

Beyond Formal Protection: Reconstructing Legal Certainty and Enforcement in Indonesia's Counterpurchase Agreements

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Abstract

ARTICLE INFORMATION

Submitted:

Revised:

Accepted:

Published:

Counterpurchase has become an important instrument of international trade policy in Indonesia, particularly in government procurement involving imported goods, yet its legal protection remains weakened by the gap between formal regulation and effective enforcement. This study examines the legal construction of counterpurchase agreements, the adequacy of existing enforcement mechanisms, and the requirements for strengthening legal certainty. It employs normative legal research with statutory, conceptual, and critical approaches, using primary legal materials, regulatory instruments, and relevant legal scholarship. The analysis shows that counterpurchase should be understood as a hybrid regulatory-contractual institution because it combines contractual autonomy, reciprocal commercial obligations, administrative supervision, and state economic objectives. Although Indonesian law provides warnings, penalties, and blacklisting mechanisms, their effectiveness is limited by fragmented institutional authority, inconsistent enforcement, and weak integration between contractual remedies and administrative sanctions. The study argues that substantive legal certainty requires clearer allocation of supervisory authority, measurable contractual obligations, proportional sanctions, effective monitoring, and enforceable remedies for cross-border non-performance. Its contribution lies in reconstructing counterpurchase protection beyond formal compliance toward an integrated enforcement framework capable of strengthening contractual predictability, regulatory accountability, and Indonesia's national trade interests.

Keywords

Counterpurchase; Legal certainty; Regulatory enforcement

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INTRODUCTION

International trade increasingly operates through contractual arrangements that serve not only commercial objectives but also broader governmental strategies concerning industrial development, export promotion, market access, and national economic resilience. Public procurement involving foreign suppliers illustrates this intersection particularly clearly, as governments may attach reciprocal economic obligations to imported goods rather than rely

exclusively on conventional cash-based transactions.¹ Countertrade emerged as one mechanism capable of connecting foreign procurement with domestic economic interests, while counterpurchase constitutes one of its principal contractual forms. Such arrangements challenge the conventional assumption that international commercial contracts are merely private exchanges between autonomous parties. They demonstrate how contractual relations may simultaneously function as instruments of economic governance, making their legal structure relevant to both contract theory and socio-legal scholarship.

Counterpurchase is commonly structured around a foreign supplier's obligation to purchase or market goods originating in the importing country in connection with the primary procurement transaction. Unlike ordinary sales, this mechanism creates interconnected obligations whose commercial value depends upon the performance of more than a single exchange. International legal scholarship has consequently treated countertrade transactions as legally complex arrangements involving questions of contractual linkage, applicable law, performance, remedies, and dispute settlement.² Indonesia institutionalizes this mechanism through regulations governing counterpurchase for government procurement of imported goods, requiring qualifying foreign suppliers to purchase or market Indonesian-origin products according to obligations attached to procurement contracts. This regulatory framework transforms counterpurchase from a purely negotiated commercial mechanism into a legally structured instrument of national economic policy.

The existence of a regulatory framework, however, does not automatically establish meaningful legal certainty. Contemporary legal theory increasingly rejects an exclusively formal understanding of legal certainty based merely upon the existence, accessibility, and textual clarity of legal rules. Legal certainty also concerns the capacity of regulated actors to anticipate legal consequences and reasonably predict institutional responses when obligations are fulfilled or breached. Predictability, consistency, and protection against arbitrary enforcement therefore constitute important elements of substantive legal certainty.³ Applied to counterpurchase, this distinction exposes an important analytical problem: regulations may clearly prescribe contractual obligations and sanctions while uncertainty persists regarding how consistently those obligations will be supervised, enforced, and translated into effective remedies.

This problem becomes more significant because Indonesian counterpurchase agreements occupy a hybrid normative position between private contractual autonomy and public regulatory intervention. Indonesian contract law recognizes freedom of contract and the binding force of agreements, principles conventionally associated with party autonomy and *pacta sunt servanda*. Yet counterpurchase obligations attached to government procurement do not arise

¹ Miriam Amanze, Dermot Cahill, and Ceri Evans, "Tackling Human Trafficking in Governments Supply Chains: Legal Certainty and Effectiveness Issues under the Australian Commonwealth Procurement Rules Model," *Federal Law Review* 50, no. 4 (2022): 479–503, <https://doi.org/10.1177/0067205X221126554>.

² Richard Craven, "Managing Dissonance: Bureaucratic Justice and Public Procurement," *Regulation & Governance* 17, no. 1 (2023): 215–33, <https://doi.org/10.1111/rego.12444>.

³ Imelda Suardi, "Procurement Governance in Reducing Corruption in the Indonesian Public Sector: A Mixed Method Approach," *Cogent Business & Management* 11, no. 1 (2024): 2393744, <https://doi.org/10.1080/23311975.2024.2393744>.

solely through unrestricted negotiation between commercially equal actors. Their substance is partly shaped by state policy seeking reciprocal economic benefits, particularly through the purchase or marketing of Indonesian-origin products. The resulting legal relationship combines contractual commitments, administrative requirements, and public economic objectives. This hybrid structure complicates the traditional separation between private and public law and raises questions about whether contractual certainty can be secured exclusively through contractual consent when performance also depends upon regulatory institutions.

