

Indonesia's Intangibles Transfer Pricing Regime: An International Comparative Review

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ABSTRACT

Intangibles are central to the digital economy, generating significant market value and premium returns. In the pre-BEPS era, intangibles facilitated tax avoidance through profit shifting to tax havens. The post-BEPS era emphasizes intangible profit allocation based on economic ownership, contributions to DEMPE functions, and the assumption of significant economic risks. As an emerging global economy, Indonesia faces challenges in transfer pricing for intangibles and must adapt to international guidelines and reforms. Using a qualitative comparative legal method, this study compares Indonesia's transfer pricing regime for intangibles with the OECD Transfer Pricing Guidelines, the UN Transfer Pricing Manual, and the domestic laws of the US, UK, and China. The analysis focuses on identification, analytical frameworks, income attribution, transfer pricing methods, and special considerations. Indonesia's regime generally aligns with international best practices, offering robust guidance and frameworks. However, the regime lacks guidance on local intangibles identification, income attribution, and the provision of hard-to-value intangibles. Indonesia can further enhance its intangibles regime by adopting certain approaches from the surveyed jurisdictions.

Keywords: transfer pricing, intangibles, DEMPE, income attribution, local intangibles

1. INTRODUCTION

Intangibles are the heart of the digital economy, reforming business models, and creating significant market value that generates premium returns (Lagarden, 2014). Intangible assets are hard to value, and their non-physical nature makes them easily transferable across jurisdictions for transfer pricing purposes (Visconti, 2019; Saputra & Chen, 2018). Tech companies primarily rely on intangibles as their key assets. However, intangibles exist in almost every industry, including extractive and agricultural. Thus, no industry is excluded from the relevance of intangibles (Lagarden, 2014).

In the pre-BEPS era, intangibles were often used as a medium for tax avoidance by shifting profits through cash box companies located in tax havens or harmful intangibles regimes (Heidecke et al, 2021; Saputra & Chen, 2018; Irina, 2014). Recognizing this growing significance, the international community has acknowledged the challenges posed by digitalization on taxation, particularly concerning intangibles (Radhakrishnan, 2016). The BEPS Action Plan addresses these challenges in its initial action, with Actions 8-10 reforming the approach to transfer pricing for intangibles, reflected in the revisions of the OECD Transfer Pricing Guidelines (OTPG) and the UN Transfer Pricing Manual (UTPM).

The post-BEPS era has reshaped transfer pricing dynamics concerning intangibles, emphasizing profit allocation based on economic ownership, contribution to DEMPE functions (Development, Enhancement, Maintenance, Protection, and Exploitation), and the assumption of economically significant risks (Dziwinski, 2023). This approach ensures that all entities contributing to the DEMPE function of intangibles receive appropriate remuneration, and income allocation is no longer solely based on legal ownership of intangibles (Peng & Lagarden, 2018). The emphasis on economic ownership has become central to intangibles transfer pricing assessment (Dziwinski, 2023; Petruzzi & Myzithra, 2020). Attribution of income through marketing intangibles is proposed as a solution to address the problem of nexus for taxing rights in the digitalized economy (Chand, 2019).

Both guidelines introduced the concept of the attribution of income from intangibles. The OTPG introduced the DEMPE concept, while the UTPM expanded it to D(A)EMPE by adding Acquisition. The DEMPE concept ensures proper rewards for every contribution related to the development, enhancement, maintenance, protection, and exploitation of intangibles. The inclusion of Acquisition by the UTPM broadens this concept to cover externally acquired intangibles, not just those developed internally. In response, China has introduced an additional clarification to DEMPE, termed “DEMPE+Promotion” (DEMPEP), which emphasizes promotional contribution within the DEMPE functions. These developments in interpreting the arm's length assessment for intangibles transfer pricing should be seen as complementary rather than contradictory, reflecting nuanced interpretations of the arm's length principle.

Under the DEMPE concept, every contribution to intangibles should be appropriately remunerated. The initial development and enhancement of an intangible asset are commonly recognized as key factors contributing to the intangible value. However, these are not the only determining contributions. After development, intangible assets must be

maintained to ensure their ongoing relevance. They must also be protected from infringement and potential corruption. Finally, intangible assets should be commercialized through exploitation, which is crucial for converting them into profit. This assessment includes analysing the functions performed, the assets used, and the risks assumed during the contribution of the intangibles in relation to the DEMPE concept. Implementing the DEMPE concept poses practical challenges due to the potential subjectivity of its application (Chand & Lembo, 2020; Paumier, 2020).

Intangibles have become a key instrument of Base Erosion and Profit Shifting (BEPS) within the digital economy (Varen, 2022). As an emerging digital economy, Indonesia is not immune to the challenges associated with the transfer pricing of intangibles. BEPS-related tax revenue losses are estimated to reach up to 13% of total corporate income tax revenue (IMF, 2014). Despite the magnitude of this issue, research on intangible transfer pricing in Indonesia remains limited, with no comparative studies examining Indonesia's regime alongside those of other jurisdictions and established international guidelines.

Indonesia has a strong market economy that attracts multinational enterprises (MNE) to establish their presence. During the marketing process, companies might perform DEMPE functions to varying degrees, contributing to the value creation of local marketing intangibles. For example, a MNE's subsidiary might have a division that collects consumer opinions to develop custom products for the Indonesian market. Another division might conduct research in Indonesia to further tailor products specifically for this market. Additionally, a company might launch marketing campaigns to develop brand value in Indonesia. They might register their intellectual properties to secure them and may require government licenses to operate in the country, which can also be considered intangibles. All these activities are part of the DEMPE functions, creating value within Indonesia and necessitating a detailed analysis of income attribution to subsidiaries in Indonesia. These

contributions to the value creation of local intangibles might not simply be remunerated by routine profit but should be analysed thoroughly and compensated accordingly.

Indonesia has recently enacted a ministerial regulation, PMK-172/PMK.03/2023 (PMK-172), on the application of the arm's length principle. This might be a proper moment to reflect on the guidance provided by the new regulation in the context of intangibles and international comparisons. Such a comparison might allow for an assessment of Indonesia's approach to intangibles from the perspective of international best practices. Considering the approaches taken by other jurisdictions can be beneficial for Indonesia, triggering discussion for the upcoming technical follow-up provisions at the more technical level provisions of the Tax General Director's regulations and circular letters.

2. LITERATURE REVIEW

2.1 OECD TP Guidelines (OTPG) & UN TP Manual (UTPM) Guidance to Intangibles

The OTPG and the UTPM are the primary references used by both tax authorities and taxpayers to guide transfer pricing assessments. Although non-binding, the guidance provided in the OTPG and UTPM is considered international best practice for the arm's length analysis. Both guidelines are viewed as soft law and consulted during the development of domestic transfer pricing regimes in various countries. The guidelines also serve as references in court settings when settling transfer pricing disputes. Therefore, it is crucial to consult these two references in the context of international comparisons of intangibles transfer pricing regimes.

This section will cover both guidelines when their approaches are similar and provide additional information when their approaches diverge. Both guidelines base their transfer pricing assessment on the arm's length principle. The UTPM typically builds on the development of the OTPG, but offers interpretations that

emphasize practical implementation and the interests of developing countries.

Both guidelines address the transfer pricing of intangibles by including special chapters dedicated to the topic (OECD, 2022a; UN, 2021). The OTPG focuses on intangibles in its Chapter VI: Special Considerations for Intangibles, while the UTPM elaborates on intangibles in its Chapter 6: Transfer Pricing Considerations for Intangibles.

2.1.1 Identification of Intangibles (OTPG & UTPM)

Both the OTPG and the UTPM do not provide a definitive definition of intangibles, but instead offer conditions for identifying intangibles with specificity. This approach avoids the pitfalls of overly broad or narrow definitions, which can lead to inaccurate compensation delineation. Both guidelines employ a three-condition approach to identify intangibles:

- a. Something that is neither a physical nor a financial asset;
- b. Capable of being owned or controlled for use in commercial activities; and
- c. Use or transfer would be compensated between independent parties in an uncontrolled transaction.

The identification of intangibles in transfer pricing is distinct from their identification in legal or accounting contexts. An intangible that is significant for transfer pricing analysis might not be recognized as an intangible for accounting or legal purposes. Legal protection is not necessary for identifying an intangible in transfer pricing analysis, although legal, contractual, or other forms of protection can contribute to the value and return of the intangible. Additionally, separate transferability is not required for an intangible to be identified; an intangible can exist within the transfer of tangible items and does not need to be distinct.

Both guidelines acknowledge that identifying intangibles can be challenging. The OTPG and UTPM emphasizes that the identification of intangibles in transfer pricing is not intended to align with the definition of

intangibles for treaty purposes. For example, an intangible under transfer pricing might not meet the definition for the application of Article 12 regarding royalties. Conversely, a payment for technical services might be considered a royalty under Article 12 but not relevant for transfer pricing analysis. The concepts of intangibles under tax treaties and transfer pricing analysis are distinct and may not be reconciled.

Legal ownership and contractual terms serve as reference points, but the actual conduct of the transaction, combined with a functional analysis, is the primary consideration to identify the intangible, attribute the remunerations, select the most appropriate transfer pricing method, and determine the arm's length price. There is no necessity to categorize types of intangibles rigidly; the focus should be on the character of the transaction rather than the category or label. However, to assist in transfer pricing analysis, intangibles can generally be referred to as trade intangibles or marketing intangibles. Trade intangibles are created through R&D activities and exploited through manufacturing, selling products, service contracts, or licensing. Marketing intangibles are created through marketing activities and add significant value, aiding the commercial exploitation of products.

The UTPM provides extensive discussion on identifying intangibles in the context of goodwill and ongoing concern value during internal business restructuring. When intangibles are transferred as part of business restructuring, Purchase Price Allocation can help identify the intangibles and provide a useful basis for business valuation.

Examples of intangibles provided in the OTPG and UTPM include:

- a. Patents;
- b. Know-how and trade secrets;
- c. Trademarks, trade names, and brands;
- d. Rights under contracts and government licenses;
- e. Contractual rights on marketing exclusivity;
- f. Licenses and other similar rights in intangibles; and
- g. Goodwill and ongoing concern value.

