

Kewajiban Exhaustion of Local Remedies pada Proses Penyelesaian Sengketa Investor dengan Negara dalam P4M: Studi Perbandingan dengan India = Obligation of Exhaustion of Local Remedies in the Investor-State Dispute Settlement Process in BIT: A Comparative Study with India

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Abstrak

Mekanisme penyelesaian sengketa investor dengan negara (investor-State dispute settlement atau ISDS) menghadapi kritik karena dianggap membatasi kedaulatan negara dan lebih menguntungkan investor asing, yang mendorong negara-negara seperti Indonesia dan India untuk meninjau kembali P4M dan BIT mereka. Kewajiban exhaustion of local remedies (ELR) atau kewajiban penyelesaian sengketa secara domestik sebelum arbitrase internasional diusulkan sebagai salah satu solusi reformasi ISDS. Penelitian ini menjelaskan dua hal, yaitu alasan-alasan P4M perlu mewajibkan ELR sebagai persyaratan sebelum proses arbitrase, dan apakah persyaratan-persyaratan sebelum memulai proses arbitrase dalam P4M dan BIT pasca peninjauan telah melindungi kepentingan masing-masing Indonesia dan India. Penelitian ini berbentuk doktrinal dengan pendekatan perbandingan dalam meninjau ELR dalam hukum internasional, sengketa investasi internasional, dan persyaratan-persyaratan sebelum arbitrase. Hasil penelitian menyimpulkan bahwa ELR perlu diwajibkan dalam P4M yang ditandatangani oleh Indonesia karena, yaitu menghormati kedaulatan negara tuan rumah, memberi kesempatan untuk menyelesaikan sengketa secara domestik, mengurangi jumlah sengketa ke arbitrase internasional, dan membantu pengembangan sistem hukum domestik dalam penyelesaian sengketa investasi. Selanjutnya, persyaratan-persyaratan sebelum arbitrase dalam P4M Indonesia pasca peninjauan belum melindungi kepentingan Indonesia terhadap gugatan investor dibandingkan dengan BIT India pasca peninjauan, karena hanya mencakup penyelesaian sengketa secara damai dan tidak mewajibkan ELR. Hal ini menyebabkan investor lebih mudah menggugat Indonesia karena tidak ada tahapan persyaratan lainnya.

.....The investor-State dispute settlement (ISDS) mechanism has faced criticism for allegedly limiting state sovereignty and favoring foreign investors, prompting countries such as Indonesia and India to review their BITs. The obligation of exhaustion of local remedies (ELR) before international arbitration has been proposed as one of the ISDS reform solutions. This study addresses two key points: the reasons why BITs should require ELR as a prerequisite before arbitration, and whether the conditions precedent to arbitration in the post-review BITs of Indonesia and India have adequately protected their respective interests. This study takes a doctrinal method and employs a comparative approach in reviewing ELR in international law and international investment disputes, and analyzing conditions precedent to arbitration. The study concludes that ELR needs to be required in BITs signed by Indonesia because namely, it respects the sovereignty of host states, provides an opportunity to resolve disputes domestically, potentially reduces the number of disputes submitted to international arbitration, and aids in the development of domestic legal systems in resolving investment disputes. Furthermore, the conditions precedent to arbitration in Indonesia's post-review BITs have not protected its interests against investor claims as effectively as India's post-review BITs, as they only include amicable settlement and do not require ELR. This results in investors finding it

easier to bring claims against Indonesia due to the lack of additional prerequisite stages.