Indonesia's counterpurchase regulatory framework provides formal mechanisms intended to ensure compliance by foreign suppliers. These mechanisms include written warnings, administrative penalties, compliance assessments, and the possibility of blacklisting suppliers that fail to fulfil prescribed obligations. Such provisions indicate that legal protection is not entirely absent at the normative level.⁴ Nevertheless, the existence of sanctions alone cannot establish whether the legal system provides effective protection to the parties concerned. A distinction therefore needs to be drawn between the formal availability of sanctions and their actual capacity to secure contractual performance. The more fundamental issue concerns whether regulatory institutions can implement those sanctions consistently, proportionately, and predictably when non-performance occurs in cross-border transactions.

Regulatory enforcement theory provides an important analytical basis for examining this distinction between formal legal protection and operational effectiveness. Effective enforcement does not depend exclusively upon the severity of sanctions but also upon institutional authority, monitoring capacity, administrative coordination, procedural clarity, and consistency in regulatory responses. Rules that appear stringent at the normative level may possess limited practical force when institutional responsibilities remain fragmented or enforcement procedures lack effective implementation.⁵ Counterpurchase presents a particularly relevant setting for this inquiry because the regulated actor is frequently a foreign supplier whose contractual performance extends beyond national territorial boundaries. Legal certainty consequently depends not only upon the existence of sanctions but also upon the credibility and enforceability of institutional responses to non-compliance.

The transnational character of counterpurchase further complicates the relationship between contractual obligation and effective legal protection. Counterpurchase transactions may involve several contracts, parties, jurisdictions, payment arrangements, and commercial obligations that are functionally related but legally distinct. Questions concerning applicable law, contractual interdependence, breach, remedies, dispute resolution, and enforcement may therefore arise when one element of the transaction fails. Differences between national legal systems may further affect the interpretation and enforceability of contractual obligations. These characteristics indicate that domestic regulation cannot operate independently from the broader

⁴ John Braithwaite, "Street-Level Meta-Strategies: Evidence on Restorative Justice and Responsive Regulation," *Annual Review of Law and Social Science* 17 (2021): 205–25, <https://doi.org/10.1146/annurev-lawsocsci-111720-013149>.

⁵ Roy Gava, "Challenging the Regulators: Enforcement and Appeals in Financial Regulation," *Regulation & Governance* 16, no. 4 (2022): 1265–82, <https://doi.org/10.1111/rego.12405>.

transnational contractual environment.⁶ A legal protection framework must consequently address not only domestic administrative compliance but also the enforceability of obligations arising across borders.

Existing scholarship on counterpurchase remains fragmented across several analytical traditions. International trade scholarship frequently evaluates countertrade and offset arrangements through procurement policy, trade distortions, industrial development, market access, and international economic regulation. Private-law scholarship tends to focus on contractual architecture, applicable law, contractual interdependence, remedies, and dispute settlement. Indonesian studies have commonly approached counterpurchase as an economic policy instrument, export strategy, or mechanism associated with government procurement. Although these approaches provide important insights, they rarely integrate legal certainty, regulatory enforcement, contractual protection, and institutional accountability within one analytical framework. Consequently, insufficient attention has been given to counterpurchase as a hybrid legal institution positioned between contractual autonomy and public regulatory governance.

This gap generates the central research problem addressed in this article: the distance between formal legal protection and substantive legal certainty within Indonesia's counterpurchase regime. The article asks, first, to what extent does the existing legal construction of counterpurchase provide predictable and enforceable protection for parties participating in international government procurement transactions? Second, how should the enforcement framework be reconstructed so that contractual obligations, administrative sanctions, regulatory supervision, and institutional authority operate coherently rather than as fragmented mechanisms? These questions shift the analysis away from merely determining whether counterpurchase regulations exist. Instead, attention is directed toward whether existing legal arrangements are capable of transforming formally prescribed obligations into predictable, enforceable, and institutionally credible legal consequences.

This article argues that legal certainty in counterpurchase cannot be reduced to the textual existence of contractual duties and administrative sanctions. Effective legal protection requires an integrated enforcement framework connecting contractual binding force, regulatory supervision, institutional accountability, sanction implementation, dispute resolution, and transnational enforceability. The article's original contribution lies in conceptualizing Indonesian counterpurchase as a hybrid regulatory-contractual institution, rather than treating it exclusively as an ordinary commercial agreement or governmental trade policy. This conceptual reconstruction places the gap between formal protection and operational enforcement at the centre of the analysis. It also contributes to legal theory and socio-legal scholarship by demonstrating that the effectiveness of commercial law depends not merely upon normative rules but upon institutional practices capable of converting legal obligations into credible expectations, compliance incentives, and enforceable consequences.

