

Keseimbangan Antara Kepentingan Investor dan Hak Regulasi Pemerintah Dalam IA-CEPA : Sebuah Analisis Prospektif = The Balance Between Investors Rights and States Regulatory Right Under the IA-CEPA : A Prospective Analysis

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Abstrak

Indonesia-Australia Comprehensive Partnership Agreement (IA-CEPA) akan berkekuatan hukum tetap pada Juli 2020. Seperti perjanjian investasi bilateral pada umumnya, perjanjian baru ini menimbulkan banyak pertanyaan mengenai hubungan antara hak-hak investor dan hak regulasi negara. Rumusan-rumusan masalah adalah 1) Bagaimana klausa Fair and Equitable Treatment dalam IA-CEPA mengatur hubungan antara investor dan negara, beserta dengan hak dan kewajiban mereka masing-masing? Dan 2) Mengingat IA-CEPA tidak mengandung klausa eksplisit mengenai kewajiban investor, apakah ada klausa-klausa lain yang membatasi klaim investor dalam rangka mencapai keseimbangan hak dan kewajiban para pihak secara substantif? Riset dilakukan secara Doctrinal Legal Research dan menggunakan metode-metode komparatif. Kesimpulannya adalah, IA-CEPA tidak memiliki inovasi yang signifikan dalam menyeimbangkan hak dan kewajiban para pihak di dalam perjanjian investasi bilateral. Namun, IA-CEPA telah mengimplementasikan doktrin Clean Hands untuk menghindari klaim investor yang mungkin ilegal. Secara keseluruhan, IA-CEPA masih merefleksikan perjanjian investasi bilateral pada umumnya dan tidak berkontribusi inovasi signifikan.

The Comprehensive Partnership Agreement (IA-CEPA) between Indonesia and Australia will enter into force in July 2020. Similar to any newly ratified bilateral investment treaty, it arises questions towards investors rights and the states right to regulate. The research questions are 1) How does the Fair and Equitable Treatment clause in the IA-CEPA strikes the balance between the host states' obligations towards foreign investors on the one hand and the foreign investors' expectations with respect to their investment in the host state on the other? And 2) Considering that IA-CEPA does not include any explicit obligations for investors, is substantive balance between investors and States achieved by placing jurisdictional conditions for foreign investor's protection under IIA, in particular limitations of an access to Investor-State Dispute Settlement for fraudulent and illegal conduct? The form of research is a doctrinal legal research with comparative methods. The conclusions are that the IA-CEPA has not introduced significant innovations to balance the state's right to regulate with the investors' private rights under the treaty. However, it should be mentioned that it has managed to codify the lean hands doctrine to the text of the treaty, in order to dismiss claims for investors that may have been illegal in establishing the investment. Overall, it is still merely a reflection of the previous investment treaties and have not contributed to the development of International Investment Treaties.