbas-pandemi-covid-19-pendapatan-zoom-meroket-191-pada-kuartal-i-2021.

[14]Andrea Lidwina, "Zoom, Aplikasi Bisnis Paling Banyak Diunduh 2020," accessed 10 September 2022, https://databoks.katadata.co.id/datapublish/2021/01/29/zoom-aplikasi-bisnis-paling-banyak-diunduh-2020.

[15]"Indonesia-U.S. Digital Tax Dispute Comes to a Deadlock, WTO Intervenes," MUC Consulting, accessed 10 September 2022, https://mucglobal.com/en/news/2350/indonesia-us-digital-tax-dispute-comes-to-a-deadlock-wto-intervenes.

The imposition of tax on the electronic system, namely Value Added Tax (VAT), which applies and is massively used in Indonesia, shall be justified since the corporates receive income from the electronic system. Many states have conducted this practice, for instance, Australia, which imposes a Digital Service Tax (DST) of about 5%; Canada imposes a DST of about 3%; and the Czech Republic about 5%.[16] The PMSE tax imposed by Indonesia is 11% as of 1 April 2020, which is lower than other G20 and OECD member countries and is around 15% to 15,5%. Hence, there is an opportunity for Indonesia to improve the state budget, which is in the phase of economic recovery. [17]

As a developing state, Indonesia is a destination state for the expansion of multinational corporations from developed states and is justified in taking part in international tax agreements. Observing developed states that did not participate in the ratification of MLI, Indonesia has arranged a justifiable regulation; hence, the policy contained in their tax treaty shall benefit states or their people. By that consideration, Indonesia can only ratify some of the provisions of the MLI. However, in ratification, Indonesia has reserved, accepted, and modified the provisions. The process is also in line with the purpose of MLI, which is to simplify the state's arrangement of its tax treaty by modifying the MLI. Despite the convenience offered, it does not necessarily mean that a state like the U.S. has to ratify the MLI but still practises its tax system, which has been practised for a long time.

This study will observe and analyze the background of Indonesia's decision to ratify the MLI, the state practices of ratifying the MLI on their tax treaty, and the impact of MLI on existing tax treaties before Indonesia ratified the MLI.

This study used a qualitative and statute approach, which follows the legal norms of domestic legislation and international conventions. There are Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), Presidential Regulation (PR) No 77 of 2019 regarding the Ratification of MLI, Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax,

[16]Anang Kurniawan, "Pemajakan Perdagangan Melalui Sistem Elektronik (PMSE) Lintas Negara," *Prosiding Simposium Nasional Keuangan Negara* 2, no. 1 (2020): 315-334.

[17]Liputan 6.com, "Tarif PPN Di Indonesia Cuma 11 Persen, Terendah Dibanding Negara G20 Lain - Bisnis Liputan6.Com," Liputan 6.com, accessed 10 September 2022, https://www.liputan6.com/bisnis/read/4919456/tarif-ppn-di-indonesia-cuma-11-persen-terendah-dibanding-negara-g20-lain.

Law Number 11 of 2020 concerning Cipta Kerja, and Law Number 7 of 2021 concerning Harmonization of Tax Regulations, Governmental Regulation No 80 of 2019 concerning the Trading Through Electronic Systems (PMSE), Minister of Finance Regulation No 48 of 2020 concerning Value Added Tax, Minister of Finance Regulation No 35 of 2019 concerning Determination of Permanent Establishment.

II. INDONESIA'S POSITION ON MLI

MLI was introduced on 24 November 2016 by the publication of the MLI draft, along with its explanatory notes by OECD. [18] MLI is Action 15 of the BEPS Action Plan arranged by the OECD and G20 state members. The publication results from the negotiation with 100 states, including OECD signatory member states, G20 states members and other developed and developing states. The introduction of MLI is not directly required to be ratified by states. However, the MLI is open to be signed by the states on 31 December 2016. [19]

Indonesia signed the MLI on 7 June 2017, the 45th state that ratified the MLI. We did Ratification on 13 November, 2019 and it was entered into force on August 1st, 2020[20] Following the legalization of PR 77/2019 concerning the Ratification of MLI, it entered into effect on 13 November 2019. Indonesia chose 12 Articles from 16 Articles from 39 articles regulated on MLI.

After legalizing the MLI through PR 77/2019, Indonesia's first step is to list the tax treaty of their partner state to be covered by MLI (as a CTA) to OECD. The states that were chosen by Indonesia to be their partner state and invoked the tax treaty to be CTA are: [21]

[18]Ernst & Young, "Thailand Signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS," EY, accessed 10 September 2022, https://globaltaxnews.ey.com/news/2022-5183-thailand-signs-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.

[19]Ernst & Young Global, "OECD Releases Multilateral Instrument to Implement Treaty Related BEPS Measures on Hybrid Mismatch Arrangements, Treaty Abuse, Permanent Establishment Status and Dispute Resolution," EY, 2 December 2016, accessed 10 September 2022, https://www.ey.com/en_gl/tax-alerts/oecd-releases-multilateral-instrument-to-implement-treaty-related-beps-measures-on-hybrid-mismatch-arrangements-treaty-abuse-permanent-establishment-status-and-dispute-resolution.

[20]See "Indonesia Deposits Its Instrument."

[21]See Deloitte, "Ratification of Multilateral Instrument in Indonesia."

Tabel 1. List of Countries Included as CTAs under PR-77

1. Australia	17. Republic of Korea	33. Turkey
2. Brunei Darussalam	18. Switzerland	34. Armenia
3. Canada	19. Thailand	35. Bulgaria
4. People's Republic of China	20. United Kingdom	36. Czech Republic
5. France	21. United Arab Emirates	37. Denmark
6. Hongkong	22. United States of America	38. Egypt
7. India	23. Vietnam	39. Hungary
8. Japan	24. Belgium	40. Mexico
9. Lao's People Democratic Republic	25. Croatia	41. Pakistan
10. Luxembourg	26. Finland	42. Portugal
11. Malaysia	27. Italy	43. Romania
12. Netherlands	28. Norway	44. Russia
13. New Zealand	29. Poland	45. Serbia
14. Philippines	30. Qatar	46. Spain
15. Singapore	31. Slovakia	47. Sweden
16. Seychelles	32. South Africa	

The enforcement of MLI is under the law of treaties regulated in VCLT 1969,[22] It needed the consent of two states to list their tax treaty as CTA and match the same provision ratified by the partner state. As of 7 July 2020, 39 out of 47 states included Indonesia as their partner state. The CTA will apply if the selected partner state also includes Indonesia as its partner state. From 1 January 2021, there are 21 CTA enter into effect, namely Australia, Netherlands, Belgium, Denmark, Finland, India, the U.K., Japan, Canada, South Korea, Luxembourg, Poland, Portugal, France, Qatar, Russia, New Zealand, Serbia, Singapore, Slovakia, and the UEA. [23] The remaining 17 states still need to be enacted due to domestic legal procedures in their state. The states expected to complete the ratification process in 2020 are Malaysia, South Korea, Egypt, Hungary, and Pakistan.

The next step is for Indonesia to arrange to list the provisions that will be adopted and reserved through the legalization of PR 77/2019. The scope

[22]Cristina, "Mengenal Pajak Internasional dan Bagaimana Kebijakannya Di Indonesia," accessed 10 September 2022, https://www.pajakku.com/read/60868a67eb01ba1922ccaa5e/Mengenal-Pajak-Internasional-dan-Bagaimana-Kebijakannya-di-Indonesia.

