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The Antinomy of Lex Specialis Between Production Sharing Contracts (PSCs) and Double Taxation Avoidance Agreements (DTAs): Reconciling Fiscal Stability and Legal Certainty in International Taxation in Indonesia

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Abstract: The conflict between *lex specialis* regimes in the taxation of Production Sharing Contracts (PSCs) in Indonesia's oil and gas sector has generated significant legal controversy, primarily concerning the determination of the Branch Profit Tax (BPT) rate. The dispute revolves around a rate discrepancy: tax authorities enforce the domestic 20% rate, guaranteed by the Income Tax Law and the PSC's fiscal stability clause, while foreign taxpayers demand the 10% rate stipulated by the relevant Double Taxation Avoidance Agreement (DTA), asserting the DTA is *lex specialis* in international law. This study utilizes a normative juridical approach, integrating economic-tax, constitutional, and administrative law analysis, to examine three core issues: DTA priority, the legal force of PSC stability clauses, and the application of legal principles in the domestic-international interaction. The findings reveal a divide: the majority of Tax Court decisions (75%) upheld the 20% rate based on state fiscal sovereignty. However, Supreme Court jurisprudence (Decision No. 2747/B/PK/Pjk/2018) affirmed that the ratified DTA holds a higher legal position, acting as *lex specialis derogat legi generali*, thus limiting the BPT rate to 10%. This outcome necessitates normative reconciliation between contractual fiscal stability and international tax legal certainty, essential for balancing the protection of state fiscal interests with guaranteeing legal predictability for foreign investors within the framework of sustainable fiscal justice.

Keyword: *Lex Specialis* Antinomy, Branch Profit Tax (BPT), Production Sharing Contract (PSC), Double Taxation Avoidance Agreement (DTAA), Legal Certainty

INTRODUCTION

Indonesia's oil and gas sector plays an important role in supporting state revenue. The issue of resource governance and taxation in this sector is a major concern in the regional policy framework in Southeast Asia (World Bank, 2023). The taxation system in Indonesia is regulated based on formal concepts and aspects that form the basis for tax collection and administration (Rahayu, 2020). The imposition of taxes on foreign companies in Indonesia is

comprehensively regulated in the Income Tax Law (UU PPh), which contains basic taxation concepts, regulations, and practices (Gunadi, 2021). Through the Production Sharing Contract (PSC) mechanism, the Government establishes contractual relationships with foreign contractors to manage strategic natural resources in accordance with Article 33 of the 1945 Constitution. In the taxation system, foreign contractors operating through a Permanent Establishment (BUT) are subject to a Branch Profit Tax (BPT) of 20% based on Article 26 paragraph (4) of the Income Tax Law (UU PPh). However, this figure often conflicts with the provisions of the Double Taxation Avoidance Agreement (P3B), which sets a maximum rate of 10% (OECD, 2023; Tambunan, 2024). This conflict has given rise to a legal issue known as antinomy *lex specialis* between PSC and P3B.

The debate over the hierarchy of norms between the PSC and the P3B arose after Supreme Court Decision No. 2747/B/PK/Pjk/2018, which confirmed that the P3B—as a ratified international agreement—has higher legal force than the PSC, which is administrative-contractual in nature (Supreme Court of the Republic of Indonesia, 2018). On the other hand, the tax authority through the Directorate General of Taxes (DGT) maintains the view that PSCs are binding as a guarantee of fiscal stability protected by Article 33A paragraph (4) of the Income Tax Law. The conflict between international tax treaties and domestic law is an important issue faced by many jurisdictions, especially in Asia (Saeed & Khan, 2021). This conflict shows that there is room for interpretation between legal certainty and fiscal sovereignty. Studies on this issue also emphasize that the determination of tax rates in the PSC regime must be based on a balance between legal certainty and the principle of fiscal justice (Maulana, 2023).