Both guidelines mention intangibles not considered for transfer pricing purposes because they cannot be owned by entities, such as:

- a. Group synergies;
- b. Market-specific characteristics; and
- c. Location savings.

2.1.2 Framework of Analyses (OTPG & UTPM)

Determining which entity or entities in an MNE group are entitled to share the returns derived from intangibles is a crucial and challenging task. This determination also relates to which entity should bear the costs, risk, and other burdens related to the DEMPE of intangibles. Legal ownership does not necessarily entitle the ultimate return of the intangibles; instead, it should be based on the functions performed, assets used, and risks assumed.

Applying the comparability analysis for intangibles is challenging due to several factors. These include the lack of comparability between intangible, the difficulty of isolating the effect of a particular intangibles on an MNE group's profit, and the taxpayer structures based on contractual terms that separate ownership, assumption of risk, control over risk, and the performance of important functions. These factors are often not observed in independent enterprises.

To address the challenges during the application of arm's length pricing and comparability analysis for intangibles, a framework of analysis can allow for a more appropriate allocation of returns derived from the exploitation of intangibles. The OTPG provide a framework of analysis for intangibles in paragraph 6.34 as follows:

- a. Identify the intangibles used or transferred in the transaction;
- b. Identify the full contractual arrangements;
- c. Identify the parties performing the actual functions;
- d. Confirm the consistency between the terms of the relevant contractual arrangements and the conduct of the parties;
- e. Delineate the actual controlled transactions related to the DEMPE of intangibles; and

- f. Determine the arm's length price for the transaction.

The OTPG framework places a strong emphasis on the assumption of economic risks related to intangibles, including the assumption of risk during the determination of contractual arrangements, financial capacity, and control of risk related to DEMPE functions. The rule of thumb in assessing the entity that assumes economically significant risks is the entity that has the capability and capacity to exert control over risk and the financial capacity to assume the risk.

To properly analyse intangibles under the framework, the OTPG advises the usage of the framework to analyse and allocate risk as follows:

- a. Identify economically significant risks;
- b. Determine how these significant risks are contractually assumed;
- c. Conduct a functional analysis to understand how the associated enterprises involved in the transaction manage and assume these risks;
- d. Assess whether the contractual assumption of risk aligns with the conduct of the associated enterprises and the facts of the case;
- e. Reallocate the risk to the entity that controls it and has the financial capacity to assume it, if the original party does not; and
- f. Price the transaction by considering the financial and risk management functions involved.

Similarly, the UTPM provides a three-factors framework that assists in analysing transactions involving the use or transfer of intangibles as follows:

- a. Fact-finding regarding the intangible.
 - 1) Identify the intangibles.
 - 2) Identify the legal owner of intangibles.
 - 3) Identify contributions relating to DAEMPE.
- b. Fact-finding regarding transactions involving the use or transfer of intangibles.
 - 1) Identify contractual terms.
 - 2) Identify the parties' performing functions, using assets, and assuming risks.

- c. Assess the consistency of the remuneration under the arm's length principle.

- 1) Assess the consistency between the contract and conduct.
- 2) Delineate the actual transaction.
- 3) Determine the arm's length price consistent with the contribution and generated economic value.

2.1.3 Attribution of Intangibles Related Returns (OTPG & UTPM)

Following BEPS Actions 8-10, determining the function in relation to the value creation of an intangible involves aspects like development, enhancement, maintenance, protection, and exploitation, often referred to as the DEMPE concept (OECD, 2015). Additionally, the UTPM generally adopts the DEMPE concept but also emphasizes "Acquisition" as a factor contributing to value creation. This interpretation does not deviate from BEPS Action 8-10 but clarifies that intangibles can be acquired as well as developed. In UTPM, this concept is referred to as DAEMPE, with the acquisition aspect highlighted, especially in examples like the one provided in para 6.49 of the OTPG, where the acquisition could be of a fully developed intangible that requires little to no ongoing development, maintenance, or protection.

Any member of an MNE group that contributes through functions, assets, and risks related to the DAEMPE concept should be compensated accordingly. It is crucial to understand that in matters involving the transfer of intangibles or rights in intangible assets, not all residual profits necessarily go to the legal owner of those intangibles. This principle applies to both the legal owner and the economic owner of intangibles. The attribution of returns from intangibles depends on the contribution to those intangibles through the functions performed, assets used, and risks assumed under the DEMPE concept. Compensation for contribution to DEMPE functions is determined on an ex-ante basis.

In the pre-BEPS era, the legal owner of an intangible received all residual profits related to

that intangible. However, in the post-BEPS era, if the legal owner does not contribute to the value creation of the intangibles by performing relevant functions, using relevant assets, or assuming relevant risks (essentially acting only as a holding entity), the legal owners would not be entitled to any returns from the intangible. Entities that only provide funding (such as cash box entities) without performing DEMPE functions or assuming other economic risks will typically receive a risk-adjusted return on their funding under OTPG or a low-risk, free-rate return under UTPM.

The OTPG and UTPM do not provide detailed explanations of functions under the DEMPE concept but include some examples, summarized as follows:

- a. Marketing activities: Local marketing activities can develop unique and valuable local marketing intangibles.
- b. Acquirer's contribution: If the acquirer of intangibles actively performs key functions and controls associated risks, they are entitled to residual returns.
- c. Protection contributions: Legal, contractual, and regulatory protection measures impact intangible value and should be appropriately rewarded.
- d. Licensee contributions: Licensees may enhance licensed intangibles during exploitation, affecting profit splits in licensing arrangements.

When determining arm's length pricing for DEMPE contributions, identifying the unique and valuable contribution is crucial. Examples include research design and control, strategic decision-making, marketing program design, protection decisions, and quality control affecting intangibles. These important functions significantly contribute to intangible value and merit appropriate compensation.

Unique and valuable intangibles affect transfer pricing methods and profit attribution. They are characterized by being incomparable to other intangibles in similar transactions and generating significantly higher economic benefits.

To be entitled to residual profits, contributions must be both unique and valuable. Contributions related to DEMPE functions are deemed unique and valuable when they are incomparable to contributions by uncontrolled parties and key sources of economic benefits. The unique and valuable criteria are intertwined with risk allocation in relation to intangibles. Entities capable of controlling significant economic risks are relevant for attributing residual profits from the exploitation of intangibles.

2.1.4 Transfer Pricing Method (OTPG & UTPM)

The OTPG, in paragraph 6.102, states that there is no mandatory requirement for using a particular transfer pricing method in transactions involving intangibles. The selection of a specific transfer pricing method is based on what is deemed the most appropriate, without necessarily following a hierarchical approach. This determination relies on functional analysis, considering the MNE's global business practices and how the intangibles interact with other functions, assets, and risks within the MNE's operations.

The general pricing methods (CUP, CPM, RPM, TNMM, PSM) can be applied to intangibles, depending on the facts and circumstances. However, OTPG and UTPM lean towards using CUP, TPSM, and valuation methods. The CUP method is ideal when reliable comparable can be found. If reliable comparable are unavailable, transactional profit splitting and valuation methods are alternatives. Valuation techniques can complement the application of CUP and TPSM approaches.

A one-sided focus on comparability analysis is generally insufficient for assessing the most suitable pricing method. For instance, while internal outsourcing services for R&D might warrant a cost-plus approach, if the R&D entities' functions are unique, valuable, and control significant economic risks, the profit split method could be more fitting.

Intangibles typically have unique characteristics and potential for greater economic benefit, crucial factors in their comparability analysis that may lead to choosing the double-sided approach as the most appropriate. Assessing the potential comparable's ability to generate higher returns is vital. Comparability and the feasibility of conducting comparability adjustments are crucial when using comparable intangibles from commercial databases or similar sources.

Selecting the most appropriate transfer pricing method depends on functional analysis and transaction details. In paragraph 6.131, several factors for choosing the most appropriate transfer pricing method for intangibles are outlined (i) the nature of relevant intangibles, (ii) the difficulty in finding comparable, and (iii) the challenges in applying certain transfer pricing methods.

When comparable data are scarce, the selection of a transfer pricing method less reliant on identifiable comparable might be necessary. For example, valuation methods or TPSM could be more suitable when comparable CUP methods are unavailable.

During the performance of DEMPE functions, multiple entities may contribute unique and valuable inputs to an intangible. For instance, the principal may contribute to manufacturing intangibles, while distribution entities contribute to marketing intangibles' exploitation and protection. The presence of such contributions influences the choice of the most appropriate transfer pricing method. Both OTPG and UTPM suggest that when unique and valuable intangibles exist, and economically significant risks are assumed by both parties, transactional profit splitting is the preferred method.

Unique and valuable intangibles often lack comparable data, leading to the adoption of a double-sided approach for the transfer pricing method. According to OTPG paragraph 3.39, the transactional profit split method (TPSM) is considered the most appropriate method in such cases.

UTPM highlights that profit split methods (PSM) might be most suitable when parties

provide unique and valuable contributions, are highly integrated, or share significant risks (e.g., cost-sharing arrangements).

When using valuation methods, special attention is needed, especially with the discounted cash flow approach. OTPG and UTPM extensively discuss valuation methods, focusing on the accuracy of financial projections, rate assumptions, discount rates, intangibles' useful life, and terminal values. Using transfer pricing methods based on development costs to estimate intangible value is discouraged.

2.1.5 Other Special Considerations (OTPG & UTPM)

The determination of transfer pricing for intangible assets can be challenging due to their unique characteristics. For instance, at the time of transfer, these assets might still be in development, making it hard to predict their future profitability. Such intangible assets are termed hard-to-value intangibles (HTVI) under the OTPG.

In such transactions, the ex-post outcome, which becomes known years after the transfer, can provide insights into assessing the arm's length ex-ante pricing. If there's a significant difference between the ex-post outcome and the initial pricing, tax authorities may review the arm's length nature of the initial pricing, possibly conducting a multi-year analysis. Adjustments may be made based on the ex-post profit levels if the initial assessment of transfer pricing was found to be inaccurate. Given the complexity and administrative burden, the OTPG outlines detailed exception criteria for applying this approach to HTVI in paragraph 6.193. On the other hand, UTPM does not offer specific guidance on identifying or assessing HTVI.