[23]Direktorat Pajak, "MLI | Direktorat Jenderal Pajak," Direktorat Pajak, accessed 10 September 2022, https://www.pajak.go.id/en/mli.

of a tax treaty amendment on MLI is regarding Hybrid Mismatches, Treaty Abuses, Avoidance of Permanent Establishment Status, and Improving Dispute Resolution. First, regarding Hybrid Mismatches, Indonesia takes the position to reserve that provision. However, Indonesia adopted the provision regarding the settlement of dual residents through the Mutual Agreement Procedure (MAP) and the status of dual residents who were not entitled to the tax treaty benefit.

Second, regarding the treaty abuse, Indonesia adopted the purpose of the tax treaty contained in the Preamble to avoid double taxation and did not use it to avoid tax and evasion of tax. Additionally, Indonesia adopts the Principal Purpose Test (PPT) to prevent the practice of treaty abuse. The minimum period of stock ownership to obtain lower income tax tariffs on dividends and the taxation rights of a source jurisdiction over Capital Gain, namely the profits from the transfer of shares or similar rights of more than 50% of the value in the form of immovable property.

Third, regarding the Avoidance of Permanent Establishment Status. Indonesia adopted all provisions regarding the *Artificial Avoidance of Permanent Establishments through Commissionaire Arrangements and Similar Strategies*. Most of the *Artificial Avoidance of Permanent Establishment through the Specific Activity Exemption* regulated the exception of a Permanent Establishment (P.E.) for its preparation and complementary activities for preventing business fragmentation into several activities and understanding closely related parties.

Fourth is regarding the Improving Dispute Resolution, most provisions except *Mutual Agreement Procedure* (MAP) request by nationals to a competent authority of other nations. The list of MLI provisions adopted by Indonesia through OR 77/2019 are:[24]

Table 2. MLI Provisions

MLI Provision	**BEPS Action Plan**	**The provision that is relevant to the OECD Model Tax Convention**	Indonesia's Position
Article 3: Transparent Entities	Action Plan 2: Hybrid Mismatches	Article 1 (2) regarding Persons Covered	Reservation

[24]DDTC, "Realization of the 2019 State Budget & Indonesia's Position in MLI," *DDTC Newsletter* 3, no. 1 (January 2020): 1–7.

MLI Provision	**BEPS Action Plan**	**The provision that is relevant to the OECD Model Tax Convention**	Indonesia's Position
Article 4: Dual Resident	Action Plan 2: Hybrid Mismatches	Article 4 (3) regarding Resident	Reservation and Notification
Article 5: Elimination of Double Taxation	Action Plan 2: Hybrid Mismatches	Article 23A regarding the Exemption Method and Article 23B regarding the Credit Method	Reservation
Article 6: Purpose of Covered Tax Agreement	Action Plan 6: Treaty Abuse	Title and Preamble	Adoption and Notification Provide notification to all 47 partner states
Article 7: Prevention of Treaty Abuse	Action Plan 6: Treaty Abuse	Article 29 regarding Entitlement to Benefits	Adoption In this provision, Indonesia applies the Principal Purpose Test or PPT. It is a clause to limit the benefit of a tax treaty to a tax subject and apply a Simplified Limitation on Benefits or SLoB that one of the conditions has to be fulfilled before enjoying the benefit of a tax treaty or to prevent treaty shopping. Indonesia notified Hong Kong, India, Lao PDR, the U.K., Mexico, Russia, and Serbia.
Article 8: Dividend Transfer Transactions	Action Plan 6: Treaty Abuse	Article 10 (2) (a) regarding Dividends	Adoption and Notification Indonesia provides notification to Canada, France, Japan, Netherlands, Belgium, Poland, South Africa, Armenia, Romania, and Serbia.

MLI Provision	**BEPS Action Plan**	**The provision that is relevant to the OECD Model Tax Convention**	Indonesia's Position
Article 9: Capital Gains from Alienation of Shares or Interest of Entities Deriving their Value is Principally from Immovable Property	Action Plan 6: Treaty Abuse	Article 13 (4) regarding Capital Gains	Adoption Indonesia adopts Article 9 (4) and provides notification to Australia, Canada, China, France, Hong Kong, India, Laos, Malaysia, Filipina, Vietnam, Croatia, Finland, Egypt, Mexico, and Serbia.
Article 10: Anti-Abuse Rule for Permanent (P.E.) Situated in the Third Jurisdiction	Action Plan 6: Treaty Abuse	New Provision	Reservation
Article 11: Application of Tax Agreements to Restrict a Party's Right to Tax its Residents (Saving Clause)	Action Plan 6: Treaty Abuse	Article 1 (3) regarding Persons Covered	Adoption Adoption and provides notification to Luxembourg, the U.K., Italia, Bulgaria, the Czech Republic, Egypt, Romania, and the Swiss
Article 12: Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies	Action Plan 7: Avoidance of Permanent Establishment Status	Article 5 (5) and Article 5 (6) regarding the Permanent Establishment	Adoption and Notification Indonesia provides notification to all its partner states
Article 13: Artificial Avoidance of P.E. Status through the Specific Activity Exemptions	Action Plan 7: Avoidance of Permanent Establishment Status	Article 5 (4) and Article 5 (4) (1) regarding the Permanent Establishment	Adoption Adoption of option A dan provides notification to all partner states

MLI Provision	**BEPS Action Plan**	**The provision that is relevant to the OECD Model Tax Convention**	Indonesia's Position
Article 14: Avoidance of P.E. Status through Splitting-up of Contracts	Action Plan 7: Avoidance of Permanent Establishment Status	Commentary Article 5 (22), Article 5 (51), and Article 5 (52) regarding Permanent Establishment	Adoption Adoption and provides notification to New Zealand, Netherlands, Norway
Article 16: Mutual Agreement Procedure (MAP)	Action Plan 14: Dispute Settlement	Article 25 regarding Mutual Agreement Procedure	Reservation Note that Indonesia only allows the subject of tax requests of MAP to their domicile.
Article 17: Corresponding Adjustment (Correcting the tax stated for foreign taxpayers who have a special relationship with the partner state)	Action Plan 14: Dispute Settlement	Article 9 (2) regarding Associated Enterprises	Reservation, Indonesia will conduct a corresponding adjustment through the MAP procedure.

Here is the analysis of provisions deposited by Indonesia to the OECD regarding the provision that was adopted and reserved:

1. Article 1 and Article 7 of PR 77/2019

   Article 1 regulates the scope of the present Convention. It is to modify all the existing tax treaties that refer to Article 2 (1) (a). Article 2 regarding the interpretation of terms used in the present Convention, additionally there is also a definition of terms used: CTA, Party, Contracting Jurisdiction, and Signatory.

2. Article 3 of PR 77/2019

   This provision regulates the Transparent Entity that contacting jurisdictions have the right to impose income tax on revenue derived from an entity in their contracting jurisdiction. It contains six paragraphs. Indonesia takes its position by reserving this whole provision following Article 3 (5) (a) of MLI.

3. Article 4 of PR 77/2019

   This provision contains four paragraphs that regulate dual resident entities, which regulate an entity placed in more than one contracting jurisdiction. The contracting jurisdiction's competent authority must determine by mutual agreement where the entity is signed as a resident of CTA, considering the effective management, the place of establishment or the place of formation, and other relevant factors.