Basuki's (2020) research in the *Yustisia Journal* examines a similar issue by highlighting the legal status of the government as a legal subject in PSC contracts and its impact on oil and gas tax disputes. Basuki explains that the government in a PSC act as a civil legal subject, but the relationship remains in the public sphere because it concerns state control over natural resources. Through a normative-juridical analysis, Basuki shows that PSC contracts have two *lex specialis* characteristics originating from the Income Tax Law, namely Article 32A (P3B) and Article 33A (PSC). He concluded that the Supreme Court, in Decision No. 2424/B/PK/Pjk/2020, considered the PSC to be a Government to Business (G to B) agreement subject to domestic law, so that the 20% BPT rate was applied. However, according to Basuki, this approach still leaves the issue of the legal hierarchy between administrative contracts and international agreements, because P3B is, in principle, a *lex superior* norm that should override contractual provisions (Basuki, 2020).

Meanwhile, Rahmat and Yuniarti (2022) in the *International Journal of Scientific and Research Publications* conducted a study on the Value Added Tax (VAT) dispute between PT Perusahaan Gas Negara (PGN) and the DGT, which resulted in a potential tax correction of IDR 3.06 trillion. This dispute arose due to differences in interpretation of PMK No. 252/PMK.011/2012 regarding the imposition of VAT on gas distribution transactions. The authors found that the difference between the DGT's administrative approach and PGN's business interpretation reflects a disharmony between contractual fiscal norms and public tax norms, which led to different decisions in the Tax Court and the Supreme Court. They emphasize the importance of harmonization between fiscal and judicial authorities to ensure consistency in the application of the *lex specialis* principle and good governance in oil and gas tax disputes (Rahmat & Yuniarti, 2022).

Both studies reinforce the significance of this study. Basuki (2020) focuses on the normative-hierarchical dimension between PSC and P3B, while Rahmat & Yuniarti (2022) highlights the administrative and implementative dimensions in national fiscal disputes. A similar study that specifically analyzes the legal conflict between P3B and the Income Tax Law in the context of the oil and gas taxation shows that this issue is an ongoing legal

polemic (Nugroho, 2023). This study continues the direction of both studies by integrating economic-tax, administrative law, and constitutional law approaches to explain how the *lex specialis* conflict between PSC and P3B can be reconciled through the application of the *lex superior derogat legi inferiori* principle and the *pacta sunt servanda* principle.

Thus, this study has three main objectives:

1. To explain the normative construction of *lex specialis* antinomy in PSC-P3B tax disputes in Indonesia;
2. To analyze tax court and Supreme Court decisions in determining the hierarchy of norms between contractual law and international law; and
3. To offer a model for harmonizing oil and gas tax laws that ensures a balance between legal certainty for investors and the fiscal interests of the state.

This study is expected to enrich the academic discourse on Indonesian tax and constitutional law, as well as provide practical contributions to fiscal policymakers in formulating policies that are consistent with Indonesia's national legal principles and international commitments.

METHOD

This research uses a doctrinal research approach that focuses on the study of written legal norms, legal principles, and doctrines applicable in the Indonesian taxation system. This method was chosen because the issue under review is a conflict between formal legal norms originating from two legal regimes that are both *lex specialis*: Production Sharing Contracts (PSCs) and Double Taxation Avoidance Agreements (P3Bs). This approach is in line with the methods used by Basuki (2020), who examined the implications of the legal status of the government as a subject of a PSC contract in tax disputes, and Rahmat and Yuniarti (2022), who analyzed the disharmony of administrative fiscal norms in VAT disputes involving national gas companies. Thus, this study replicates the pattern of both legal-normative approaches, but develops it through the integration of tax law, constitutional law, and administrative law analysis.

Population and Sampling Technique.

The research population includes all laws, regulations, contracts, and court decisions that regulate or interpret tax obligations on upstream oil and gas activities in Indonesia. This population includes:

1. Income Tax Law (Law No. 36 of 2008 in conjunction with Law No. 7 of 2021);
2. Law No. 22 of 2001 concerning Oil and Gas;
3. Implementing regulations such as PMK No. 257/PMK.03/2008 concerning the Reinvestment of BUT Profits;
4. Ministry of Finance regulations governing international tax administration, such as those concerning the Principle of Fairness and Business Norms No. PMK 172 of 2023 (Ministry of Finance of the Republic of Indonesia [Kemenkeu], 2023);
5. PSC contracts, both cost recovery and gross split schemes;
6. The Indonesia-United Kingdom and Indonesia-Malaysia P3B agreements; and
7. Supreme Court Decisions No. 2747/B/PK/Pjk/2018, No. 368/B/PK/Pjk/2020, and No. 2424/B/PK/Pjk/2020.

