

Moving Towards a Level Playing Field between Foreign Investor and Host State: An Analysis of Counterclaim Cases in International Investment Arbitration

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ABSTRACT

This Legal Research seeks to analyse how the tribunal in *Burlington* have successfully issued the host state counterclaim and why the tribunals that were faced with counterclaims before *Burlington* failed to do the same. Based on such analysis, this Legal Research will also identify how a bilateral investment treaty should be formulated to ensure the submission of a counterclaim in investor-state dispute settlement.

To do so, this Legal Research utilises empirical research that is based on literature study on arbitral awards, international investment agreements, and arbitration rules that are relevant to international investment law and counterclaims in international investment arbitration.

Based on this Legal Research's finding, it is concluded that *firstly*, the tribunal in *Burlington* have created a level playing field between a host state and foreign investor in international investment arbitration by rendering a counterclaim decision. *Secondly*, the tribunals before *Burlington* found that host state counterclaims cannot be adjudicated because they are not within the tribunal's jurisdiction based on the limited scope of the BITs. Further, some of the counterclaims were not deemed to be admissible before the tribunal because they are not closely connected to the primary claim. *Lastly*, BITs in general should have a broader scope in its dispute settlement provision and applicable law and include investor obligation to ensure the submission of counterclaim in investment arbitration.

Keywords: counterclaim, host state, international investment arbitration, international investment law.

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Menciptakan Keseimbangan Kedudukan antara Investor Asing dan Negara Penerima Investasi: Studi Kasus Gugatan Balik (Counterclaim) di Arbitrase Investasi Internasional

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INTISARI

Penelitian Hukum ini berupaya untuk mengidentifikasi bagaimana majelis arbitrase dapat berhasil memberikan putusan atas gugatan balik yang diajukan oleh negara penerima investasi di kasus Burlington dan mengapa majelis arbitrase gagal dalam memberikan putusan sejenis pada kasus-kasus sebelumnya. Berdasarkan analisa tersebut, penelitian hukum ini juga akan mengidentifikasi bagaimana perjanjian investasi bilateral sebaiknya dirancang agar negara penerima investasi dapat mengajukan gugatan balik di forum penyelesaian perselisihan antara investor asing dan negara penerima investasi (investor-state dispute settlement).

Penelitian Hukum ini menggunakan metode penelitian empiris yang didasarkan oleh studi literatur pada putusan arbitrase, perjanjian investasi internasional, dan peraturan arbitrase yang berkaitan dengan hukum investasi internasional dan gugatan balik pada arbitrase investasi internasional.

Berdasarkan temuan Penelitian Hukum ini, dapat disimpulkan bahwa pertama, majelis arbitrase di kasus Burlington berhasil menciptakan keseimbangan kedudukan antara negara penerima investasi dan investor asing di arbitrase investasi internasional melalui putusan gugatan balik. Kedua, majelis arbitrase dalam kasus-kasus gugatan balik sebelum putusan Burlington gagal dalam memberikan putusan gugatan balik yang diajukan oleh negara penerima investasi karena gugata tersebut tidak termasuk dalam yurisdiksi arbitrase berdasarkan perjanjian investasi bilateral. Kemudian, beberapa counterclaim tidak dapat diterima karena dianggap tidak berhubungan dengan gugatan utama. Terakhir, cakupan klausula penyelesaian sengketa dan hukum yang berlaku dalam perjanjian investasi bilateral secara umum harus lebih luas dan perjanjian tersebut juga harus turut meliputi kewajiban investor asing untuk memastikan pengajuan gugatan balik di arbitrase investasi internasional

Kata Kunci: *gugatan balik, negara penerima investasi, arbitrase investasi internasional, hukum investasi internasional.*

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