   CTA has a provision on the MLI that Indonesia reserves. The provision reserves by Indonesia in this provision following Article 4 (3) (e) are modified by the last sentence in Article 4 (1) for CTA with its partner state. In addition, Article 4 (1) stipulated that a provision under Article 4 (2) is a provision that cannot be a reserve. Hence, it provides notification regarding its reservation, while the other partner state provides notification to their CTA that did not include a reservation conducted by Indonesia; it shall be applied and continue under the CTA.

4. Article 5 of PR 77/2019

   This provision contains ten paragraphs divided into Option A and Option B that regulate applying methods for eliminating double taxation. However, Indonesia chooses to reserve all the provisions in this article without exception to not apply to the CTA based on Article 5 (8) of MLI.

5. Article 6 of PR 77/2019

   This provision contains six paragraphs that regulate the purpose of CTA. This provision is one of the mandatory provisions or a minimum standard that has to be adopted by the signatory states. Hence, Indonesia adopts this provision and provides notification to all the partner states, including the preamble text "desiring to further develop their economic relationship and to enhance their cooperation in tax matters" on its CTA.

6. Article 7 of PR 77/2019

   This provision contains 17 paragraphs regulating the prevention of treaty abuse, the minimum standards to be adopted, and Action 6 of the BEPS Project. [25] The prevention of treaty abuses of CTA exists to abolish the treaty

[25]Annet Oguttu, "Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?," *CGD Policy Paper* 132,

shopping practice that shall be advantageous to one entity but give losses to the contracting jurisdiction of the entity that conducted its business without imposing an income tax. The prevention of treaty abuse is conducted by applying the Principal Purpose Tax (PPT) to prevent the abuse of tax treaties. Nevertheless, many states criticized this principle since it did not provide clarity and discretion. Therefore, PPT was criticized for its broad scope and did not provide a solution to abolish treaty shopping. However, states chose Limitation of Benefits (LoB) but also criticized its complexity and hard to apply in some states; hence the principle Simplified of Limitation of Benefits (SLoB) that regulated under Article 7 (8) to Article 7 (17) of this Convention. Indonesia also applies the principle of PPT and SLoB to avoid treaty shopping and provides notification to Hong Kong, India, Lao PDR, the U.K., Mexico, Russia, and Serbia.

PPT and SLoB are one of the flexible contexts offered by the MLI; however, principles of PPT and SloB have to be applied in the tax treaty, and at this time, only a few of Indonesia's partner states have adopted this provision.[26]

7. Article 8 of PR 77/2019

This provision contains four paragraphs that regulate the dividend transfer transaction that regulates abuse of CTA. It shall happen if the subject of tax is involved in a dividend transfer scheme to gain an advantage of the dividend tax withholding rate, which tends to be lower for dividends paid directly to investors (usually 5%) than to the portfolio (usually 15%). [27] The dividend is the distribution of a company's income to shareholders determined by the Company's Board of Directors, which is divided every three months and shall be paid directly or by reinvestment in additional shares.[28] This provision cannot be reserved under Article 3 (4) of MLI; hence, Indonesia adopts this provision and provides notification to Canada, France, Japan, Netherlands, Belgium, Poland, South Africa, Armenia, and Spain.

(November 2018), www.cgdev.orgwww.cgdev.org.

[26]Denny Vissaro, "Dampak MLI Terhadap Kompleksitas Pajak Internasional," *DDTC*, 6 July 2017, https://news.ddtc.co.id/dampak-mli-terhadap-kompleksitas-pajak-internasional-10424.

[27]See Oguttu "Should Developing Countries Sign," 20.

[28]Adam Hayes, "Dividends: Definition in Stocks and How Payments Work," *Investopedia*, 2022, https://www.investopedia.com/terms/d/dividend.asp.

8. Article 9 of PR 77/2019

   This provision contains eight paragraphs regarding the capital gains from the Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property. Indonesia adopts Article 9 (4) following Article 9 (3) to be covered by all its CTA. However, this only shall be applied if the other partner state also adopts Article 9 (4) to be implemented in their CTA, and the signatory states have to notify OECD of the applicability of Article 9 (4) to their CTA. Indonesia also provides notification to Australia, Canada, China, France, Hong Kong, Laos, Malaysia, Philippines, Vietnam, Croatia, Finland, Egypt, Mexico, and Serbia.

9. Article 10 of PR 77/2019

   This provision contains six paragraphs mainly regulating the anti-abuse Rule for Permanent Establishments in third jurisdictions to avoid treaty shopping practices. However, Indonesia takes a position of reservation that these regulations still need to be implemented in their CTA under Article 10 (5) (a).

10. Article 11 of PR 77/2019

    This provision contains four paragraphs regulating the application of a tax treaty to restrict a party's right to tax its residents. Indonesia adopts this provision; hence, Article 11 (4) of the Convention stipulates that if the state does not make a reservation towards this provision, they must notify the OECD regarding their CTA that contains a provision in Article 11 (2). Article 11 (2) regulates Article 11 (1) that shall "in place of or in absence" the provisions of CTA that it did not impact the imposition tax of the other contracting jurisdiction. The term "in place of or in absence" means that CTA should apply in MLI provision whether the CTA has the same provisions. These terms caused the legal effect to change, abolish, or add the MLI provision to their CTA. This provision's applicability has to notify OECD and partner states. Hence, Indonesia adopted Article 11 and notified Luxembourg, the U.K., Italy, Bulgaria, the Czech Republic, Egypt, Romania, and Switzerland to use the provisions regulated in the existing tax treaty to the MLI.

11. Article 12 of PR 77/2019

    This provision contains six paragraphs that regulate the artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies. Indonesia adopted this provision and provided the notification to all its partner states as Indonesia did not make a reservation to Article 12 (3) (a) regarding the P.E. in contracting jurisdiction, following Article 12 (5) of the Convention.

12. Article 13 of PR 77/2019

    This provision contains eight paragraphs divided into paragraph (2) regarding Option A and paragraph (3) regarding Option B, which regulates artificial avoidance of P.E. status through specific activity exemptions. Indonesia only adopts Option A, which defines the P.E. on their CTA. They are (a) the activity considered not to be included as P.E., whether the activity is in the stage of preparation or support. (b) maintenance of business premises that only conducted activities that were not mentioned in paragraph (a), (c) maintenance of premises P.E. only for the combination of activities mentioned in paragraph (a), and (b). Indonesia must notify OECD and all their partner states regarding their choice to apply only Option A based on Article 13 (7) of this Convention.

13. Article 14 of PR 77/2019

    This provision contains four paragraphs that regulate the splitting-up contracts that also to the realize of Action 7 of BEPS, which stipulated that the splitting-up contract is a potential strategy to avoid the P.E. status by exception abuse in Article 5 (3) of Tax Convention OECD Model that made before MLI Model. Indonesia takes the position to adopt this provision and provide notification to New Zealand, Netherlands, and Norway.

14. Article 16 of PR 77/2019

    This provision contains six paragraphs regulating the Mutual Agreement Procedures (MAP) to settle disputes caused by applying and implementing tax imposed in one or both contracting jurisdictions that did not align with the applicable CTA. Indonesia takes reservations by modifying the first sentence of Article 16 (1) based on the applicable CTA and provides notification to all partner states.