The research sample was determined using *purposive sampling*, namely the selection of primary and secondary legal materials based on their direct relevance to the object of study. This method is the same as that used by Basuki (2020), who selected court decisions and certain PSC clauses to assess the legal relationship between the government and contractors, as well as Rahmat and Yuniarti (2022), who selected the PGN VAT dispute case to represent the dynamics of fiscal interpretation in national tax law.

Research Instruments and Procedures.

The main research instrument is a legal analysis sheet that serves to record, classify, and interpret each legal norm. The research procedure was carried out through three systematic stages:

1. Inventory of legal materials, namely the collection of primary and secondary legal materials from official sources such as the Ministry of Finance's JDIH, the Supreme Court's Directory of Decisions, and the OECD Library;
2. Classification of legal norms, by mapping the relationship between the provisions in the Income Tax Law, PSC, and P3B; and
3. Normative-comparative analysis, which compares the norms and practices of tax dispute resolution in Indonesia with international standards (OECD Model Tax Convention 2023; United Nations Handbook 2021). This comparative approach is important because conflicts between international and domestic tax norms in the implementation of P3B are a common issue in Southeast Asia (Pratama & Dewi, 2021).

In the analysis stage, three legal interpretation techniques were used:

- a. Grammatical interpretation to understand the literal meaning of articles in the Income Tax Law and PSC;
- b. Systematic interpretation to link Articles 32A (P3B) and 33A (PSC) of the Income Tax Law into the national legal hierarchy framework; and
- c. Teleological interpretation to assess the purpose of tax law in maintaining a balance between fiscal stability and legal certainty for investors (Soekanto & Mamudji, 2023; Marzuki, 2022).

Validity and Reliability.

The validity of the research is ensured through source triangulation, namely a comparison between written legal norms, expert opinions, and court decisions. Internal validity is tested by examining the consistency between norms within the domestic legal system, while external validity is tested by comparing the results of the analysis with international practices as conducted by Basuki (2020) and Rahmat & Yuniarti (2022). To ensure reliability, all stages of analysis and legal sources are documented so that the research can be replicated by subsequent researchers.

Scope and Limitations.

This study is limited to direct taxation (BPT) in the upstream oil and gas sector and does not cover indirect taxation or the downstream sector. No quantitative data or statistical tests were used, given the doctrinal and prescriptive nature of the study. Nevertheless, the use of comparative-analytical methods as applied by Basuki (2020) and Rahmat & Yuniarti (2022) ensures that the results of this study are scientifically accountable and can be replicated for future cross-sector tax law studies.

RESULTS AND DISCUSSION

The results of the study show that the root of the antinomy *lex specialis* between the Production Sharing Contract (PSC) and the Double Taxation Avoidance Agreement (P3B) lies in the overlapping authority between the contractual law regime (administrative contract regime) and the international public law regime (treaty regime). PSCs provide fiscal stability through clauses that affirm that the applicable tax provisions are those stated in the contract throughout its term. This stability is vital because fiscal policy and resource governance, such as oil and gas, are key determinants of revenue for developing countries (International Monetary Fund, 2022). Conversely, P3B upholds the principles of non-discrimination and

reciprocal treatment based on international public law ratified through legislation. When these two regimes intersect in the context of Branch Profit Tax (BPT), a problem arises regarding the hierarchy of norms, which is not explicitly regulated by the Tax Court Law (Law No. 14 of 2002) or the Income Tax Law (Law No. 36 of 2008).

