

PERBEDAAN PENAFSIRAN KLAUSUL *MOST FAVORED NATION* TERHADAP YURISDIKSI TRIBUNAL ARBITRASE INVESTASI: IMPLIKASI DAN UPAYA UNTUK MEWUJUDKAN KEPASTIAN HUKUM

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INTISARI

Penelitian ini bertujuan untuk menganalisis pengaruh perbedaan penafsiran klausul *Most Favored Nation* (MFN) dalam menentukan yurisdiksi tribunal arbitrase investasi terhadap kepastian hukum bagi investor dan negara tuan rumah dan mengidentifikasi upaya untuk mewujudkan kepastian hukum bagi investor dan negara tuan rumah dalam penafsiran klausul MFN terhadap yurisdiksi tribunal arbitrase investasi. Penelitian ini merupakan penelitian hukum normatif didukung wawancara narasumber. Penelitian ini menggunakan pendekatan konseptual dengan menganalisis norma, prinsip, dan doktrin hukum berdasarkan data sekunder berupa perjanjian investasi internasional, konvensi, putusan arbitrase investasi, serta literatur hukum. Data sekunder dikumpulkan melalui studi dokumentasi. Data sekunder dalam penelitian ini didukung wawancara dengan narasumber yang merupakan akademisi hukum investasi dan hukum internasional. Analisis data dilakukan secara kualitatif.

Hasil penelitian dan pembahasan menunjukkan bahwa perbedaan penafsiran klausul MFN berdampak pada kepastian hukum dengan menciptakan ketidakpastian dengan mengganggu kemampuan investor dan negara tuan rumah memperkirakan konsekuensi hukum dari klausul MFN serta ketentuan penyelesaian sengketa yang ada dalam perjanjian investasi. Untuk mewujudkan kepastian hukum, dapat ditempuh dua jenis upaya: (1) upaya preventif yang dilakukan dengan perumusan klausul MFN secara eksplisit dalam perjanjian investasi oleh negara-negara pihak perjanjian; dan (2) upaya represif yang dilakukan melalui penafsiran oleh tribunal dengan menghormati kedaulatan dan imunitas negara, menjunjung prinsip konsensualitas, dan ketentuan penafsiran perjanjian dalam *Vienna Convention on the Law of Treaties*.

Kata Kunci: Most-Favored Nation (MFN), Arbitrase Investasi, Yurisdiksi, Kepastian Hukum.

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DIFFERENCES IN THE INTERPRETATION OF MOST- FAVORED-NATION CLAUSES TO THE JURISDICTION OF INVESTMENT ARBITRATION TRIBUNALS: IMPLICATIONS AND EFFORTS TO ENSURE LEGAL CERTAINTY

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ABSTRACT

This study aims to analyse the impact of differing interpretations of the Most Favored Nation (MFN) clause in determining the jurisdiction of investment arbitration tribunals on legal certainty for investors and host states, as well as to identify efforts to realise legal certainty for both parties in the interpretation of MFN clauses within the jurisdiction of investment arbitration tribunals. This is a normative legal research supported by interviews with experts. The research adopts a conceptual approach by analysing legal norms, principles, and doctrines based on secondary data, which include international investment agreements, conventions, arbitral awards, and legal literature. Secondary data were collected through document studies. The secondary data are complemented by interviews with expert informants, scholars of investment law and international law. Data analysis was conducted qualitatively.

The research findings and discussion demonstrate that divergent interpretations of the MFN clause affect legal certainty by creating uncertainty, undermining the ability of investors and host states to anticipate the legal consequences of the MFN clause and the dispute settlement provisions contained in investment treaties. To achieve legal certainty, two types of efforts may be undertaken: (1) preventive measures through the explicit formulation of MFN clauses in investment treaties by contracting states; and (2) repressive measures through tribunal interpretation that respects state sovereignty and immunity, upholds the principle of consent, and adheres to the rules of treaty interpretation under the Vienna Convention on the Law of Treaties.

Keywords: Most-Favored Nation (MFN), Investment Arbitration, Jurisdiction, Legal Certainty.

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