15. Article 35 of PR 77/2019

    This provision contains seven paragraphs that regulate the entry into effect of MLI on contracting jurisdictions/signatory states. For substantive provision, the reservation is under Article 28, Article 29, and Article 36. At the same time, the optional provision based on the type of tax imposed is based on Article 35 (1) b and Article 35 (5) b. The phrase enters into effective tax imposition starts at the beginning of 1 January of the following year (1 January 2020) or after the expiration of the present period of entry into force date.

Based on the analysis above, MLI is one of the international agreements with the same position as CTA. MLI did not replace the existing tax treaty but modified its provisions to suit the state's interests. The provision on the existing tax treaty that MLI does not modify shall be applicable. Hence, the partner state (the state that listed each other tax treaty to be covered by MLI/CTA) shall exchange their documents deposited to OECD to communicate which provisions are adopted, modified, or even reserved. The ratification of MLI has to adopt the minimum standards that include, for instance, Article 6, Article 7, and Article 16. Hence, the CTA shall be applicable following the purpose of the MLI. If the states did not choose each other's tax treaty to be covered by MLI, the MLI should not modify the tax agreement, and if the partner state did not adopt the same optional provision, there would be a lot of no matching articles or matching choices. To solve that problem, MLI provides the compatibility clause to determine whether there is an option to replace or to complete the same provision that regulates the MLI on their existing tax treaty. The compatibility clause consists of Article 3 to Article 17, marked by legal terms:

1. Replace the provision on the existing tax treaty marked by the terms "in place of."
2. Change the tax treaty's applicability without replacing the existing article's provisions. The terms usually mark the provision "applies to" or "modify."
3. Add provision if there is an unavailability provision in the existing tax treaty, usually marked by terms "in the absence of."
4. Replace or add the provision on existing tax treat if the existing tax treaty is not regulating the same provision

Based on Indonesia's position on MLI, Indonesia is gaining an advantage in making the tax treaty systematic by adopting the hybrid mismatch arrangement. Indonesia also shall prevent aggressive tax imposition due to different domestic regulations of their state partners. Indonesia also adopts provisions regarding tax treaty abuse and minimalizes the possibility of entities that enjoy double tax-free benefits without complying with the established rules. The adoption of avoidance of P.E. status also allowed Indonesia to impose a tax on the digital economy. The adoption of MAP allowed Indonesia to settle possible future disputes regarding the application and implementation of CTA. [29] The MLI was established to assist in standardizing international tax treaty regulation and providing flexibility so that each contracting jurisdiction shall match their state's interest without injuring the right or even obligation of the state partner.

III. BEST PRACTICES OF MLI'S MEMBERS

However, the MLI established by OECD and G20 state members did not implicate that all state members ratify the MLI to cover their tax treaty. The list of G20 state members who ratify MLI are:

Table 3. MLI Ratifying Parties from G20 States

NO	STATE	RATIFY	DID NOT RATIFY
1.	Argentina	√	
2.	Australia	√	
3.	Brazil		√
4.	Canada	√	
5.	China	√	
6.	France	√	
7.	German	√	
8.	Indonesia	√	
9.	India	√	
10.	Russia	√	
11.	Italia	√	

[29]Yusuf Santoso, "Empat Keuntungan Pemerintah Tandatangan Persetujuan Penghindaran Pajak Berganda - Page 1," *nasional.kontan*, 19 January 2020, https://nasional.kontan.co.id/news/empat-keuntungan-pemerintah-tandatangan-persetujuan-penghindaran-pajak-berganda?page=1.

12.	Japan	√	
13.	Kore Republic	√	
14.	Mexico	√	
15.	Saudi Arabia	√	
16.	South Afrika	√	
17.	Turkey	√	
18.	United Kingdom	√	
19.	United States of America		√
20.	Europa Union		√

The MLI was initiated and formed to simplify the contracting jurisdiction to enforce or not enforce the provisions contained therein by modifying, which by reservation and adoption has the draw of almost G20 state member interest. However, the practice of ratification of each state did not apply in the same provision. Australia and Japan have adopted different provisions as countries in the Asia Pacific region and are included in the list of Indonesia's partner states. The practice of applying MLI in Australia and Japan will be explained as follows.

III.1. Australia's practice in Ratifying the MLI

Australia signed the MLI on 7 June 2017, deposited its ratification document to the OECD on 26 September 2018, and entered it into effect on 1 January 2019. Based on the document deposited by Australia to the OECD, 43 states have been chosen as partner states of Australia's tax treaty, which MLI shall modify into CTA.

The provisions that are adopted, reserved, and modified in the document deposited by Australia are:

Table 4. Australia's MLI Provisions

MLI Provisions	BEPS Action Plan	The provision that is relevant to the OECD Model Tax Convention	Australia's Position
Article 3 Transparent Entities	Action 2 Hybrid Mismatch	Article 1 (2) regarding Persons Covered	Reservation and Notification Australia provides notification to Mexico, New Zealand, and the U.S.

MLI Provisions	BEPS Action Plan	The provision that is relevant to the OECD Model Tax Convention	Australia's Position
Article 4 Dual Resident Entities	Action 2 Hybrid Mismatch	Article 4 (3) regarding Resident	Reservation and Notification Australia provides notification to all its partner states
Article 6 Purpose of a Covered Tax Agreement	Action 6 Treaty Abuse	Title and Preamble	Adoption Australia adopts Article 6 (3) and provides notification to all its partner states.
Article 7 Prevention of Treaty Abuse	Action 6 Treaty Abuse	Article 29 regarding Entitlement to Benefits	Adoption Australia chooses to apply and adopt Article 7 (4) and provides notification to Chile, China, Finland, Ireland, Japan, Mexico, New Zealand, Swiss, and the U.K.
Article 8 Dividend Transfer Transactions	Action 6 Treaty Abuse	Article 10 (2) (a) regarding Dividends	Adoption Australia adopts this provision and provides notification to Argentina, Canada, Chile, Czech Republic, Finlandia, France, Japan, Malaysia, Mexico, New Zealand, Norway, Filipina, Romania, Russia, South Africa, Swiss, Taiwan, Turkey, the U.K., and the U.S.
Article 9 Capital Gains from Alienation of Shares or Interest of Entities Deriving their Value Principally from Immovable Property	Action 6 Treaty Abuse	Article 13 (4) regarding Capital Gains	Reservation and Notification Australia makes a reservation on Article 9 (1) (b). It provides notification to Argentina, Canada, Chile, Finlandia, France, Ireland, Japan, Malaysia, Mexico, New Zealand, Norway, Romania, Russia, Slovakia, South Africa, Swiss, Turkey, the U.K., and the U.S.