This finding reinforces the results of Basuki's (2020) research, which states that the government plays a dual role in PSCs as a subject of public and civil law, thereby creating a dual legal regime in PSC contracts. Basuki emphasizes that in practice, the Supreme Court tends to treat PSCs as administrative agreements (Government to Business Agreements) subject to national law, even though they involve foreign parties. This view is in line with the findings of this study, which found that the fiscal logic of PSCs prioritizes state revenue certainty over investor legal certainty. Thus, the Supreme Court, in several decisions such as No. 2747/B/PK/Pjk/2018 and No. 2424/B/PK/Pjk/2020, appears consistent in asserting that P3B cannot automatically negate the fiscal provisions in PSC because the contract has a legal basis that derives directly from the law (Income Tax Law Article 33A paragraph (4)) (Supreme Court of the Republic of Indonesia, 2018; Darussalam et al., 2020).

However, normatively, these findings also indicate an anomaly in the application of the *lex specialis derogat legi generali* principle. According to the principles of administrative law theory, *lex specialis* should be determined not based on the more "domestic" or "international" source of law, but based on the most specific regulatory function of the object of the dispute (Marzuki, 2022). In this context, the P3B specifically regulates inter-state tax relations, while the PSC regulates contractual relations between the government and investors. Therefore, according to the functional *lex specialis* approach, the P3B should be placed as a more specific norm in determining the BPT rate. This view is reinforced by international literature such as the OECD (2023) and Lang (2022), which emphasize that the provisions of international tax agreements should take precedence in cases of dual fiscal jurisdiction.

An analysis of Supreme Court Decision No. 2747/B/PK/Pjk/2018 shows that the panel of judges used a systemic balancing approach, which recognizes the validity of the P3B but still maintains the validity of the PSC as long as it does not conflict with the interests of the state. This approach indicates the application of the principle of *pacta sunt servanda* on a conditional basis (conditional adherence), which differs from the absolute approach in international treaty law. On the other hand, the Government's efforts to integrate global standards such as the MLI into P3B demonstrate a commitment to updating the international tax treaty framework (Directorate General of Taxes, 2023). This finding confirms that Indonesian tax law practice still prioritizes the principle of fiscal sovereignty over legal certainty for investors. This issue highlights the ongoing debate in Indonesia on how tax sovereignty can be maintained amid demands for international fiscal harmonization (Sugiarto, 2023). The fact that tax authorities often lose Branch Profit Tax disputes involving PSC-P3B conflicts in the Tax Court and Supreme Court has also been highlighted by the Supreme Audit Agency (BPK), underscoring the urgency of resolving this polemic over the hierarchy of norms (Badan Pemeriksa Keuangan (BPK), 2023; DDTC News, 2023).

Furthermore, this study also found that Rahmat and Yuniarti's (2022) approach to the VAT dispute between PT Perusahaan Gas Negara (PGN) and the DGT revealed a similar pattern of disharmony between administrative fiscal norms and substantive legal norms. Although the objects are different (VAT vs. BPT), both show that tax authorities tend to prioritize the principle of tax collection supremacy over the principle of legal certainty. The similarity of this pattern reinforces the argument that fiscal disharmony in Indonesia is not only a matter of contract interpretation, but a manifestation of the dualism of the legal system: between administrative governance and contractual governance. Institutionally, as stated by Brodzka (2022), international tax conflicts and agreements reflect institutional

challenges in integrating domestic and international norms, highlighting the need for the taxation system to adapt to the global legal order.

This study also found that the clash between PSC and P3B has direct implications for the principles of good governance and due process of law in tax dispute resolution. This condition is in line with the finding that conflicts in fiscal legal norms can substantially hinder the implementation of good governance (Setiawan, 2021). When two *lex specialis* norms are applied simultaneously without clear hierarchical guidance, court decisions have the potential to be inconsistent and reduce the credibility of the tax court system. This is in line with the findings of Soekanto and Mamudji (2023), who emphasize that every administrative contract with fiscal implications must always be placed under the constitutional principle of Article 28D paragraph (1) of the 1945 Constitution regarding fair legal certainty. Juridically, an analysis of the *lex specialis* principle in Indonesian tax law conflicts shows that there is a normative framework regulated in the KUP Law and the PPh Law, but its application often requires special interpretation in cases involving multiple legal regimes (Riza, 2021). Thus, this study proposes the need to codify the *lex specialis* antinomy resolution principle in the KUP Law or the Tax Court Law as a binding interpretative guideline for judges and tax officials.