2.2. Indonesia's (ID) Intangibles Transfer Pricing Regime

The legal foundation for Indonesia's transfer pricing regime is outlined in Article 18, paragraph (3) of the Income Tax Law (ITL), Article 35 Government Regulation Number 55 of 2022, and

Article 11, paragraph (2) Government Regulation Number 50 of 2022. Recently, the Ministry of Finance issued Regulation number PMK-172/PMK.03/2024 (PMK-172) concerning the Application of the Principle of Fairness and Reasonableness in Affiliated Transactions (Arm's Length Principle), which provides extensive guidance on the transfer pricing assessment, particularly regarding intangibles. Article 4 of PMK-172 specifically includes intangibles among the transactions that must undergo preliminary analysis before applying the general transfer pricing framework.

2.2.1 Identification of Intangibles (ID)

The Income Tax Law and ministerial provisions in Indonesia do not explicitly define intangible assets for transfer pricing purposes. Instead, the Circular Letter of the Director General of Tax number SE-50/PJ/2013 (SE-50) provides a broad definition. According to SE-50, intangible assets are “assets that are neither tangible nor financial”. Identifying these assets requires consideration of their type, usage, characteristics (e.g. duration of benefit, market value, location, and legal protection), and other factors as follows:

- a. utilization allowing higher profitability than industry averages,
- b. not being determined by presence on the balance sheet, and
- c. not contingent on legal protection availability.

The identification of intangibles presents a significant challenge during transfer pricing assessments (Muhammadi et al., 2016). SE-50 addresses this by discussing legal and economic ownership of intangibles, recommending a review of contracts for legal ownership and an assessment of actual activities for economic ownership. It categorizes intangibles into manufacturing intangibles and marketing intangibles.

The development of manufacturing intangibles may involve collaboration or service contracts within a group, enabling local subsidiaries to become economic owners if they make unique and valuable contributions. The

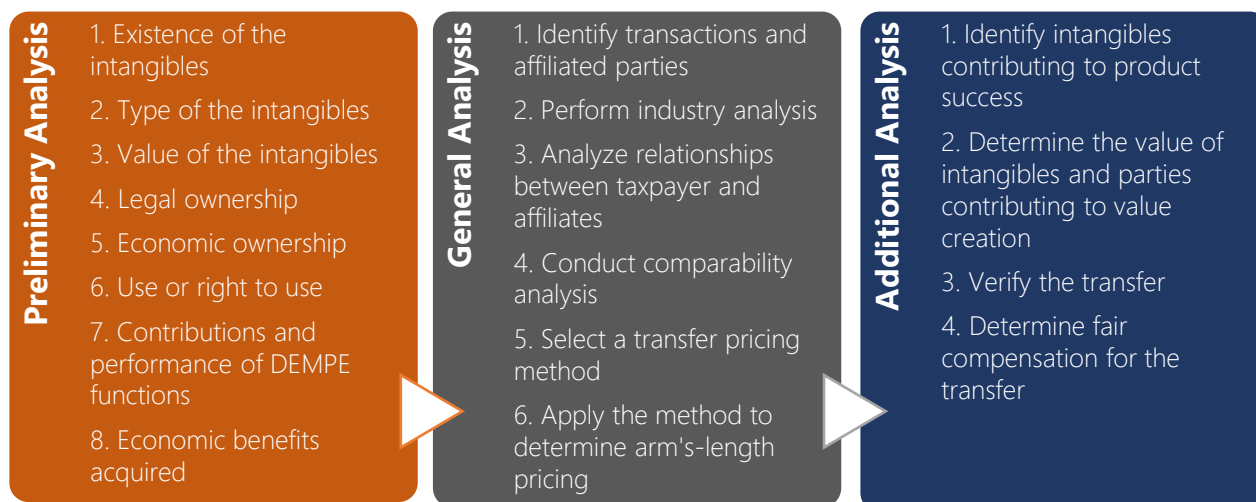
owner of manufacturing intangibles aims to generate positive returns by exploiting these intangibles through selling goods, licensing, or contracting services. SE-50 suggests the following steps for auditors to identify manufacturing intangibles:

- a. Analyse the contractual terms;
- b. Perform functional analysis on manufacturing functions and intangible use;
- c. Review organizational charts for manufacturing responsibilities;
- d. Conduct site visits and interviews for know-how verification;
- e. Identify unique equipment improving quality or reducing costs;
- f. Note factory engineering changes reducing costs;
- g. Obtain a list of patents and interview R&D for valuable ones;
- h. Assess market power from patents; and
- i. Seek expert opinions if needed for patent valuation.

Marketing intangibles encompass a wide range of assets, including trademarks, trade names, customer lists, distribution channels, and distinctive names, symbols, or graphics with significant promotional value. The value of these intangibles is influenced by factors like brand reputation, quality control, ongoing research, distribution effectiveness, and promotional impact. Auditors should follow these steps to identify marketing intangibles:

- a. Review license contracts;
- b. Conduct functional analysis related to marketing;
- c. Examine the marketing organizational chart, including key personnel and their roles;
- d. Interview marketing and sales staff to understand factors driving product market success;
- e. Identify value-generating activities in the transaction;
- f. Identify distribution channels enhancing customer access; and
- g. Seek expert opinions if needed on the reasons for product market success.

The specific intangibles mentioned for transfer pricing purposes include know-how,

Figure 1*Framework of Intangibles Transfer Pricing Analysis*

Note. Source: Author's elaboration on PMK-172 & PER-22

patents, licenses, trademarks, manufacturing intangibles, and marketing intangibles. There are no exclusions mentioned for intangibles in transfer pricing considerations.

2.2.2 Framework of Analyses (ID)

Regarding the transfer pricing analysis of intangibles, before applying the general transfer pricing framework, a preliminary framework should be applied, as outlined in Article 13 paragraph (3) PMK-172. This involves gathering evidence regarding:

- Existence of the intangibles;
- Type of intangibles;
- Value of the intangibles;
- Legal ownership of the intangibles;
- Economic ownership of the intangibles;
- Use or right to use of the intangibles.
- Contributions and performance of DEMPE functions (development, enhancement, maintenance, protection, and exploitation) related to the intangibles; and
- Economic benefits are acquired by the parties utilizing the intangible property.

Intangible transactions that do not pass the preliminary analysis will be recharacterized based on the facts and circumstances, potentially resulting in fiscal adjustments. Transactions that

pass the preliminary analysis will undergo a subsequent framework of analysis for intangibles.

The general framework to assess the arm's length principle, as outlined in Article 4 paragraph (4) of PMK-172, includes six steps:

- Identify affected transactions and affiliated parties;
- Perform industrial analysis, identifying factors influencing business performance;
- Analyse commercial and financial relationships between the taxpayer and affiliates;
- Conduct comparability analysis;
- Select a transfer pricing method; and
- Apply the method to determine arms-length pricing.

An additional analysis framework for intangibles is provided under Section B of the Director General Taxes Regulation number 22/PJ/2013 (PER-22), which is specifically used during tax audits but can also guide taxpayers in assisting compliance. The analysis framework for intangibles includes:

- Identifying intangibles contributing to product market success;
- Determining the value of intangible property and identifying parties contributing to its value creation;
- Verifying the occurrence of the transfer; and

- d. Determining fair compensation for the transfer.

Intangibles identification is conducted through functional analysis. The moment of transfer can also be analysed using independent transactions as a reference. Compensation is based on market value and compared with comparable transactions. The arms-length assessment for intangibles utilization or transfer should consider both the transferor and transferee perspectives. The transferor is assumed to gain profit or a higher return from intangible transfer or exploitation, while the transferee expects additional benefits from acquiring the intangible. For the transferee, intangibles acquisition or utilization should consider payment aligning with expected returns and provision of economic benefits. Factors for valuing intangibles include:

- a. Protection and duration;
- b. Exclusivity;
- c. Geographic reach;
- d. Useful life;
- e. Development, enhancement, and repair rights;
- f. Inclusion of other intangibles or services;
- g. Sublicensing rights; and
- h. Other economic factors affecting intangible value.

A taxpayer, as the licensee or purchaser of intangibles, must ensure the royalty payment reflects the economic benefit, supported by financial ratios analysing returns and costs during licensing.

2.2.3 Attribution of income (ID)

PMK-172 offers vital guidance on the DEMPE concept, which analyses contributions in relation to the intangibles. It emphasizes gathering evidence in the preliminary step. However, it does not elaborate on how contributions to DEMPE functions impact income attribution.

PER-22 requires tax auditors to collect additional information crucial for evaluating intangibles' role in a taxpayer's business and their contribution to intangibles development. These

factors determine the transfer pricing method and compensation levels related to intangibles.

SE-50 aids in identifying contributions to value creation, though it predates the DEMPE concept. It covers functions related to DEMPE, such as Development, Protection, and Maintenance. Factors considered include:

- a. Research and development costs or marketing costs;
- b. Presence of a research and development function;
- c. Presence of a marketing function;
- d. Assumption of risks associated with research and development and/or marketing;
- e. Employment of individuals with specialized qualifications in marketing, manufacturing, R&D, or other functions; and
- f. Existence of distribution channels and customer lists.

Contributions to DEMPE functions of intangibles that significantly enhance product success should be attributed more than routine compensation, as they correlate with higher financial performance compared to industry averages. Extensive marketing efforts, including distribution channel creation or significant advertising costs, might establish the distributor as the economic owner of marketing intangibles.

2.2.4 Transfer Pricing Method (ID)

PMK-172's Article 9 paragraph (2) provides guidance on selecting transfer pricing methods applicable to intangible transactions. The selection of the transfer pricing method should consider:

- a. Appropriateness with transaction characteristics;
- b. Pros and cons of potential methods.
- c. Availability of independent comparable transactions;
- d. Comparability between analysed and comparable transactions; and
- e. Accuracy of necessary adjustments.

