

Gugatan Shareholder Reflective Loss: Upaya Indonesia Dalam Meminimalisir Gugatan Berganda Dari Sengketa Investasi Internasional = Shareholder Reflective Loss Claims: Indonesia's Efforts in Minimizing The Risk of Multiple Claims in International Investment Disputes

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Abstrak

Hukum investasi internasional mencatat bahwa pemegang saham dari perseroan penanaman modal asing telah mengajukan gugatan shareholder reflective loss (“gugatan SRL”) terhadap negara tuan rumah, yakni gugatan atas tindakan negara tuan rumah yang merugikan perseroan tersebut yang seringkali menyebabkan timbulnya gugatan berganda (multiple claims). Penelitian ini menjelaskan tiga hal yaitu alasan-alasan perlunya pengaturan gugatan SRL dalam perjanjian investasi internasional; hal-hal yang menentukan diterima atau ditolaknya gugatan SRL oleh majelis arbitrase internasional; serta pengaturan gugatan SRL yang meminimalisir risiko gugatan berganda terhadap Indonesia sebagai negara tuan rumah. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan peraturan perundang-undangan dan kasus dalam meninjau pengaturan gugatan SRL pada ketentuan perjanjian investasi internasional. Hasil penelitian menyimpulkan bahwa terdapat setidaknya tiga alasan gugatan SRL perlu diatur. Ketiga alasan tersebut adalah untuk mengurangi praktik treaty shopping, meminimalisir gugatan berganda dan menghindari terjadinya pemulihan kerugian berganda oleh pemegang saham perseroan penanaman modal asing. Selain itu, penelitian juga menyimpulkan bahwa gugatan SRL diterima oleh majelis arbitrase karena tidak adanya pengaturan mengenai gugatan SRL pada perjanjian investasi internasional dan ditolak karena sempitnya definisi investor dan investasi dan batasan ruang lingkup berlaku pada perjanjian investasi internasional. Terakhir, penelitian menyimpulkan bahwa untuk mengurangi gugatan SRL terhadap Indonesia sebagai negara tuan rumah, diperlukan adanya pengaturan lain seperti rezim gugatan SRL khusus, ketentuan definisi investor dan investasi, ketentuan denial of benefits, ketentuan pengeyampingan, dan ketentuan konsolidasi dan daluwarsa dalam perjanjian investasi internasional. Hal ini karena aturan gugatan SRL yang dapat melindungi negara tuan rumah tidak dapat berdiri sendiri tetapi harus dikaitkan dengan ketentuan lain.International investment law has witnessed that shareholders of foreign investment companies have submitted shareholder reflective loss claims (“SRL claims”) against host States, namely claims challenging the host State’s measure that has injured the company which often result in multiple claims. This study explains three issues, namely the reasons for the regulation of SRL claims in international investment agreements; the factors that determine arbitral tribunals’ acceptance and rejection of SRL claims; and the appropriate regulation of SRL claims that can minimize the risk of multiple claims against Indonesia as a host State. This study uses judicial normative method and statutory and case-based approach in evaluating the regulation of SRL claims in international investment agreements. The results of the study conclude that there are at least three reasons for the regulation of SRL claims. These three reasons include reducing treaty shopping, minimizing multiple claims and avoiding the occurrence of double recovery by shareholders of the foreign investment company. Apart from this, this study also concludes that arbitral tribunals accept SRL claims due to the lack of regulation on SRL claims and reject SRL claims based on the narrow definition of

investors, investments and the scope of the international investment agreement. Lastly, this study concludes that to minimize multiple claims against Indonesia as a host State, there is the need for other provisions such as a special SRL claim regime, investor and investment definition provision, denial of benefits provision, waiver provision, consolidation and statute of limitations provision in international investment agreements. This is because SRL claims cannot be regulated independently, but rather need to be linked to other provisions.