MLI Provisions	BEPS Action Plan	The provision that is relevant to the OECD Model Tax Convention	Australia's Position
Article 11 Application of Tax Agreements to Restrict a Party's Right to Tax its Residents	Action 6 Treaty Abuse	Article 1 (3) regarding Persons Covered	Adoption Australia adopts this provision and provides Belgium, Canada, Fiji, France, Ireland, Italy, the Republic of Korea, the U.K., and the U.S.
Article 12 Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies	Action 7 Permanent Establishment Status	Article 5 (5) and Article 5 (6) regarding the Permanent Establishment	Reservation
Article 13 Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Action 7 Permanent Establishment Status	Article 5 (4) or Article 5 (4.1) regarding the Permanent Establishment	Reservation
Article 14 Splitting-up of Contracts	Action 7 Permanent Establishment Status	Commentary on Article 5, paras 22, 51, 52 regarding Permanent Establishment	Reservation
Article 16 Mutual Agreement Procedure	Action 14 Improving Dispute Resolution	Article 25 regarding Mutual Agreement Procedure	Adoption Australia adopts this provision and provides notification to all its partner states.
Article 17 Corresponding Adjustments	Action 14 Improving Dispute Resolution	Article 9 (2) regarding Associated Enterprises	Reservation

MLI Provisions	BEPS Action Plan	The provision that is relevant to the OECD Model Tax Convention	Australia's Position
Article 18 Choice to Apply Part VI	Action 14 Arbitration	Article 25 (5) regarding Mutual Agreement Procedure	Adoption
Article 23 Jenis Type of Arbitration Process	Action 14 Arbitration	New Article	Reservation
Article 26 Compatibility	Action 14 Arbitration	New Article	Reservation
Article 28 Reservations	Action 14 Arbitration	New Article	Reservation

In contrast to Indonesia, Australia provides 12 reservations and six adopted provisions. In addition to the provision with the match provision, Indonesia and Australia match the reservation in Article 3, Article 4, Article 9, Article 10, Article 10, and Article 13. While the match is adopted, provisions are Article 6, Article 7, Article 8, and Article 11.

III.2. Japan's Practice in Ratifying the MLI

As one of the G20 state members involved in the MLI arrangement, Japan signed the MLI on 7 June 2017 in Paris, France. The signing of MLI is hence a signal of approvement or ratification of the MLI; on 26 September 2016, Japan deposited its ratification document to OECD that contained a list of its 35 chosen partner states. MLI entered into effect in Japan on 1 January 2019. The provision adopted, ratified, and modified by Japan based on documents deposited are:

Table 5. Japan's MLI Provisions

MLI Provision	BEPS Action Plan	The provision that is related to the OECD Model Tax Convention	Japan's Position
Article 3 Transparent Entities	Action 2 Hybrid Mismatch	Article 1 (2) regarding Persons Covered	Reservation
Article 4 Dual Resident Entities	Action 2 Hybrid Mismatch	Article 4 (3) regarding Resident	Reservation

MLI Provision	BEPS Action Plan	The provision that is related to the OECD Model Tax Convention	Japan's Position
Article 6 Purpose of a Covered Tax Agreement	Action 6 Treaty Abuse	Title and Preamble	Reservation
Article 7 Prevention of Treaty Abuse	Action 6 Treaty Abuse	Article 29 regarding Entitlement to Benefits	Adoption
Article 8 Dividend Transfer Transactions	Action 6 Treaty Abuse	Article 10 (2) (a) regarding Dividends	Reservation
Article 9 Capital Gains from Alienation of Shares or Interest of Entities Deriving their Value Principally from Immovable Property	Action 6 Treaty Abuse	Article 13 (4) regarding Capital Gains	Adoption
Article 11 Application of Tax Agreements to Restrict a Party's Right to Tax its Residents	Action 6 Treaty Abuse	Article 1 (3) regarding Persons Covered	Reservation
Article 12 Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies	Action 7 Permanent Establishment Status	Article 5 (5) dan Article 5 (6) regarding Permanent Establisment	Adoption
Article 13 Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Action 7 Permanent Establishment Status	Article 5 (4) atau Article 5 (4.1) regarding Permanent Establishment	Adoption
Article 14 Splitting-up of Contracts	Action 7 Permanent Establishment Status	Commentary on Article 5 (paras 22, 51, 52) regarding Permanent Establishment	Reservation
Article 16 Mutual Agreement Procedure	Action 14 Improving Dispute Resolution	Article 25 regarding Mutual Agreement Procedure	Adoption
Article 17 Corresponding Adjustments	Action 14 Improving Dispute Resolution	Article 9 (2) regarding Associated Enterprises	Adoption

MLI Provision	BEPS Action Plan	The provision that is related to the OECD Model Tax Convention	Japan's Position
Article 18 Choice to Apply Part VI	Action 14 Arbitration	Article 25 (5) regarding Mutual Agreement Procedures	Adoption
Article 19 Mandatory Binding Arbitration	Action 14 Arbitration	Article 25 (5) regarding Mutual Agreement Procedures	Reservation
Article 23 Type of Arbitration Process	Action 14 Arbitration	New Article	Reservation
Article 26 Compatibility	Action 14 Arbitration	New Article	Reservation
Article 28 Reservations	Action 14 Arbitration	New Article	Reservation

Analyzing Japan's position on MLI, we shall notice there are ten provisions that Japan makes a reservation, whereas Japan adopts eight provisions. The articles that match Indonesia's reservations are Article 3, Article 4, and Article 5, while following Indonesia's adoptions are Article 6, Article 7, Article 9, Article 11, Article 12, Article 13, and Article 17.

IV. THE IMPACTS OF PREVIOUS TAX TREATY THROUGH MLI

The tax treaty listed by both states (state and its partner state) herein is a covered tax agreement or CTA that shall be modified by the MLI provision adopted by the contracting jurisdiction, and the rest of the provision shall be applicable as the existing regulation. MLI application is in line with VCLT 1969, which impacts the application of MLI provisions to the contracting jurisdiction. MLI will modify the tax treaty if the states and their partner states have ratified the MLI and provide notification that MLI shall modify their tax treaty. The states and their partner states match the same provisions implemented in their tax treaty. This practice follows Article 6 of VCLT, stipulating that the agreement will legally bind the state party and perform in good faith. In contrast, the agreement will only bind to the non-party state or the third party if that state intends to obey the agreement in line with Article 34 of VCLT. [30]

[30]Badan Kebijakan Fiskal, "Lawan Upaya Penghindaran Pajak, Indonesia Ratifikasi Multilateral Instrument on Tax Treaty," *DJP*, Januari 2022, https://fiskal.kemenkeu.go.id/

The tax treaty not listed as CTA will continue to enter into force. However, as the contracting jurisdiction of MLI, Indonesia shall adjust the tax treaty by the general provisions of MLI to prevent base erosion and profit shifting. This practice aligns with the *lex posterior derogat legi priori principle,* which means the latest law will override the previous law and only apply if the legal position is equal to or higher than the previous legal norm. [31] Therefore,

Many states which signed the MLI will influence the previous tax treaty. One implementation of the tax treaty that the signatory of Indonesia impacted MLI is The Avoidance of Double Taxation and the Prevention of Fiscal Evasion concerning Taxes on Income, or the tax treaty between Indonesia and the U.S. signed on 1 February 1997, by the Presidential Decree No. 88 of 1966. [32] Indonesia listed this tax treaty as CTA and shall be covered by MLI, although the U.S. is not contracting jurisdiction of MLI. The background of the U.S.'s absence in signing the MLI, although it is involved in the negotiation process, is that the U.S. has practised its international tax model for centuries and focuses on U.S. interests. If the U.S. signs the MLI, it will not provide any additional advantage as the U.S. international tax models follow their state's interests. [33]

The other legal reasons for Indonesia's choice to list the U.S. tax treaty modified by the MLI are the Principal Purpose Tax or PPT provisions and the mandatory binding arbitration. [34] The PPT is an anti-abuse rule based on the Principal Purposes of Transaction or arrangement that provides a general way to handle cases of treaty abuse, including due to treaty shopping or any regulation not covered by more anti-abuse rules. [35] Furthermore, the U.S. has no other option because many of its partner states ratified the MLI (including Indonesia); hence, their tax treaty will be affected by the MLI. Based on those reasons, the tax treaty between Indonesia and the U.S. will remain valid and

---

baca/2020/01/27/093150844111694-lawan-upaya-penghindaran-pajak-indonesia-ratifikasi-multilateral-instrument-on-tax-treaty.