There are no restrictions on method use for intangibles, but CUP or CUT is preferred when multiple appropriate methods are available. PMK-172 suggests using the profit split method

when parties perform unique and valuable functions, though this is not mandatory and depends on factors like the availability of independent transactions as comparable. To qualify as unique and valuable, contributions must surpass those of independent parties in comparable situations and serve as a primary source of actual or potential economic benefit. The Profit Split Method (PSM) is favoured for intangible transactions if:

- a. Multiple entities make unique contributions.
- b. Business processes are highly integrated.
- c. Parties share significant risks or assume related risks separately.

Valuation methods are preferred for intangible transfers, usage rights, mining rights, plantation rights, etc. PMK-172 outlines two PSM approaches: contribution and residual. The contribution approach allocates total profit based on an allocation factor, while the residual approach distinguishes routine profit from residual profit, allocating the latter based on an allocation factor, potentially a percentage of shared profit from comparable transactions or relative value contributions.

For business restructuring involving goodwill or going concern transfers, the business valuation method is recommended. PER-22 and SE-50 suggest using income-based, cost-based, or market-based approaches for valuations.

2.2.5 Other Special Considerations (ID)

The treatment of hard-to-value intangibles (HTVI) is not specifically addressed in domestic regulations. When HTVI cases arise, the DGT refers to OTPG to complement domestic provisions for handling intangible-related transfer pricing dispute (OECD, 2021).

Indonesia labels certain affiliated transactions as special affiliated transactions, which are considered high-risk under domestic measures. PMK-172 outlines seven types of affiliated transactions categorized as special, including transactions involving intangible assets. These transactions require an arm's-length analysis after conducting a preliminary assessment. The outcome of this preliminary

analysis is crucial, as if the transaction fails to meet the criteria, the DGT has the authority to re-characterize the transaction based on facts and circumstances and make necessary fiscal adjustments.

2.3 The United States' (US) Intangibles Transfer Pricing Regime

Under Section 482 of the Internal Revenue Code (IRC), the US establishes the legal framework for applying the arm's length standard to determine transfer prices in affiliated transactions. Despite the introduction of the BEPS Action 8-10 aimed at aligning transfer pricing outcomes with value creation, the US has not made specific updates to its transfer pricing regime in response to these reports (Armitage et al., 2022).

It is important to note that, given the substantial variations in tax systems across US states, this discussion focuses solely on the US federal tax transfer pricing regime and does not examine income allocation at the state level. The US transfer pricing regime is primarily based on domestic regulations and case law. While the Internal Revenue Service (IRS) generally aligns its position with the OTPG, there are significant differences in certain provisions, such as those related to identification of intangibles, intercompany service transactions, and business restructuring (Armitage et al, 2022; Hochreiter, 2020). Despite these differences, the IRS acknowledges and respects the use of the OTPG as a basis for resolving disputes through mutual agreement procedures (MAP).

2.3.1 Identification of Intangibles (US)

Under Treas. Reg. § 1.482-4(b), intangible property for transfer pricing purposes in the US is defined as an asset with substantial value independent of individual services. These intangibles for transfer pricing purposes comprise:

- a. Patents, inventions, formulae, processes, designs, patterns, or know-how;
- b. Copyrights, literary, musical, or artistic compositions;

- c. Trademarks, trade names, or brand names;
- d. Franchises, licenses, or contracts.
- e. Methods, programs, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data; and
- f. Other similar items.

Additionally, the "other similar items" clause encompasses goodwill, going concern value, workplace in place, or any other item with value not attributable to tangible property, per section 367(d)(4) of the IRC.

In the US transfer pricing regime, the classification of intangibles (e.g., manufacturing or marketing intangibles) is primarily for analytical purposes and has limited practical or legal implications (Armitage et al., 2022). The classification of non-routine intangibles in the US is similar to the classification of unique and valuable intangibles outlined in the OTPG and the UTPM.

2.3.2 Framework of Analysis (US)

Determining the owner of intangible assets is crucial in the US transfer pricing regime as it directly impacts how returns from those assets are attributed. The US Transfer Pricing regime acknowledges both legal and economic ownership of intangibles, allowing for adjustments when needed to align with economic realities. Treas. Reg. §1.482-4(f)(3) outlines four key principles for determining intangibles ownership:

- a. Legal Ownership: The legal owner of intangible property, as recognized by law, is considered the owner for transfer pricing purposes;
- b. Contractual Interest: If an entity holds a contractual interest in an intangible property, that entity is recognized as the owner;
- c. Control and Facts: In cases where there's no clear legal or contractual owner, the party exercising control over the intangibles based on relevant facts and circumstances is deemed the owner; and
- d. Economic Substance: These principles may be set aside if determining ownership under

them contradicts the economic substance of the underlying transactions.

2.3.3 Attribution of Income (US)

The US Transfer Pricing regime places significant emphasis on economic ownership and the concept of non-routine contributions to determine the attribution of returns from intangible assets (Armitage et al, 2022). This approach aligns with the principles of unique and valuable contributions as defined by the OTPG.

The US transfer pricing regime does not explicitly use the DEMPE framework for the attribution of returns from intangible assets. Instead, it relies on the concept of economic ownership, which is determined by non-routine contributions (Armitage et al, 2022; Torvik, 2019). Non-routine contributions refer to activities or assets that significantly impact the value creation process and are crucial for the residual profit allocation.

For marketing intangibles, the IRS acknowledges that local marketing activities can create valuable marketing intangible assets (Armitage et al, 2022). These activities include branding, advertising, and the development of customer lists. When local subsidiaries engage in substantial marketing activities that enhance the value of a product, they are considered to have created valuable marketing intangibles, which should be factored into the arms-length pricing for the product (Armitage et al, 2022).

In the landmark *GlaxoSmithKline* case, the IRS recognized that US subsidiaries made unique contributions to a patented product. As a result, these subsidiaries were entitled to a significant share of the income derived from the product. This case exemplifies how non-routine contributions, which enhance the value of intangible assets, justify the allocation of premium returns to the contributing entity.

Section 482 of the IRC mandates that the pricing of intangibles be "commensurate with income" generated by those intangibles. This principle ensures that the transfer price of an intangible asset is periodically adjusted based on the income it generates. The periodic adjustment

provision ensures that the initial royalty rate, established under the arms-length principle, remains appropriate over time (Torvik, 2019).

There are specific conditions under which periodic adjustments are not required when using the CUT method. The conditions, outlined in Treas. Reg. § 1.482-4(f)(2)(ii)(B), are as follow:

- a. Written Intercompany Agreement: A written agreement specifying the royalty amount for each year, which was at arm's length in the first year of substantial payment and remains effective in the review year;
- b. Comparable Uncontrolled Transaction (CUT) Agreement: A written CUT agreement with no provisions for changing the amount, renegotiation, or termination under circumstances similar to the controlled transaction in the review year;
- c. Similarity in Terms and Duration: The controlled agreement must be very similar to the uncontrolled agreement in terms of duration and provisions;
- d. Field or Purpose Limitation: The controlled agreement should limit the use of the intangibles to a specific field or purpose, consistent with industry practice and any limitations in the uncontrolled agreement;
- e. Consistency in Functions Performed: The functions performed by the controlled transferee should not change significantly after the controlled agreement was signed, except for unforeseeable events; and
- f. Profit Range Consistency: The total profits earned or cost savings from using the intangibles in the review year and previous years should be between 80% and 120% of the expected profits or savings when comparability was established.

2.3.4 Transfer Pricing Method (US)

In the US transfer pricing regime, there is no hierarchy of methods for the selecting the transfer pricing method, but rather the most appropriate method should be used. According to Treas. Reg. § 1.482-1(c)(1), the transfer pricing method used should, "under the facts and

circumstances, provide the most reliable measure of arm's length result."

The selection mechanism for transfer pricing methods in the US is generally similar to the approach of the OTPG. The US transfer pricing regime mentions five general transfer pricing methods (CUP, CPM, RPM, TNMM, and PSM) and "unspecified methods." An example of an unspecified method in the context of transferring intangibles is comparing the profit generated between a hypothetical alternative of producing and selling in the US and the transfer price of the intangible. Valuation based on the discounted cash flow approach is commonly used under unspecified methods for valuing intangible assets (Armitage et al, 2022).

Treas. Reg. § 1.482-4(a) mentions four methods for determining arm's length prices for the transfer of intangible property:

- a. Comparable Uncontrolled Transaction (CUT)
- b. Comparable Profit Method (CPM)
- c. Profit Split Method (PSM)
- d. Unspecified methods

The CPM is equivalent to the TNMM, which is a one-sided approach for determining arm's length pricing in controlled transactions by examining the appropriate base/ profit level indicator. The PSM is prescribed when each party to the transaction makes a "non-routine" contribution to the intangible. There are two types of PSM: Total Profit Split Method (TPSM) and Residual Profit Split Method (RPSM). The TPSM splits the total profit, including routine and residual profit, based on specified comparability factors. The RPSM compensates routine functions based on the most appropriate transfer pricing method, then allocates the residual profit based on respective non-routine contributions.

Two commonly used unspecified methods are the "rule of thumb" method and the valuation method based on the discounted cash flow approach (Armitage et al, 2022). The rule of thumb method applies a percentage to the combined intangibles income, based on the reasoning that in uncontrolled transactions, the licensor and licensee share the generated profit from the intangible. This percentage is not based on benchmarking but on common sense

approaches, such as 25-50%. Although this method is imprecise and open to criticism, its use has been observed in court cases, such as *Ciba-Geigy Corporation v. Commissioner* (85 T.C. 172, 1985).

2.3.5 Other Special Considerations (US)

The IRS argues in the OECD transfer pricing survey that the "commensurate with income" (CWI) and "periodic adjustment" concepts are equivalent to the HTVI approach (OECD, 2022d; OECD 2022e).

The CWI standard is a notable measure in the US for determining compensation for affiliated transfers of intangible property. According to Section 482 of the IRC, the CWI standard allows the IRS to perform periodic adjustments to the royalty rate if it is not commensurate with the income from the exploitation of the intangible, even if the transfer price in preceding years complied with the arm's length principle. Treasury Regulation § 1.482-4(f)(2)(ii) provides exceptions to the periodic adjustment for specific transfer pricing methods.

