

## INTISARI

### **Analisis Kebijakan Pemenuhan Kewajiban Ofset Pertahanan Melalui Penanaman Modal Asing**

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Peraturan Pemerintah Nomor 76 Tahun 2014 pasal 15 ayat (2e) dan ayat (2n) mencantumkan saham patungan ataupun investasi, sebagai salah satu bentuk ofset pertahanan/ *defence offset*. Penelitian atas kebijakan ini bertujuan mengidentifikasi kendala implementasi Penanaman Modal Asing (PMA) sebagai ofset dalam akuisisi pertahanan, dari analisa hukum positif Indonesia. Permasalahan tentang kebijakan ini dirumuskan sebagai berikut: apakah bidang yang tertutup di Industri Pertahanan untuk ‘JV PMA’, apakah kontrak pengadaan dimungkinkan untuk mencantumkan klausul ofset PMA, dan apakah kontrak dengan klausul ofset bisa mencegah wanprestasi komitmen PMA.

Penelitian hukum dilakukan secara yuridis normatif, terhadap bahan hukum primer di bidang investasi dan kontrak internasional. Penelitian mempelajari pembentukan dan bidang usaha JV PMA sehubungan dengan peraturan bidang Penanaman Modal, Perseroan Terbatas, dan Industri Pertahanan. Penelitian mempelajari *Standard Bidding Document* dan proses berkontrak sehubungan dengan ofset dan pencegahan wanprestasi.

Melalui UU 16/2012 dan Peraturan Pemerintah 76/2014, Indonesia mencanakan program ofset, kandungan lokal dan imbal dagang hingga 85% nilai kontrak pembelian. Peraturan tidak konsisten dalam hal bidang tertutup untuk JV PMA dalam industri pertahanan, berupa Perpres 44/2016 tentang KBLI bidang industri tertutup dalam Industri Pertahanan dan UU 16/2012 tentang bidang tertutup berupa industri alat utama. Pengecualian peraturan juga terdapat pada JV dengan BUMN (tentang pengecualian klaster Industri Pertahanan) dan JV dalam Perusahaan Tbk (tentang pengecualian pada Penanaman Modal yang dilakukan melalui Pasar Modal). Peraturan pengadaan dalam Permenhan 17/2014 memungkinkan pencantuman klausul Ofset berupa JV PMA dalam suatu Kontrak pengadaan. *Standard Bidding Document* dengan klausul ofset, sebagaimana Pasal 50 Permenhan 17/2014, dapat mengakomodasi prinsip imbal dagang sesuai UNCITRAL, prinsip sahnya perjanjian menurut Pasal 1320 KUH Perdata, dan prinsip hukum internasional. Kontrak akuisisi pertahanan dapat mencegah wanprestasi komitmen implementasi PMA melalui pengawasan oleh BKPM dan Kemhan, dan adanya klausul ganti rugi atas wanprestasi.

Kata kunci : imbal dagang, ofset pertahanan, saham patungan.

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## **ABSTRACT**

### ***Policy Analysis on Fulfilment of Defence Offset Obligation thru Foreign Direct Investment***

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*Regulation of Government 76/2014 article 15 (2e) and (2n), states Joint Venture (JV) and Foreign Direct Investment (FDI), as means of defence offset. Purpose of this research is to identify potential obstacles in the implementation of FDI as an offset in defence acquisition, from the analysis on Indonesia positive law. Issues surrounding this policy are : which field of defence industry is closed for 'FDI JV', whether procurement regulation allows defence contract to contain offset clauses in the form of FDI, and whether defence contract with offset clauses can prevent breach of commitment for FDI.*

*Legal research is conducted in normative juridical approach toward primary legal material in the field of Investment and International Contract. The research studies complication of formation, operation, and dismissal of JV in defence industry, in conjunction with Investment regulation. and Defence Industry regulation. The research then studies Standard Bidding Document, and defence contracting process in relation non-performance and offset implementation.*

*Capitalizing on foreign major defence acquisitions, thru Law 16/2012 and Regulation of Government 76/ 2014, Indonesia has instigated a requirement for local content, countertrade and offset up to 85% of defence procurement contracts value. Regulations that are not consistent on the industrial field of JV in Defence Industry, are Regulation of President 44/2016 in addressing in the format of Indonesia Standard Industrial Classification of All Economic Activities (KBLI) and Law 16/2012 on industrial field of lead integrator. There are also discrepancies in regulations pertaining to JV of State-owned Enterprise (in regards to exemption of defence industry cluster), and JV of public listed company (in regards to exemption of capital market or portfolio investment activity). Procurement regulation in Regulation of Defence Minister 17/2014 allows defence contract to contain Offset clause for a JV. Standard Bidding Document containing Offset clauses, as stipulated in Article 50 Defence Minister Regulation 17/2014, can accommodate countertrade principles as guided by Uncitral, principles of Article 1320 Indonesia Civil Code, and principles of international contract. A Defence contract with countertrade clauses, can prevent non-performance of FDI commitment, by observation of FDI milestones , and clause of significant claim damages on non performance on offset obligation.*

*Keywords: countertrade, defence offset, joint venture.*

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