

Counterclaim sebagai Mekanisme Pembelaan Indonesia dalam Forum Investor-State Dispute Settlement: Sudah Efektifkah? = Counterclaim as a Defense Mechanism for Indonesia in Investor-State Dispute Settlement Forum: Has It Been Effective?

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Abstrak

Sistem Investor-State Dispute Settlement (ISDS) dikenal dengan sifatnya yang asimetris, yang dianggap lebih mengutamakan perlindungan hak-hak investor dan membebankan kewajiban yang besar bagi negara tempat suatu investasi dilakukan (host state). Dalam perkembangannya, sistem ISDS seperti demikian kemudian dikritik dan mendorong upaya reformasi dari negara-negara yang tergabung dalam PBB melalui United Nations Commission on International Trade Law Working Group III (UNCITRAL WG III). Salah satu upaya reformasi yang dilakukan adalah untuk menjawab kritik terkait kurangnya mekanisme untuk menangani counterclaim dari host country yang menjadi pihak tergugat (respondent state) dalam suatu perkara ISDS. Skripsi ini membahas (i) apakah bilateral investment treaty (BIT) Indonesia telah efektif dalam menyediakan counterclaim sebagai mekanisme pembelaan yang dapat digunakan oleh Indonesia dalam menghadapi gugatan arbitrase investasi internasional dan (ii) hal-hal apa saja yang mempengaruhi pertimbangan majelis arbitrase investasi dalam menerima atau menolak counterclaim. Skripsi ini menggunakan metode penelitian doktrinal dengan pendekatan kasus yang menghasilkan kesimpulan sebagai berikut: pertama, BIT Indonesia belum secara efektif menyediakan counterclaim sebagai mekanisme pembelaan yang dapat digunakan oleh Indonesia dalam forum ISDS karena tiga alasan, yakni (a) eksistensi consent terhadap counterclaim dalam BIT Indonesia masih ambigu; (b) terdapat ketidakpastian hukum terkait kriteria “hubungan yang dekat” antara counterclaim dengan gugatan utama; dan (c) walaupun terdapat ketentuan baru mengenai kewajiban investor, ketentuan tersebut berkontradiksi dengan klausul ISDS yang menutup kemungkinan counterclaim bagi Indonesia. Selanjutnya, terdapat setidaknya empat hal yang menentukan pertimbangan majelis arbitrase untuk menerima atau menolak counterclaim, yakni pertama, cakupan atau ruang lingkup “sengketa” (dispute) berdasarkan BIT yang berlaku; kedua, legal standing untuk mengajukan gugatan arbitrase berdasarkan klausul ISDS; ketiga, klausul applicable law dalam BIT; dan keempat, pasal yang berkaitan dengan kewajiban investor.

.....The Investor-State Dispute Settlement (ISDS) system is known for its asymmetrical nature, which is deemed to prioritize the protection of investor rights and, on the other hand, impose large obligations on the host state. Over the course of its development, such an ISDS system was later criticized and encouraged reform efforts from the member states of the United Nations through the United Nations Commission on International Trade Law Working Group III (UNCITRAL WG III). One of the reform efforts is aimed to address criticism related to the lack of mechanisms to handle counterclaims from the host country, which is the respondent state in an ISDS case. This thesis discusses (i) whether Indonesia's bilateral investment treaty (BIT) has been effective in providing counterclaims as a defense mechanism that can be used by Indonesia in the face of international investment arbitration claims and (ii) what are the factors that influence the consideration of investment arbitration tribunals in accepting or rejecting counterclaims. This thesis uses a doctrinal research method with a case approach which results in the following conclusions: first, the

Indonesian BIT has not effectively provided counterclaims as a defense mechanism that can be used by Indonesia in the ISDS forum for three reasons, namely (a) the existence of consent to counterclaims in the Indonesian BIT is still ambiguous; (b) legal uncertainty pertaining the “close connection” criteria between the counterclaim and the primary claim; and (c) although there are new provisions regarding investor obligations, these provisions contradict the ISDS clause which closes the possibility of counterclaims for Indonesia. Furthermore, there are at least four things that determine the consideration of the arbitral tribunal to accept or reject a counterclaim, namely first, the scope of the “dispute” under the applicable BIT; second, legal standing to file an arbitration claim based on the ISDS clause; third, the applicable law clause in the BIT; and fourth, the existence of a provision relating to investor obligation.