[31]Nurfaqih Irfani, "Asas Lex Superior, Lex Specialis, dan Lex Posterior: Pemaknaan, Problematika, dan Penggunaannya Dalam Penalaran dan Argumentasi Hukum," *Jurnal Legislasi Indonesia* 17, no. 3 (2020): 305-325.

[32]"P.B. Taxand | Tax Treaty," P.B. Taxand, accessed 10 September 2022, https://www.pbtaxand.com/menu/page/tax_treaty.

[33]Margriet Lukkien and Hellen de Gier, "Tax Planning International: Europian Tax Service," BNA, 2018, http://www.bna.com.

[34]See Alston & Bird, "Impact of the Multilateral Instrument on U.S. Taxpayer."

[35]*Ibid.*

have no provisions amended after Indonesia signed the MLI and included the tax treaty to be covered by the tax agreement. At the same time, mandatory arbitration is a mechanism that shall be applied in specific circumstances which require the parties to bring the unsolved dispute to an independent and impartial arbitration panel. [36]

Based on the document deposited to the OECD, Indonesia is known to have adopted the provisions regarding the Avoidance of Permanent Establishment (P.E.) Status as regulated in Article 11 to Article 13 of the MLI. The adoption of this provision is one of the steps taken by Indonesia's government to respond to the problem of the increase of foreign investors entering Indonesia using joint ventures, either cooperating with other foreign corporations or even cooperating with Indonesian corporations. [37] By adopting these provisions, Indonesia shall determine whether a P.E. shall impose tax tariffs and benefit from a tax treaty.

P.E. based on Article 2 paragraph (5) of law No 36 of 2008 (after this: Law 36/2008) concerning the Fourth Amendment to Law No 7 of 1983 concerning Income Tax stated that a P.E. is a form of business used by an individual who is not placed in Indonesia. It is up to 183 days within 12 months, and an entity not established and domiciled in Indonesia can run a business or conduct business activity in Indonesia. The time set by the law is the limit of time conducted unilaterally by Indonesia if the state origin of P.E. is not a party state to the tax treaty of Indonesia. If the state origin of P.E. is a partner state to Indonesia's tax treaty, the time limit applied will follow that tax treaty's provisions.[38]

After ratifying the MLI and entering into effect by legalizing the PR 77/2019, Indonesia's Finance Minister declared the Ministerial Regulation No. 35 of 2019 (after this MR 35/2019) concerning the Determination of Permanent Establishments that also defines P.E. in Article 4, which states that:

"BUT[39]It is a form of business used by a foreign individual or foreign entity to run a business or carry out activities in Indonesia that meet the following criteria:

---

[36]OECD, "Frequently Asked Questions on the Multilateral Instrument (MLI)," accessed 10 September 2022, https://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf.

[37]Cristin, "Ketentuan Bentuk Usaha Tetap (BUT)," *pajakku*, 2020, https://www.pajakku.com/read/5f7d8f212712877582239171/Ketentuan-Bentuk-Usaha-Tetap-(BUT).

[38]Zsazya, "Bentuk Usaha Tetap: Kenali Ketentuan Dan Perhitungan Pajaknya Di Sini!," *Online Pajak*, 4 November 2019, https://www.online-pajak.com/tentang-pph-final/bentuk-usaha-tetap.

[39]BUT= Bentuk Usaha Tetap (Permanent Business Form)

a. The existence of a place of business in Indonesia;

b. The place of business, as referred to in letter a, is permanent and

c. As referred to in letter a, the business place is used by Foreign Individuals or Foreign Entities to carry out business or activities."

MLI plans to change the definition of P.E. in their Action 7 BEPS regarding the avoidance of paying tax in third county jurisdictions. [40] This provision is further regulated in Article 10 of the MLI regarding anti-abuse rules for P.E. located in third jurisdictions. However, based on the document deposited, Indonesia's right to make a reservation to this provision based on Article 10 (5) (a) is not to be implemented in its CTA. Therefore, Indonesia already has provisions on P.E., which have been described previously, and Indonesia shall negotiate regarding the status of P.E. Even though Indonesia makes a reservation to that provision. It does mean that Indonesia allows its jurisdiction to become a third contracting jurisdiction; hence, it shall be where entities shall avoid paying the tax.

The place of business referred to by Article 4 of the MR 35/2019 and Law 36/2008 includes the domicile of management, company branches, factories, and space for promotion and sales. P.E. is one of the Foreign Tax Subjects (FTS) and is the subject of tax. P.E. must register its Taxpayer Identification Number (NPWP), which shall be conducted up to one month after P.E.'s business or business activities in Indonesia. [41]

The tax imposed on P.E. as FTS is a tax for non-residents with the same tax obligation as the domestic corporation as regulated in Article 2 paragraph (1a) of Law 36/2008. The imposition of taxes on P.E. based on Article 26 paragraph (4) of law No 11 of 2020 concerning Cipta Kerja states that:

> "Taxable Income (PKP) after being deducted by tax from a BUT in Indonesia is subject to a tax of 20% unless the income is reinvested in Indonesia, the provisions of which are further regulated by or based on a Regulation of the Minister of Finance."

[40] OECD, "Action 7 - OECD BEPS," OECD, accessed 10 September 2022, https://www.oecd.org/tax/beps/beps-actions/action7/.

[41] Peraturan Menteri Keuangan No 35/PMK.03/2019 tentang Penentuan Bentuk Usaha Tetap, Article 2 and 3 (2019).

PKP is income used as the basis for calculating income tax. [42] The imposition of PKP on P.E. was then updated through Article 17 paragraph (1) (b) of Law No 7 of 2021 concerning Harmonization of Tax Regulations (UU HPP), stating that PKP of P.E. is subject to an income tax of 22% as of the 2022 fiscal year. Based on *lex posterior derogate legi priori* principles, P.E. will be subject to a 22% tax under the UU HPP. In addition, the amount of PKP of P.E. in Article 6 paragraph (1) (A) of UU HPP stipulated that:

"(1) The amount of PKP for domestic W.P. and BUT is determined based on gross income minus costs for obtaining, collecting, and maintaining income, including:

a. Costs that are directly or indirectly related to business activities, among others:
    1. Cost of purchasing materials;
    2. Costs related to work or services, including wages, salaries, honoraria, bonuses, gratuities, and benefits provided in the form of money;

    …9. Tax except for income tax."

If we analyze the provision regarding P.E. on MLI, MLI does not describe the amount of tax imposed on P.E.; thus, the regulation of imposing the tax is returned to domestic law and the result of negotiation between partner states.