To counter potential incentives for outbound income shifting, the US implements the Global Intangibles Low-Taxed Income (GILTI) provision (Armitage et al, 2022; NYU Tax Law Center, 2024). Although it mentions intangibles, the GILTI tax applies to excess income earned by controlled foreign corporations (CFCs) without limiting the source of income solely to intangibles. The tax base for GILTI is defined as residual income after deducting income from tangible property. GILTI is not part of the US intangibles transfer pricing regime but functions as a specific anti-avoidance rule for the CFC regime.

2.4 The United Kingdom's (UK) Intangibles Transfer Pricing Regime

The UK transfer pricing regime is established under the Taxation (International and Other Provisions) Act 2010 (TIOPA). TIOPA mandates that any provisions made by transactions

between connected persons must be conducted on an arm's length basis, akin to uncontrolled transactions. Although TIOPA does not provide detailed steps for applying the arm's length principle, it aligns its approach with the OTPG and the OECD Model Tax Convention on Income and on Capital, emphasizing the need for consistency in interpretation to "best secure consistency".

Besides TIOPA, there are specific frameworks for certain transactions, such as the tax treatment for intangible fixed assets and transactions involving know-how and patents, which are provided under the Corporation Tax Act 2009. This framework extends to the treatment of transfer pricing for intangibles. The identification, analysis framework, and attribution of income on intangibles are based on the OTPG, with exemptions for small and medium-sized enterprises (SMEs) and oil transactions.

2.4.1 Identification of Intangibles (UK)

The UK approach to identifying intangibles aligns with the OTPG framework, which does not provide a specific definition but instead delineates certain characteristics. According to the OTPG, intangibles are (i) non-physical or non-financial assets, (ii) capable of being owned or controlled for use in commercial activities, and (iii) assets that would be compensated if used or transferred in uncontrolled comparable transactions. As the OTPG offers an open list for the identification of intangibles, the UK transfer pricing regime supplements this by including additional items considered intangibles, such as the workforce, trade secrets, training systems, customer lists, and distribution networks (Cypher & Lord, 2024).

The UK transfer pricing regime identifies certain factors relevant to the assessment of arm's length transactions, which are not classified as intangibles for transfer pricing purposes, including network effects, synergies, location savings, and features of the geographic market.

2.4.2 Framework of Analysis (UK)

The analysis framework for intangibles in the UK transfer pricing regime is based on the OTPG, which emphasizes the economic ownership, contribution to DEMPE function, and assessment of significant economic risk. The transfer pricing regime places greater importance on the substance and functional contributions of both parties involved in the transaction when analysing intangibles. Consistent with the OTPG, the conduct of the parties involved in the transaction is considered more critical than the legal aspects.

The revisions related to BEPS Actions 8-10 in the OTPG 2017 serve as clarifications to the existing UK's transfer pricing regime, facilitating the implementation of the DEMPE concept and risk management functionality for prior years before the OTPG 2017 version (Cypher & Lord, 2024).

2.4.3 Attribution of Income (UK)

Consistent with the OTPG, the attribution of income generated from intangible assets is based on contributions to the DEMPE functions and the assumption of economically significant risk. HMRC clarifies that the attribution of both ex-ante and ex-post returns on intangibles must also consider the contribution of control over risk (Cypher & Lord, 2024).

For example, in a scenario where Company A provides funding and Company B performs the development of an intangible asset, the determination of whether to use the ex-post or ex-ante TPSP method depends on the type of control each company exercises over the risks involved. If Company A assumes control over financial risk (e.g., employing executives capable of assessing IP development) and Company B assumes control over specific development risks (e.g., decisions on how to allocate the funding), the ex-post TPSP method is more appropriate.

Conversely, the ex-ante TPSP method is more suitable when Company A controls financial risk and Company B contributes to the control of development risk (e.g., providing information on development controlled by Company A). If an

analysis reveals that Company A does not have the capability to control the financial risk (e.g., no significant decision-making regarding IP development) and the economically significant risk is assumed by Company B, then Company A will only be attributed a risk-free return.

HMRC considers the characteristic of unique and valuable contributions as one of the important factors in determining the nature and quantum of remuneration (Cypher & Lord, 2024). The identification of unique and valuable contributions, consistent with OTPG, should not be comparable with those made by a controlled entity in comparable conditions, and should be an important source of actual or potential economic benefit. Contribution to the control of risk might be considered a unique and valuable contribution.

2.4.4 Transfer Pricing Method (UK)

The decision on the transfer pricing method and its application is generally based on the OTPG. The criterion used for the application of the transfer pricing method is based on the most appropriate method. The UK, interpreting the OTPG, employs specific approaches for selecting transfer pricing methods for certain intangibles. For instance, the preferred transfer pricing method for discrete sales of intangible properties is the valuation method, utilizing accepted valuation approaches such as cost-based, market-based, and income-based methods (Cypher & Lord, 2024).

For licensing transactions, the CUP method might be appropriate when comparable third-party data is available, typically for intangibles with routine characteristics. When the licensing transaction is deemed unique, the profit split method may be considered the primary method or used as a corroborative analysis, depending on the facts and circumstances. HMRC holds the position that when the reallocation of risk is not warranted, a double-sided approach to the transfer pricing method might also be utilized (Cypher & Lord, 2024).

HMRC's Internal Manual 485025 (INTM485025) provides guidance on how to

price contributions to control of risk when there is no assumption of risk. In such situations, a one-sided method (e.g., CPM, CUP, TNMM) might be appropriate, but the potential for using TPSM is not excluded. The TPSM is potentially the most appropriate method when three indicators exist: (i) a unique and valuable contribution, (ii) a high level of integration of business and operations, and (iii) a shared assumption of economically significant risks.

Considering the complexities, when confirmation is needed to determine the most appropriate method, HMRC recommends seeking advice from the Transfer Pricing Team in the HMRC CS&TD Business, Assets & International Directorate.

2.4.5 Other Special Considerations (UK)

HMRC's approach to hard-to-value intangibles (HTVI) aligns with the guidance outlined in Chapter VI of the OECD Transfer Pricing Guidelines (OECD, 2022c; OECD 2022f). According to this guidance, HTVI transactions involve intangibles characterized by the absence of reliable comparable data and high uncertainty regarding future anticipated income. HMRC does not subject HTVI transactions to other approaches, such as domestic anti-abuse rules, beyond transfer pricing (Cypher & Lord, 2024).

HMRC has implemented notable measures to further clarify the remuneration for local subsidiaries that contribute to the control of risk related to intangibles. As outlined in INTM485025, HMRC stipulates that parties should always be appropriately remunerated for their contribution to the control of economic risk. When a party contributes to the control of an intangible-related risk, it is entitled to receive both the potential upside and downside, commensurate with its contribution to controlling that risk. This attribution of income allows HMRC to employ a double-sided transfer pricing method to allocate profits more accurately when local subsidiaries contribute to risk control without assuming the risk.

For example, if local subsidiaries do not assume the reputational risk related to marketing

intangibles (i.e. the principal assumes the risk) but contribute to controlling this risk by providing information or other mitigation measures, the local subsidiaries should be remunerated appropriately. This appropriate remuneration includes attributing potential profit or loss in relation to the intangible. In such cases, merely attributing routine profit to the local subsidiaries is not considered appropriate.

2.5 China's (CN) Intangibles Transfer Pricing Regime

Although not explicitly recognized under domestic regulation, China treats the OTPG as an important reference and has adopted fundamental concepts for transfer pricing analysis (Li & Su, 2022). However, in the latest UTPM, China provides extensive exposure to its domestic transfer pricing system under the chapter "Country Practices" which displays its preference towards UTPM. In addition to publicizing the major influence of UTPM, China also expresses concerns with the arm's length principle, the challenges in applying transfer pricing methods, the inadequate recognition of location-specific advantages, and the lack of profit associated with Chinese affiliates (Li & Su, 2022). China shows support for the global formulary apportionment method and emphasizes the value creation principle (Li & Su, 2022).

2.5.1 Identification of Intangibles (CN)

In the China transfer pricing regime, there is no specific definition of intangibles for transfer pricing purposes. However, there is a broad meaning definition of intangibles property under Article 12 of the Enterprise Income Tax (EIT) law, which defines intangibles as "incorporeal, non-monetary, long-term assets held by an enterprise for the production of goods, provision of services, leasing, or operation and management, such as patents, trademarks, copyrights, land use rights, proprietary technologies, and goodwill". The State Taxation Administration (STA) provides that in related party transactions, intangibles

properties include “patents, non-patented technological know-how, trade secrets, trademarks, brand names, customer lists, sales channels, franchise rights, government licenses, copyrights, etc.”

The STA does not provide a systematic classification of intangibles, such as distinguishing between marketing intangibles and manufacturing intangibles. However, in terms of brand names, technical know-how, and business processes, the STA distinguishes between “original” and “improved” intangibles (Li & Su, 2022). Additionally, the STA might treat location-specific advantages and group synergies as intangibles in specific contexts when applying contribution-based methods or profit split methods.

2.5.2 Framework of analysis (CN)

In the domestic law of China, there is no general systematic guidance provided for the framework of analysis for intangibles. However, there is some guidance on the determination of ownership of intangible property, where, for China's transfer pricing regime, ownership of intangibles is not limited to a strict legal sense but also includes economic ownership (Li & Su, 2022). Ownership of intangibles is determined by the contribution of the relevant parties to the development, formation, and maintenance of intangibles.

In terms of contract manufacturing, which is one of the most common transfer pricing characterizations of manufacturing used by MNE in China, the approach to assess transfer pricing begins with the presumption that the related parties' purchase price of materials is at arm's length (Li & Su, 2022). The assessment for the purchase price of materials might be assisted by Customs, which checks the reasonableness of the import price of materials to safeguard against unrealistically low intercompany prices. The assessment then continues by adopting the cost-plus method and using Full Cost Mark-Up (FCMU) as a profit level indicator.

