

Penyelesaian sengketa penanaman modal berdasarkan bilateral investment treaty melalui arbitrase international centre for settlement of investment disputes (Studi kasus sengketa penanaman modal Rafat Ali Rizvi melawan Republik Indonesia) = Settlement of investment dispute based on bilateral investment treaty through the arbitration of the international centre for settlement of investment disputes (A study on the investment disputes case between Rafat Ali Rizvi versus Republic of Indonesia)

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Abstrak

Tesis ini mengkaji putusan ICSID dalam sengketa antara Rafat Ali Rizvi melawan Republik Indonesia yang diputus berdasarkan Bilateral Investment Treaty ('BIT') antara negara Indonesia dan negara Inggris, Agreement between the Government of United Kingdom and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, yang ditandatangani pada tanggal 27 April 1976 dan mulai berlaku tanggal 24 Maret 1977. Permasalahan utama yang menjadi fokus penelitian ini adalah (i) apakah yang menjadi pokok sengketa antara Rafat Ali Rizvi melawan Republik Indonesia dan (ii) bagaimana pendapat majelis arbitrase ICSID yang memeriksa dan mengadili perkara tersebut dikaitkan dengan penafsiran atas ketentuan BIT dalam sengketa penanaman modal. Metode yang digunakan dalam penelitian ini adalah metode penelitian hukum normatif.

Hasil penelitian menunjukkan bahwa pokok sengketa yang terjadi adalah masalah proses dan prosedur masuknya penanaman modal asing (admission process) yang harus dilalui investor berdasarkan BIT. Proses tersebut menentukan legalitas penanaman modal yang dilakukan. Tidak terpenuhinya admission process tersebut menjadikan Majelis Arbitrase ICSID tidak memiliki yurisdiksi untuk memeriksa dan mengadili sengketa tersebut sehingga pokok perkara tidak dapat diperiksa. Penafsiran atas ketentuan-ketentuan dalam BIT utamanya menggunakan Pasal 31 ayat (1) Konvensi Wina 1969 tentang Hukum Perjanjian, khususnya penafsiran berdasarkan makna biasa dari rumusan ketentuan BIT.

Kajian tesis ini menyimpulkan bahwa penanaman modal yang dilakukan Penggugat tidak memenuhi ketentuan Pasal 2 ayat (1) BIT mengenai admission process sehingga Majelis Arbitrase menyatakan tidak memiliki yurisdiksi untuk memeriksa perkara tersebut. Majelis Arbitrase menafsirkan frasa 'granted admission in accordance with' dalam ketentuan Pasal 2 ayat (1) BIT antara Indonesia dan Inggris berdasarkan Konvensi Wina 1969 tentang hukum perjanjian khususnya Pasal 31 ayat (1). Penggunaan aturan penafsiran tersebut juga ditemukan dalam putusan-putusan ICSID lainnya yang menafsirkan ketentuan BIT yang serupa dengan ketentuan BIT antara Indonesia dan Inggris.

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This thesis analyzes the decision of ICSID tribunal in the case between Rafat Ali Rizvi v. Republic of Indonesia based on Bilateral Investment Treaty ('BIT') between Indonesia and United Kingdom, Agreement between the Government of United Kingdom and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, signed on 27 April 1976 and entered into force on 24 March 1977. The research questions of this thesis are (i) what is the subject matter of the case between

Rafat Ali Rizvi v. Republic of Indonesia; (ii) how is the opinion of the Tribunal in examining and adjudicating the case related to the interpretation of BIT provisions in investment disputes. The method used in analyzing the problems is normative legal research method.

Research result shows that the subject matter of the case is the admission process of foreign investment. There is admission process that should be followed based on BIT in that process which determines the legality of the investment. This legality requirement is related to ICSID jurisdiction. If these processes are unfulfilled, the ICSID tribunal will not have jurisdiction on the case. Thus, the merit of the case will not be examined. The rule of interpretation used is mainly the provision of Article 31 (1) of the 1969 Vienna Convention on the Law of Treaty especially interpretation based on the ordinary meaning of the BIT provision.

This study concludes that the Claimant's investment does not fulfil the provision of Article 2 (1) of BIT between Indonesia and United Kingdom concerning the admission process that the Tribunal does not have jurisdiction on the case. The Tribunal interprets the phrase 'granted admission in accordance with' in the provision of Article 2 (1) of the BIT based on the 1969 Vienna Convention on the Law of Treaty especially Article 31 (1) concerning interpretation based on the ordinary meaning of the BIT provision. The use of this rule of interpretation is also found in other ICSID decisions which interpret similar phrase of BIT as that in the BIT between Indonesia and United Kingdom.