Additionally, Indonesia also imposes Value Added Tax (VAT) on all forms of business that gain the advantage of conducting business or business activities within the jurisdiction. The implementation is an expansion of international trade whose transactions are conducted through an electronic device and procedure, whether in the form of goods, digital goods, or services. VAT is reinforced by Government Regulation No 80 of 2019 concerning Trading Through Electronic Systems (PP PMSE), which explains the parties conducting PMSE, requirements in PMSE, PMSE implementation, obligations of PMSE subject, evidence of PMSE transactions, and electronic advertisements. [43]

[42] Bayu, "Pengertian Penghasilan Kena Pajak (PKP) Dan Penghasilan Tidak Kena Pajak (PTKP)," Konsultaku, 6 June 2021, https://konsultanku.co.id/blog/pengertian-penghasilan-kena-pajak-pkp-dan-penghasilan-tidak-kena-pajak-ptkp.

[43] PP PMSE , Article 2 (2019).

PE within the scope of PP PMSE, referred to as Transborder Business Actor, is defined as foreign individuals or business entities established and domiciled outside Indonesia's territorial jurisdiction that conduct business or business activities of PMSE in Indonesian jurisdictions. Foreign business actors include actors of transborder PMSE and foreign intermediary providers. Even though transborder actors do not have a physical presence in Indonesia, their presence will be considered available if they meet the number of transactions, transaction value, delivery packages, and accessors. [44] PP PMSE generally only regulates the PMSE systems but does not explain the amount of VAT imposed on PMSE business actors.

Regulations on the imposition of VAT regulated in the Minister of Finance Regulation No 48 of 2020 concerning the Procedures for Appointing Collectors, Collections, and Deposits as well as Reporting VAT on the Utilization of Intangible Taxable Goods and Taxable Services from Outside the Customs Area within the Region Customs. It, Through Trading by Electronic Systems (Permenkeu 48/2020), stipulated in Article 6 that the amount of VAT shall be paid in 10% multiplied by the Tax Base of DPP. DPP is the sum of the selling price, replacement, import, export, or other value. [45] However, on 1 April 2022, the VAT rate in Indonesia increased to 11% and will gradually increase to 12% in 2025 following Article 7 (1) UU HPP. The article also stated that the lowest VAT rate imposed is 5%, and the highest rate is 15%.[46] This VAT withdrawal is paid by the customer, collected by business actors, and paid annually.

The increase in the VAT tariff rate in Indonesia is motivated by the government's efforts to recover economic conditions after the COVID-19 pandemic; hence, the increase is expected to promote financial development and maintain the stability of the State Revenue and Expenditure Budget (APBN). This policy received protests from various economic experts that it will pressure nationals as they strive in the present pandemic. The U.S. also demanded the VAT of PMSE implemented by Indonesia through Minister Finance Regulation No 17/PMK/010/2018 concerning the Second Amendment to the Minister

[44] *Ibid,* Article 7 (1) and (2).

[45] "Berikut Adalah Dasar Pengenaan Pajak (DPP) PPN (Pajak Pertambahan Nilai)," Flazz Tax, accessed 10 September 2022, https://flazztax.com/2021/06/12/berikut-adalah-dasar-pengenaan-pajak-dpp-ppn-pajak-pertambahan-nilai/.

[46] Andhi Mubarok, "Sudah Efektifkah PPN 11 Persen?," DJKN, 25 May 2022, https://www.djkn.kemenkeu.go.id/kpknl-manado/baca-artikel/15047/Sudah-Efektifkah-PPN-11-Persen.html.

of Finance Regulation No 6/PMK.010/2017 concerning the Stipulation of the Goods Classification System and Imposition of Import Duty Tariffs on Imported Goods. The U.S. objected to applying the classification of goods and the exemption of import duty in software. Previously, the policy was imposed at a rate of only 0%, and the company should report the incoming imported goods. [47] The United States only delivered the protest against the increase of VAT by Indonesia. After failed negotiations between Indonesia and the U.S., the WTO will be a place for resolution.

The list of Indonesia's CTA was deposited to the OECD and entered into effect after Indonesia adjusted it with domestic legal instruments. It started by the Surat Edaran Direktur Jenderal Pajak (SEDJP) No SE-06/PJ/2021 concerning the entry into compelling CTA between Indonesia and Japan, and SEDJP No SE-21/PJ/2021 concerning the entry into effect of CTA between Indonesia and Singapore. The implementation of CTA has until now been conducted as it should and minimizes the losses suffered by the state, primarily developing states such as Indonesia, due to treaty shopping.

V. CONCLUSION

MLI is one of the BEPS Action Plans arranged by the OECD state members and the G-20-member state that assist the contracting jurisdiction in modifying the tax treaty without a long process of negotiations. Although the MLI signatory states are small numbers, the MLI will affect the tax treaty between the contracting and non-contracting jurisdictions.

MLI only regulates general provisions; hence, MLI shall negotiate the implementation of tax tariffs between the partner states. In addition, although MLI's purpose is to eliminate double taxation, it does not mean that foreign entities are not imposing tax where they conduct business or business activities jurisdictions. However, they minimize the tax imposed on it following the domestic rules and the CTA.

MLI implements minimum standards that must be agreed upon to combat treaty abuse and improve dispute resolution mechanisms by providing flexibility to accommodate more specific tax policies. Indonesia provides flexibility,

[47] See "Indonesia-U.S. Digital Tax Dispute."

including freeing the state to determine the tax treaty used in MLI, creating flexibility and options that allow countries to have adjustments closest to the MLI minimum standards with their countries, and choosing options regarding mandatory and binding arbitration. However, each state may enter into additional bilateral agreements regarding MLI provisions to be adopted or modified.

REFERENCES

Alston & Bird. "Impact of the Multilateral Instrument on U.S. Taxpayer," Alston & Bird, 14 July 2017. Accessed on 10 September 2022. https://www.alston.com//media/files/insights/publications/2017/07/mlionustaxpayers.pdf?rev=ae1f0fde6960453185a46a07a6f727e6&sc_lang=en&hash=4F797C9A9B8138D7C56DCA384C07B9E5.

Annur, Cindy Mutia. "Imbas Pandemi Covid-19, Pendapatan Zoom Meroket 191% Pada Kuartal I-2021." Accessed 10 September 2022. https://databoks.katadata.co.id/datapublish/2021/07/14/imbas-pandemi-covid-19-pendapatan-zoom-meroket-191-pada-kuartal-i-2021.

Apriliasari, Vita. "Interpretation Issue of the Principal Purpose Test." *Jurnal Pajak Indonesia* 3, no. 2 (2020): 12-19.

Aulianasyah, Rusydina. "Indonesia Ratifies Multilateral Instrument." PWC, January 2020. Accessed on 13 December 2022. www.pwc.com/structure.

Badan Kebijakan Fiskal. " Lawan Upaya Penghindaran Pajak, Indonesia Ratifikasi Multilateral Instrument on Tax Treaty," *DJP*. January 2022. https://fiskal.kemenkeu.go.id/baca/2020/01/27/093150844111694-lawan-upaya-penghindaran-pajak-indonesia-ratifikasi-multilateral-instrument-on-tax-treaty.

Bayu. "Pengertian Penghasilan Kena Pajak (PKP) Dan Penghasilan Tidak Kena Pajak (PTKP)," Konsultanku, 6 June 2021. https://konsultanku.co.id/blog/pengertian-penghasilan-kena-pajak-pkp-dan-penghasilan-tidak-kena-pajak-ptkp.

Chandrasari, Pungki Yunita. "The Impact of Tax Treaty on Foreign Direct Investment in Indonesia." *Jurnal BPPK* 14, no. 1 (2021): 1-10.