In the context of sales, marketing, and distribution, China faces issues with MNE characterizing local affiliated distributors as

limited risk distributors and using benchmarks from mature markets (e.g., Japan) as comparable. China considers the functions performed by local subsidiaries to be more substantial than the comparable (Li & Su, 2022). China also believes that the typical treatment should also consider China's market characteristics, such as strong demand and a strong growth economy (Li & Su, 2022). In this context, the STA addresses the issue by adjusting the decision on the transfer pricing method, putting emphasis on profit split in cases where significant local marketing intangibles or Location-Specific Advantages (LSA) exist.

China adopts the position that the geographical market can contribute material differences that require comparability adjustments, which becomes the fundamental reasoning for the application of LSA. The STA provides guidance on the framework for applying LSA as follows:

- a. Identify the existence of LSA;
- b. Determine whether the LSA might generate additional profit;
- c. Quantify and measure the additional profit arising from LSA; and
- d. Determine the transfer pricing method to allocate the profit arising from LSA.

2.5.3 Attribution of Income (CN)

In paragraph 2.21.4 of the UTPM, China appreciates and considers the approach taken by the updated UTPM on intangibles, particularly regarding the attribution of intangibles' value creation. China recognizes that entities that contributed to the DEMPE of intangibles should be remunerated accordingly. In SAT Public Notice [2017] No. 6, China introduces the concept of DEMPE+Promotion (DEMPEP) as a tool for attributing income related to intangibles. The inclusion of promotion in the DEMPE framework clarifies that, from China's perspective, promotion activities are considered value-creating for intangibles and should be remunerated accordingly. China takes the position that the allocation of income generated by intangibles should be commensurate with the

economic substance and contribution to the value creation of the intangible.

The value of intangibles developed by principals outside of China may be enhanced, maintained, protected, exploited, and promoted by local subsidiaries. The economic activities undertaken by these local subsidiaries contribute to the value creation of the intangible (Li & Su, 2022).

The main factors for attributing income related to intangibles are the value contributions with respect to DEMPEP functions. For example, royalties paid to related parties that do not contribute to the value creation of the intangibles and simply act as legal owners may be subject to special tax adjustments by the STA. The royalties paid or received should correspond to the economic benefit obtained by the related parties.

China acknowledges the limited risk characterization in the operation of local subsidiaries, which results in routine-level attribution of returns from intangibles (Li & Su, 2022). Regulations stipulate that in such characterizations, entities would not bear significant economic risks or be in a position of loss arising from product sales, strategic failures, or underutilization of manufacturing capacity. In essence, when the level of profit is limited, the downside would also be limited.

China respects the concept of unique and valuable contributions regarding to DEMPEP functions of intangibles and its implications for attributing returns from intangibles. Although there is no specific characteristic or definition of a unique and valuable contribution provided in the domestic transfer pricing regime, the position of the STA discouraging the use of the TNMM when entities own "significantly valuable intangibles" implicitly indicates that there is identification and distinction of transfer pricing treatment based on the classification of valuable or non-valuable intangibles (Li & Su, 2022).

2.5.4 Transfer Pricing Method (CN)

In general, there is no limitation on the transfer pricing method that can be used for intangibles in China. The selection of the transfer pricing

method is not hierarchical but based on choosing the most appropriate method. The domestic legislation in China acknowledges the common five methods (CUP, RPM, CPM, TNMM, TPSM) and other reasonable methods.

The "any other reasonable method" generally includes appraisal and valuation methods (e.g., cost approach, market approach, and income approach) and methods aligned with the principle that "profit should be in the jurisdiction where economic activities occur and value is created." If local subsidiaries contribute to the value creation of intangibles under DEMPEP, then the profit split method and valuation are preferable.

Article 115 of the EIT provides an additional list of other reasonable methods that might also be employed for determining the pricing of transactions involving intangibles, including:

- a. Level of profit of the same company;
- b. Cost plus reasonable expense and profit margin;
- c. A reasonable ratio of the overall group profit; and
- d. Any other reasonable method.

China disregards the use of TNMM when the intangibles are identified as significantly valuable (Li & Su, 2022). Instead, China prescribes the use of the profit split method when the operations of the parties are highly integrated and there is the existence of valuable and unique intangible assets. China acknowledges two types of profit split methods: (i) the general profit split method, which allocates both routine and residual profit based on functional analysis, and (ii) the residual profit split method, which allocates routine profit and residual profit separately based on contribution and functional analysis of each type of profit. The residual profit is the total consolidated profit minus the routine profit.

2.5.5 Other Special Considerations (CN)

China does not provide specific guidance or employ special measures regarding HTVI (OECD, 2022b). For transfer pricing analysis, China

adopts LSA as the basis for comparability adjustments. The existence of LSA is considered to contribute to the generation of premium profits. In paragraph D.2.20.8 of the UTPM, the STA provides the definition of LSA as “advantages for production arising from assets, resource endowments, government industry policies and incentives, etc., which exist in specific localities.” LSA has two components:

- a. Location Savings: This refers to the net cost savings acquired by the MNE in low-cost jurisdictions, including costs such as labour, raw materials, transportation, social security, and other costs, and
- b. Market Premium: This is the increased profit derived by the MNE in jurisdictions with unique characteristics that impact the sale and demand of products or services.

3. RESEARCH METHOD

Research on intangible transfer pricing in Indonesia remains limited, particularly in relation to comparative analyses with other jurisdictions and international standards. This study aims to address this gap by examining Indonesia's transfer pricing regime for intangibles in relation to the OECD TP Guidelines, the UN TP Manual, and the domestic laws of selected jurisdictions. The analysis will focus on five topics: (i) identification of intangibles, (ii) analytical framework, (iii) attribution of income, (iv) transfer pricing methods, and (v) other special considerations.

To achieve this objective, a qualitative research approach using comparative legal method will be utilized. This method involves comparing legal frameworks and principles across different jurisdictions and international soft laws on the aforementioned topics (Van der Meer, 2018; Wilson G., 2017). The study will draw information from various sources such as international guidelines, domestic legislation, relevant case law, and academic literature.

The selected surveyed jurisdictions for this analysis are the United States (US), the United Kingdom (UK), and China (CN). These jurisdictions were selected to provide a diverse

perspective, including jurisdictions with transfer pricing regimes referenced as an alternative transfer pricing model to OTPG and UTPM (US), jurisdictions with transfer pricing regimes closely aligned with the OTPG (UK), and jurisdictions included within the country profile under the UTPM (CN).

4. ANALYSIS

4.1 General Analysis

4.1.1 *Common Ground on Arms-Length Principle*

The reviewed domestic laws and international guidelines emphasize the arm's length principle as the foundation for determining transfer pricing of intangibles in affiliated transactions. All of the surveyed references recognize the unique nature of intangibles in transfer pricing, necessitating additional provisions and specific treatment.

Indonesia, in line with this approach, classifies intangibles as special affiliated transactions warranting specific treatment. The US offers detailed guidance on determining taxable income related to the transfer of intangibles, backed by relevant court cases that address the treatment of intangibles in transfer pricing. The UK's approach is aligned with the OTPG, offering special considerations for intangibles within its framework. China takes a robust stance on intangibles, providing comprehensive coverage of its intangibles transfer pricing approach in the country profile section 2.21 of the UTPM.

4.1.2 *Interplay between References*

The interaction between the OTPG, the UTPM, and the United States model regarding the treatment of intangibles in transfer pricing demonstrates a noticeable interplay between references. Historically, these three primary sources of transfer pricing reference have influenced each other, shaping the current transfer pricing landscape. While all three adhere to the arm's length principle as the fundamental basis, the interpretation of this concept varies,

leading to diverse applications in domestic legal contexts.

An example of this interplay can be seen in the introduction of the Comparable Profit Method (CPM) by the United States in 1994. This introduction marked a shift towards a profitability-based approach rather than a purely transactional one. This change prompted an international response, resulting in the inclusion of TNMM in the OTPG in 1995, closely followed by incorporation into the UTPM (Hawkins, 2008).

The convergence of international interests facilitated by the G20 and OECD led to the creation of the final report BEPS Action 8-10, which provided extensive guidance on intangibles to ensure appropriate taxation of returns related to intangibles in relevant jurisdictions (Radhakrishnan, 2016). The update of the OTPG regarding intangibles subsequently influenced the US model and the UTPM, creating a ripple effect across jurisdictions.

In response to the final report, the US amended provisions related to intangibles to allow for more certainty in identifying intangibles and introduced principles to help determine the owner of intangible property (Armitage et al., 2022). This approach enables the identification of local intangibles resulting from enhancements by local subsidiaries to intangible property. The UTPM adopted aspects of the final report and clarified the DEMPE concept from the OTPG by adding the concept of "Acquisition."

Indonesia has already adopted the DEMPE concept since 2020 under the Minister of Finance Regulation number PMK-22/PMK.02/2020. China demonstrates its respect for the OTPG by incorporating fundamental aspects into domestic provisions. China implicitly endorses the UTPM by publishing its transfer pricing regime in the UTPM. Although not explicitly mentioned in domestic legislation, Indonesia utilizes both the OTPG and UTPM as references for formulating transfer pricing policies, regulations, and dispute settlements. The transfer pricing provisions in the United Kingdom mandate interpretation in a manner that "best secures consistency" with the OTPG.

4.2 Identification of Intangibles

The identification of intangibles is a pivotal aspect in determining the transfer pricing of intangibles in affiliate transactions, serving as the entry point for subsequent analysis, including the attribution of returns related to the intangibles. It is worth noting that the identification process for transfer pricing purposes can differ significantly from accounting or legal perspectives. For example, while a distribution channel may not be listed as intangible property on a balance sheet, it can be considered a marketing intangible from a transfer pricing standpoint, as per the OTPG.

All reviewed jurisdictions and international guidelines recognize the special nature of intangibles and implement special treatments that impact pricing. According to the OTPG and the UTPM, if a transaction involves the transfer or use of an intangible, each party contributing to the DEMPE functions of the intangibles should receive appropriate remuneration. In Indonesia, transactions involving affiliate intangibles are considered special transactions and undergo further analysis for transfer pricing purposes.