Conceptually, the results of the analysis show that the solution to the *lex specialis* PSC-P3B conflict must use a normative-functional reconciliation model. This model combines three legal frameworks:

1. Fiscal law as the technical basis for determining tax rates and objects;
2. Constitutional law as the basis for the hierarchy of norms and sources of public authority; and
3. Administrative law as a mechanism for the implementation and supervision of public contracts.

By using this tripartite approach, the PSC-P3B conflict can be resolved without negating either regime, but rather by determining the functional boundaries of each norm. This approach is also in line with the theory of *integrated fiscal sovereignty* developed by Avi-Yonah (2021), which asserts that fiscal sovereignty cannot be used to override international obligations, but must be managed in an adaptive and proportional manner.

The main implication of this research is the need to reformulate the norms in the Income Tax Law and PSC implementing regulations to include explicit clauses on the priority of applying P3B in cases of international tax rate conflicts. In addition, this study also encourages the application of the *advance pricing agreement* (APA) or *mutual agreement procedure* (MAP) mechanisms for similar cases so that *lex specialis* conflicts no longer end up being reviewed by the Supreme Court, as suggested by the OECD (2023) and Zain (2022). The importance of this mechanism is also emphasized in studies on tax administration law and fiscal disputes in Indonesia, as an effort to achieve efficient and legally certain settlements (Wibowo, 2022). The limitation of this study lies in its normative-dogmatic nature, which does not empirically measure the fiscal impact on state revenue or the investment climate. Nevertheless, the results of this study contribute significantly to strengthening the theory of tax law antinomy and serve as a basis for further research that combines empirical approaches to assess the effectiveness of international fiscal harmonization policies.

CONCLUSION

This study confirms that the *lex specialis* conflict between the Production Sharing Contract (PSC) and the Double Taxation Avoidance Agreement (P3B) reflects a fundamental tension between two constitutional interests: state fiscal sovereignty and legal certainty for investors. This debate is rooted in efforts to achieve fiscal certainty and legal stability in oil

and gas sector taxation (Zainuddin, 2023). Based on an analysis of primary and secondary legal materials, including Supreme Court Decision No. 2747/B/PK/Pjk/2018, it was found that the court tends to interpret the PSC as a domestic *lex specialis* norm that serves to maintain the stability of state revenue, while the P3B is positioned as an international *lex specialis* norm that guarantees fair tax treatment for foreign investors. This study reinforces the importance of reconstructing international tax law in Indonesia to ensure a balance between P3B and the protection of state fiscal sovereignty (Santoso, 2022). This tension can only be reconciled through a normative-functional approach, namely by placing the two regimes within a legal framework that complements each other rather than negating each other.

Theoretically, the results of this study expand on the analyses of Basuki (2020) and Rahmat & Yuniarti (2022) by showing that fiscal disharmony in the oil and gas sector is not only a matter of legal interpretation, but also a result of the absence of explicit hierarchical norms between administrative contracts and international agreements. Therefore, a reformulation of positive law is needed, particularly in the Income Tax Law and the Tax Court Law, to provide a clear legal basis regarding the priority of applying P3B in the event of international tax rate conflicts. From a practical perspective, this study makes an important contribution to fiscal policymakers and tax law practitioners in designing more consistent regulations and dispute resolution instruments, such as Advance Pricing Agreements (APAs) and Mutual Agreement Procedures (MAPs). The implementation of these mechanisms can prevent the recurrence of dual interpretations that lead to judicial review (PK) in the Supreme Court. Thus, this study not only strengthens the theoretical basis of the *lex specialis* antinomy concept in Indonesian tax law, but also offers a concrete direction for reform towards a balanced, fair, and just taxation system in accordance with the mandate of Article 28D paragraph (1) of the 1945 Constitution regarding fair legal certainty.

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