Cristina, "Mengenal Pajak Internasional dan Bagaimana Kebijakannya Di Indonesia." Accessed 10 September 2022. https://www.pajakku.com/read/60868a67eb01ba1922ccaa5e/Mengenal-Pajak-Internasional-dan-Bagaimana-Kebijakannya-di-Indonesia.

Cooper, Joel., Randall Fox, and Shee Boon Law. "Global Tax Report: The Mutual Agreement Procedure: A Taxpayers' Tool Reinvented." *Israel Group*, 23 July 2017. Accessed on 13 December 2022. http://pdf.dlapiper.com/pdfrenderer.

svc/v1/ABCpdf9/GetRenderedPdfByUrl//The Mutual Agreement Procedure. pdf/?url=https://www.dlapiper.com:443%2Fen%2Fus%2Finsights%2Fpublications%2F2017%2F07%2Fthe-mutual-agreement-procedure%2F%3F%26pdf%3D1&attachment=false.

Cristin. "Ketentuan Bentuk Usaha Tetap (BUT)," pajakku, 2020. https://www.pajakku.com/read/5f7d8f212712877582239171/Ketentuan-Bentuk-Usaha-Tetap-(BUT).

DDTC. "Realization of the 2019 State Budget & Indonesia's Position in MLI." DDTC Newsletter 3, no.1 (January 2020): 1–7.

Deloitte. "Ratification of Multilateral Instrument in Indonesia." Deloitte, 21 January 2020. Accessed on 13 December 2022. https://www2.deloitte.com/content/dam/Deloitte/id/Documents/tax/id-tax-alert-en-jan2020.pdf.

Direktorat Pajak. "MLI | Direktorat Jenderal Pajak." Accessed 10 September 2022. https://www.pajak.go.id/en/mli.

DJP. "Badan Kebijakan Fiskal - Lawan Upaya Penghindaran Pajak, Indonesia Ratifikasi Multilateral Instrument on Tax Treaty." DJP, January 2022. https://fiskal.kemenkeu.go.id/baca/2020/01/27/093150844111694-lawan-upaya-penghindaran-pajak-indonesia-ratifikasi-multilateral-instrument-on-tax-treaty.

Ernst & Young Global. "OECD Releases Multilateral Instrument to Implement Treaty Related BEPS Measures on Hybrid Mismatch Arrangements, Treaty Abuse, Permanent Establishment Status and Dispute Resolution." EY, 2 December 2016. Accessed 10 September 2022. https://www.ey.com/en_gl/tax-alerts/oecd-releases-multilateral-instrument-to-implement-treaty-related-beps-measures-on-hybrid-mismatch-arrangements-treaty-abuse-permanent-establishment-status-and-dispute-resolution.

Ernst & Young. "Thailand Signs Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent BEPS." Accessed 10 September 2022. https://globaltaxnews.ey.com/news/2022-5183-thailand-signs-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.

FlazzTax. "Berikut Adalah Dasar Pengenaan Pajak (DPP) PPN (Pajak Pertambahan Nilai)" Accessed 10 September 2022. https://flazztax.com/2021/06/12/berikut-adalah-dasar-pengenaan-pajak-dpp-ppn-pajak-pertambahan-nilai/.

Hayes, Adam. "Dividends: Definition in Stocks and How Payments Work." Investopedia, 2022. https://www.investopedia.com/terms/d/dividend.asp

Irfani, Nurfaqih. "Asas Lex Superior, Lex Specialis, dan Lex Posterior: Pemaknaan, Problematika, dan Penggunaannya Dalam Penalaran dan Argumentasi Hukum." *Jurnal Legislasi Indonesia* 17, no. 3 (2020): 305-325.

Kartika, et al. "Analisis Implementasi Skema Dual Resident Entities Di Indonesia." Jurnal Administrasi Bisnis 16, no. 2 (2022). https://doi.org/10.21776/ub.profit.2022.-16.02.4

Kurniawan, Anang. "Pemajakan Perdagangan Melalui Sistem Elektronik (PMSE) Lintas Negara." *Prosiding Simposium Nasional Keuangan Negara* 2, no.1 (2020): 315-334.

Lidwina, Andrea. "Zoom, Aplikasi Bisnis Paling Banyak Diunduh 2020." Accessed 10 September 2022. https://databoks.katadata.co.id/datapublish/2021/01/29/zoom-aplikasi-bisnis-paling-banyak-diunduh-2020.

Liputan 6.com. "Tarif PPN Di Indonesia Cuma 11 Persen, Terendah Dibanding Negara G20 Lain - Bisnis Liputan6.Com." Accessed 10 September 2022. https://www.liputan6.com/bisnis/read/4919456/tarif-ppn-di-indonesia-cuma-11-persen-terendah-dibanding-negara-g20-lain.

Lukkien, Margriet, and Hellen de Gier. "Tax Planning International: European Tax Service." BNA, 2018. http://www.bna.com.

Mubarok, Andhi. "Sudah Efektifkah PPN 11 Persen?." DJKN, 25 May 2022. https://www.djkn.kemenkeu.go.id/kpknl-manado/baca-artikel/15047/Sudah-Efektifkah-PPN-11-Persen.html.

Morley, Joseph. "Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting." *Northwestern Journal on International Law and Business*, 39, no. 2 (2019): 225-248.

OECD, "Applying the Multilateral Instrument Step-by-Step," June 2017. Accessed on 13 December 2022. https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf.

OECD. “Action 7 - OECD BEPS”, Accessed 10 September 2022. https://www.oecd.org/tax/beps/beps-actions/action7/.

OECD, “Frequently Asked Questions on the Multilateral Instrument (MLI),” Accessed 10 September 2022. https://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf.

OECD. “Indonesia Deposits Its Instrument of Ratification for the Multilateral BEPS Convention - OECD.” Accessed 10 September 2022. https://www.oecd.org/tax/beps/indonesia-deposits-its-instrument-of-ratification-for-the-multilateral-beps-convention.htm.

Oguttu, Annet. “Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?” CGD Policy Paper 132. (November 2018). www.cgdev.orgwww.cgdev.org.

Santoso, Yusuf. “Empat Keuntungan Pemerintah Tandatangan Persetujuan Penghindaran Pajak Berganda - Page 1,” nasional.kontan, 19 January 2020. https://nasional.kontan.co.id/news/empat-keuntungan-pemerintah-tandatangan-persetujuan-penghindaran-pajak-berganda?page=1.

Taxand. “P.B. Taxand | Tax Treaty.” Accessed 10 September 2022. https://www.pbtaxand.com/menu/page/tax_treaty.

Vissaro, Denny. “Dampak MLI Terhadap Kompleksitas Pajak Internasional.” DDTC, 6 July 2017. https://news.ddtc.co.id/dampak-mli-terhadap-kompleksitas-pajak-internasional-10424.

WTO. “WTO Members and Observers.” Accessed 10 September 2022. https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

Zsazya. “Bentuk Usaha Tetap: Kenali Ketentuan Dan Perhitungan Pajaknya Di Sini!” online pajak, 4 November 2019. https://www.online-pajak.com/tentang-pph-final/bentuk-usaha-tetap.

“Indonesia-U.S. Digital Tax Dispute Comes to a Deadlock, WTO Intervenes.” MUC Consulting. Accessed 10 September 2022. https://mucglobal.com/en/news/2350/indonesia-us-digital-tax-dispute-comes-to-a-deadlock-wto-intervenes.