A critical consideration in defining intangibles is finding a balance. A definition that is too narrow may overlook remuneration that should be included in the tax base of a jurisdiction. Conversely, a definition that is overly broad can lead to excessive administrative burden for both taxpayers and tax authorities and unnecessarily increase the risk of tax disputes.

4.2.1 Definition of Intangibles for Transfer Pricing purpose

The OTPG, the UTPM, and the UK do not provide a definitive definition of intangibles for transfer pricing purposes. Indonesia offers a broad definition, categorizing intangibles as assets that are neither physical nor financial. The US defines intangibles through a specific list, requiring them to have substantial value independent of individual services. China provides a broad definition, describing intangibles as non-physical, non-monetary, long-term assets held for

Table 1*The Identification of Intangibles Note.* Source: Author's elaboration

Subtopics	Indonesia	OTPG	UTPM	US	UK	China
Definition of Intangibles for TP purposes	Provided	Not provided	Not provided	Provided	Not provided	Provided
Classification of intangibles	Provided	Provided	Provided	Provided	Provided	Provided
List of included Intangibles	Provided	Provided	Provided	Provided	Provided	Provided
List of Excluded Intangibles	Not Provided	Provided	Provided	Not Provided	Provided	Not Provided

Note. Source: Author's elaboration

business purposes, supplemented by a detailed list for clarification.

Beyond definitions, identifying characteristics of intangibles is crucial for proper recognition of intangibles for transfer pricing purposes. Most surveyed jurisdictions offer criteria to aid in this identification. Indonesia emphasizes the importance of evidence to confirm the existence of an intangible asset in the preliminary analysis. The UK follows the three-point criteria from OTPG to identify intangibles for transfer pricing purposes. The US allows the identification of intangibles beyond the provided list when the value or potential value is not tied to tangible property.

In comparison with international standards and other jurisdictions, Indonesia's broad definition and additional identification criteria generally align with international best practices. However, Indonesia does not include "ownership and control" as identifying criteria, which might lead to recognizing certain intangibles, such as group synergies, location savings, and market-specific advantages, that are excluded by OTPG and UTPM.

Indonesia could consider adopting the approach of the US and China, which mentions a broader range of intangibles for transfer pricing purposes. This could provide clarity on intangibles such as methods, programs, systems,

procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, technical data, location-specific advantages, and group synergies.

4.2.2 Classification of Intangibles

None of the surveyed jurisdiction mandate classifying intangibles for transfer pricing purposes, but utilize classifications to assist the transfer pricing analysis. These classifications include (i) manufacturing/trade intangibles and marketing intangibles, (ii) routine and non-routine intangibles, and (iii) valuable and non-valuable intangibles.

OTPG and UTPM classify intangibles into trade and marketing intangibles to facilitate discussions. Indonesia uses a manufacturing and marketing intangibles classification, offering detailed guidance for tax audits. China utilizes a valuable and non-valuable intangibles classification to assist the selection of transfer pricing methods. The US considers manufacturing and marketing intangibles classification, but notes limited impact. The US also utilizes routine and non-routine intangibles classification to determine the best transfer pricing method. The UK follows OTPG's approach of trade and manufacturing intangibles classifications. Indonesia's approach to

intangibles classification aligns with international references and surveyed jurisdictions.

4.2.3 Listed intangibles

The identification of intangibles can be complex and open to interpretation. Providing a list of intangibles explicitly mentioned for transfer pricing purposes could help clarify and reduce

The OTPG offers a six-step framework emphasizing risk analysis and economic ownership regarding intangibles. The UTPM provides a three-factor framework emphasizing fact-finding related to legal and economic ownership, contributions in terms of DAEMPE, and pricing determination.

The US outlines four principles for intangibles analysis, focusing on the

Table 2
The Framework of Analysis

Subtopics	Indonesia	OTPG	UTPM	US	UK	China
Specific framework of analysis	Eight factors preliminary analyses and four steps additional analysis	Six steps analysis with emphasis on economic risk	Three factors of analysis	Four principles of analysis	Six steps analysis with emphasis on economic risk	Specific cases analysis guidance
Emphasis on economic ownership	Observed	Observed	Observed	Observed	Observed	Observed

Note. Source: Author’s elaboration

disputes. All surveyed jurisdictions and international references employ such lists for identifying or clarifying intangibles. Some also provide a list of intangibles excluded from transfer pricing purposes. To enhance clarity, Indonesia may consider adding more intangibles to both the included and excluded lists for transfer pricing purposes.

4.3 Framework of Analysis
4.3.1 Specific framework of analysis for intangible

All of the surveyed references provide frameworks to aid in analysing their transfer pricing implications. Indonesia treats intangibles as special affiliated transactions and requires a preliminary analysis focusing on establishing their existence and economic significance. The tax audit guidance for transfer pricing transactions in Indonesia includes an additional four-step framework for transfer pricing intangibles analysis.

determination of legal and economic ownership. The United Kingdom follows the OTPG intangibles analysis framework. China offers guidance for specific cases such as contract manufacturing, marketing, distribution, and LSA applications, but lacks a specific analytical framework for intangibles.

Comparing Indonesia's framework with international standards and surveyed jurisdictions, the domestic guidance aligns with the international best practices. The preliminary analysis is particularly beneficial as a gateway mechanism, enabling Indonesia to efficiently conduct arms-length assessments of intangibles. If needed, Indonesia could consider adopting additional frameworks similar to those used by China for specific intangible asset cases.

4.3.2 Economic Ownership

In the pre-BEPS era, the common approach was that the legal owner should exclusively receive the residual return related to intangible assets.

This encouraged MNE to separate intangible legal ownership from economic substance and transfer it to tax havens or jurisdictions with a harmful intangibles' preferential regime, often using structures like the "double Irish Dutch sandwich," a structure frequently employed by US MNEs leveraging the US check-the-box regime (Nabben, 2017). This issue has been a central focus in BEPS Action 8-10, aiming to align intangibles outcomes with relevant jurisdictions by shifting focus to economic ownership and mandating remuneration for contributions under the DEMPE concept.

All surveyed references acknowledge the importance of economic ownership, giving it precedence over legal ownership. Typically, the frameworks outlined in domestic and international provisions concentrate on identifying economic ownership and contributions to intangibles. Contractual terms serve as a starting point, undergoing further analysis to ensure consistency with economic substance. These frameworks also help pinpoint factors and contributions affecting intangible value, thereby influencing the determination of intangible pricing. Indonesia's emphasis on economic ownership over legal ownership aligns with international best practices.

4.4 Attribution of Income

Attribution of income in the context of intangible assets involves determining which entity receives

remuneration, the extent of that remuneration, and the method used to establish it. In the pre-BEPS era, the legal owner of the intangibles typically received the residual income from it. However, under BEPS Action 8-10, economic ownership takes precedence over legal ownership. The guidance specifies that income derived from intangibles transfer pricing should be allocated to every entity contributing to the intangible's value creation, following the DEMPE concept. The level of contribution can influence the income attribution to specific entities. If multiple entities provide unique and valuable contributions, income should be attributed accordingly using methods allowing for a dual-sided approach. Given the intricate intangible asset's structures of MNE, income attribution complexities arise in assigning income related to intangibles to entities contributing to their value creation.

4.4.1 Concept of Attribution of Income

The existence of an attribution concept for intangibles guides the appropriate remuneration for contributions to these assets. The DEMPE is a key concept for income attribution related to intangibles. Indonesia has adopted the DEMPE concept, necessitating the identification of parties performing functions under DEMPE. Contributions to intangible value creation and their impact on entity financial performance determine compensation levels in Indonesia.

Table 3
Attribution of Income

Subtopics	Indonesia	OTPG	UTPM	US	UK	China
Concept of attribution	DEMPE	DEMPE	D(A)EMPE	Commensurate with income	DEMPE	DEMPE(P)
Allocation of residual return	Unique and valuable contribution	Unique and valuable contribution	Unique and valuable contribution	Non-routine contribution	Unique and valuable contribution	Valuable and unique contribution, and significantly valuable intangible

Note. Source: Author's elaboration

UTPM generally aligns with the DEMPE concept with the addition of Acquisition for clarity (DAEMPE). The US, while not explicitly mentioning DEMPE, uses an economic ownership approach and the concept of "commensurate with income" for intangibles remuneration. The UK aligns with OTPG and integrates DEMPE into intangibles transfer pricing analysis. China introduces DEMPE+Promotion (DEMPEP) to highlight promotion as a contribution to intangible value creation. DEMPE has emerged as the primary concept for income attribution among surveyed jurisdictions.

Indonesia's adoption of the DEMPE concept, consistent with other surveyed jurisdictions, reflects global best practices. However, Indonesia lacks emphasis and technical guidance on attributing income to local intangibles. All surveyed jurisdictions demonstrate domestic measures to attribute income to local subsidiaries that contribute to the creation of local intangibles.

Indonesia could enhance its income attribution framework by incorporating aspects of China's approach, which includes Promotion in the DEMPE concept and emphasizes the economic substance and value creation of local intangibles. Additionally, adopting the US "commensurate with income" principle and periodic adjustment mechanisms, as well as the UK's approach on contributions to risk control, would further strengthen Indonesia's domestic provision on income attribution to local intangibles.

4.4.2 Allocation of Residual Return

According to the OTPG and the UTPM, contribution to the D(A)EMPE functions of intangibles does not automatically entitle an entity to receive residual profits from the intangible. Residual profit is what remains after deducting routine profits related to the intangible. To qualify as a recipient of residual profit, an entity must be identified as the economic owner of the intangible. This determination hinges on functional analysis based on D(A)EMPE concept and the assumption

of significant economic risk. If the analysis reveals that an entity performs unique and valuable functions, it becomes a crucial indicator of economic ownership and the right to receive residual profit. In cases where multiple entities are identified as economic owners, the allocation method should allow for a multi-sided approach.

Indonesia adopts the concept of unique and valuable contributions to assist in the attribution of income analysis. The United States employs the concept of non-routine contributions to decide on allocating residual profits among relevant parties. The United Kingdom aligns with OTPG guidelines and uses the unique and valuable criteria to determine the allocation of residual profit. China utilizes the concept of valuable and unique contributions, particularly focusing on significantly valuable intangibles, to allocate residual profits related to intangibles.

Compared to surveyed references, Indonesia offers sufficient guidance to determine profit allocation concerning intangibles. The concept of unique and valuable contributions aligns with OTPG, UTPM, and the approaches of surveyed jurisdictions.

4.5 Transfer Pricing Method

The selection of the transfer pricing method plays a critical role in determining the pricing of intangible assets. Due to the unique nature of intangibles, traditional transfer pricing methods may not always be applicable. Post-BEPS regulations mandate remuneration for any party contributing to the DEMPE functions of intangibles, often necessitating a dual-sided transfer pricing method approach. Difficulty in finding comparable intangibles transactions may lead to the selection of methods less reliant on comparable, such as valuation methods or the Transactional Profit Split Method (TPSM). Jurisdictions may also have preferred domestic approaches for determining the most appropriate method for intangibles transfer pricing analysis.

4.5.1 Preference over Transfer Pricing Methods

All surveyed jurisdictions and international references favour the “most appropriate method” approach over a hierarchical method for selecting transfer pricing methods, especially when dealing with intangibles. While the five common transfer pricing methods may be

also permits the use of an “other reasonable method” based on the principle that profits should align with where value is created and economic activities occur.

The US mentions an “unspecified method” as one of the TP methods for intangible transfer pricing analysis, allowing for a broad range of methods. This flexibility has introduced unique and potentially debatable methods

Table 4

Intangible Transfer Pricing Method

Subtopic	Indonesia	OTPG	UTPM	US	UK	China
Preference over Transfer Pricing Methods	CUT, CUP, PSM, and Valuation Method	CUT, CUP, PSM, and Valuation Method	CUT, CUP, PSM, and Valuation Method	CUT, Comparable Profit Method, PSM, and Unspecified method	CUT, CUP, PSM, and Valuation Method	PSM and valuation method
Approach on Valuation Method	Income based, cost based, and market based	Income based (DCF)	Income based (DCF)	Income based (DCF)	Income based (DCF)	Income based, cost based, and market based

Note. Source: Author's elaboration

applicable to intangible, depending on facts and circumstances, preferences are often observed among surveyed jurisdictions for certain methods like Comparable Uncontrolled Price (CUP), Comparable Uncontrolled Transaction (CUT), Profit Split Method (PSM), and valuation methods.

Indonesia, for instance, recommends the valuation method for transactions involving the transfer and use of intangible assets, including rights related to mining, plantation, forestry, and similar activities. However, when reliable comparable transactions are available, Indonesia prefers the CUT or CUP method.

The United States prescribes four methods for intangibles, determining the most appropriate method based on available facts. Both the US and UK base their method selection on the OTPG. In cases where local subsidiaries contribute to value creation under DEMPE, China favours the PSM and valuation methods. China

compared to other surveyed references. Arguably, this approach acknowledges that due to the nature of intangibles, the methods used to determine transfer prices may need to be more flexible and adaptive. However, this approach might adversely affect the legal certainty of the transfer pricing assessment of intangibles.

Under the unspecified method, the US allows for the use of the “rule-of-thumb” method, which determines the transfer price based on a given percentage. Additionally, the US considers the “realistic alternative” method, which determines the pricing of intangibles based on analysing the costs and risks of realistic alternatives available at the time of transfer.

Comparing Indonesia's preferences with international references and surveyed jurisdictions, Indonesia's preference toward certain transfer pricing methods for intangibles generally aligns with international best practices.

4.5.2 Approach on Valuation Methods

Considering the nature of intangibles, all surveyed jurisdictions and international references highlight the use of valuation for transfer pricing methods. The valuation method is particularly useful in transfer pricing analysis

4.6 Other Special Considerations

Special considerations might be necessary when dealing with the transfer pricing assessment of intangible assets. For instance, the OTPG provides guidance on analysing hard-to-value Intangibles (HTVI), acknowledging their

Table 5

Other Special Considerations

Subtopics	Indonesia	OTPG	UTPM	US	UK	China
Provision on HTVI	Not provided, but OTPG will be consulted for addressing tax dispute related HTVI arise	Provided	Not, Provided	Not provided. IRS in position that the "Commensurate with Income" and periodic adjustment concept correspond to HTVI concept.	Provided, in consistent with OTPG	Not provided
Jurisdiction Notable measures	Preliminary analysis	-	-	"Commensurate with income" (CWI) and periodic adjustment concept	Higher potential remuneration for contribution to risk control concept	Location-Specific Advantages (LSA)

Note. Source: Author's elaboration

when reliable comparable are unavailable. Various approaches to conducting valuations can affect the results of the pricing of intangibles.

The OTPG and UTPM emphasize the use of an income-based approach, specifically discounted cash flow (DCF), for valuation. Indonesia and China allow the use of (i) income-based, (ii) cost-based, and (iii) market-based approaches. The US prefers the DCF approach for valuations, while the UK's approach aligns with the OTPG's general position.

In comparison with international references and surveyed jurisdictions, Indonesia's approach to valuation is already aligned with best practices, particularly in its use of the income-based approach.

challenging nature. The OTPG place attention to the domestic measure on HTVI and conducts ongoing monitoring to survey the HTVI approaches across jurisdictions.

Another example of special consideration is China's introduction of the Location-Specific Advantages (LSA) regime. This regime prioritizes country-specific market characteristics as a primary factor in determining intangibles transfer prices, highlighting the significance of local market dynamics and advantages in transfer pricing assessments.

4.6.1 Provision on HTVI

The OTPG offers comprehensive guidance on HTVI, covering its identification, treatment, and exceptions. However, Indonesia, the UTPM, and

China do not provide specific provisions on HTVI identification and treatment. The United States also lacks direct provisions on HTVI, but argued in the OECD Transfer Pricing Country Profile that its “commensurate with income” (CWI) standard, combined with periodic adjustments, aligns with the HTVI concept. On the other hand, the United Kingdom adopts OTPG guidance on HTVI for its domestic provisions.

Indonesia's position of not providing guidance on HTVI may create a gap that could potentially be exploited for tax avoidance utilizing HTVI. However, in case such transactions lead to tax disputes, Indonesia could refer to OTPG guidance to identify and address HTVI-related issues.

4.6.2 Jurisdiction's Notable Measures

Depending on specific country conditions and policies, jurisdictions may implement notable measures not found in other jurisdictions or international references. These measures can aid in conducting arms-length assessments for transactions involving intangibles. For example, Indonesia employs a preliminary analysis before applying the general transfer pricing analysis for affiliated transactions involving intangibles. This preliminary analysis acts as a gateway, allowing for measures or adjustments to be made before conducting a full transfer pricing assessment. This approach might lead to more efficient resource utilization in intangible transfer pricing analysis.

The United States implements the CWI concept and periodic adjustments as notable measures to determine remuneration related to intangible returns. The United Kingdom provides guidance that contributions to controlling risk without assuming risk should be appropriately remunerated, allowing for the use of a double-sided approach transfer pricing method. China utilizes the LSA as a basis for making comparability adjustments and properly remunerates “advantages for production arising from assets, resource endowments, government industry policies, and incentives specific to certain localities.”

5. CONCLUSION

Upon comparison with international references and surveyed jurisdictions, Indonesia's intangibles transfer pricing regime generally aligns with international best practices. It offers clear guidance for identifying intangibles, extensive frameworks emphasizing economic ownership, and adoption of DEMPE concepts for income attribution. The regime's guidance on transfer pricing methods is comprehensive, favouring double-sided approaches and valuation methods based on specific criteria. The special provision on preliminary analyses allows for more efficient intangibles transfer pricing assessments. However, in comparison to surveyed jurisdictions, Indonesia's intangible transfer pricing regime lacks emphasis and technical guidance on the identification and income attribution of local intangibles, along with provisions addressing hard-to-value intangible (HTVI). This deficiency might diminish the capacity to align outcomes from the transfer pricing of intangibles with domestic economic substance and potentially create gaps that facilitate tax avoidance.

Indonesia could enhance its intangibles transfer pricing regime by adopting the potentially beneficial provisions observed in surveyed jurisdictions. This includes implementing ownership and control criteria to better identify intangibles and adopting guidance on HTVI to improve legal certainty and close gaps of potential tax avoidance. Drawing on analysis frameworks from other jurisdictions, such as China's specific case approach and the US's four principles for determining economic ownership, would provide a valuable addition to domestic provisions. Extension of attribution concepts like DEMPE+Acquisition from UTPM, DEMPE+Promotion and Location Specific Advantage from China, along with principles like commensurate with income from the US, may offer effective ways to allocate returns related to local intangibles. Additionally, attributing returns based on contributions to risk control, as seen in the UK approach, could further strengthen

Indonesia's approach in better aligning outcomes related to intangibles.

6. IMPLICATIONS AND LIMITATION

6.1 Implication

Comparing Indonesia's intangible transfer pricing regime internationally provides insights into its alignment with global best practices. By examining practices in other jurisdictions, Indonesia can adopt measures that enhance the transfer pricing of intangible assets, potentially benefiting the regime. Intangibles, easily transferred globally, highlight the importance of aligning Indonesia's regime with best practices to mitigate tax avoidance associated with the transfer pricing of intangible assets.

6.2 Limitation

This contribution exclusively examines the comparison of provisions concerning intangibles without assessing the practical application. While Indonesia may have provisions aligned with international best practices for intangible transfer pricing, actual implementation challenges may persist. This paper does not address these implementation issues.

While the analysis provides insights into the potential adoption of approaches implemented by surveyed jurisdictions, it does not comprehensively discuss or project the associated benefits, challenges, or additional administrative burdens that may arise from the adoption.

Furthermore, this study does not explore the implications of Pillar 1 and Pillar 2 on the landscape of intangible transfer pricing. Pillar 1's Amount B, which addresses safe harbours for distribution and marketing functions, and Pillar 2's global minimum tax rules could potentially affect the global intangible structures of multinational enterprises. This could give rise to intangible transfer pricing issues on business restructuring, goodwill, and the transfer of a going concern, which are beyond the scope of this paper.

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