⁶ I Dewa Made Ary Swanjaya and Ni Wayan Ella Apriyani, "Blacklist: Pengaturan Dan Pengaruhnya Terhadap Penyedia Dalam Pengadaan Barang/Jasa Pemerintah," *Kertha Semaya: Journal Ilmu Hukum* 10, no. 9 (2022): 2168–79, <https://doi.org/10.24843/KS.2022.v10.i09.p17>.

METHODS

This study employs normative legal research with a conceptual and critical orientation to examine the relationship between legal protection, legal certainty, and regulatory enforcement in Indonesia's counterpurchase regime. The normative approach is used to assess the coherence, structure, and enforceability of legal rules governing counterpurchase obligations, while the conceptual approach develops an analytical understanding of legal certainty beyond the mere existence of formal norms.⁷ A critical orientation is incorporated to evaluate the distance between regulatory design and the capacity of legal institutions to ensure compliance. This combination is appropriate because the research problem concerns not only what the law formally prescribes but also whether the existing legal construction provides predictable, coherent, and enforceable protection in international commercial relations.

The research subjects consist of legal norms, regulatory institutions, contractual principles, and enforcement mechanisms governing counterpurchase agreements related to government procurement of imported goods in Indonesia.⁸ No human participants or individual respondents are involved because the inquiry focuses on legal texts and institutional arrangements rather than empirical behaviour collected through interviews or surveys. Particular attention is given to the legal relationship between foreign suppliers and Indonesian governmental actors, especially the allocation of contractual obligations, supervisory authority, administrative sanctions, and consequences of non-performance. The analysis also considers the interaction between private contractual autonomy and public regulatory intervention to determine whether counterpurchase should be understood solely as a commercial contract or as a hybrid regulatory-contractual institution.

The research procedure is conducted through several interconnected stages.⁹ The first stage identifies the legal foundations governing contractual obligations, international trade, government procurement, and counterpurchase arrangements. The second stage maps the rights, obligations, enforcement mechanisms, institutional responsibilities, and sanctions established by the relevant legal instruments. The third stage evaluates these provisions through the concepts of freedom of contract, *pacta sunt servanda*, legal certainty, regulatory enforcement, and institutional accountability. The final stage reconstructs the relationship between these concepts to assess whether the existing regulatory architecture can transform formal legal obligations into predictable and enforceable consequences. This procedure allows the study to move from doctrinal identification toward theoretical evaluation and normative reconstruction.

⁷ Sanne Taekema, "Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship," *Law and Philosophy* 40, no. 1 (2021): 33–66, <https://doi.org/10.1007/s10982-020-09388-1>.

⁸ Agustinus Budianto, "Legal Research Methodology Reposition in Research on Social Science," *International Journal of Criminology and Sociology* 9 (2020): 1339–46, <https://doi.org/10.6000/1929-4409.2020.09.154>.

⁹ N Majeed, A Hilal, and A N Khan, "Doctrinal Research in Law: Meaning, Scope and Methodology," *Bulletin of Business and Economics* 12, no. 4 (2023): 559–63, <https://doi.org/10.61506/01.00167>.

The legal materials examined consist of primary and secondary sources. Primary legal materials include the Indonesian Civil Code, Law No. 7 of 2014 on Trade, regulations governing counterpurchase for government procurement of imported goods, and relevant international legal instruments concerning international commercial transactions and trade. Secondary materials consist of peer-reviewed journal articles, legal scholarship, academic books, institutional publications, and scholarly discussions concerning international trade law, contract law, countertrade, legal certainty, and regulatory enforcement. Legal documents and scholarly literature function as the principal research instruments because they provide the normative and theoretical basis required to assess the structure and effectiveness of the counterpurchase regime. Sources are selected according to their relevance, legal authority, scholarly credibility, and connection to the research questions.

Legal materials are collected through documentary and literature research using systematic identification, classification, and examination of relevant legal sources. Primary materials are organized according to their regulatory hierarchy and substantive relationship to contractual obligations, supervision, sanctions, and dispute-related consequences. Secondary sources are grouped according to the principal analytical themes of the study, including contractual autonomy, substantive legal certainty, regulatory enforcement, institutional coordination, and transnational enforceability. Rather than treating each source independently, the research examines how these materials interact in constructing the legal position of counterpurchase agreements. This technique enables the study to identify normative consistencies, regulatory gaps, institutional ambiguities, and theoretical tensions that may affect legal protection.

The collected materials are analyzed qualitatively through statutory interpretation, systematic interpretation, conceptual analysis, and legal argumentation. Statutory interpretation is employed to determine the normative content and legal consequences of counterpurchase provisions, while systematic interpretation examines their relationship with broader principles of Indonesian contract and trade law. Conceptual analysis is used to distinguish formal legal protection from substantive legal certainty and to explain the role of enforcement in connecting legal norms with actual compliance expectations. Legal argumentation then evaluates whether the existing framework provides coherent protection and develops a reconstructed enforcement model based on contractual binding force, regulatory supervision, institutional accountability, sanction implementation, and transnational enforceability. The analysis is prescriptive rather than merely descriptive because it seeks to identify how the legal framework should be structured to strengthen certainty and enforcement.

The scope of this study is limited to the legal and institutional architecture of counterpurchase associated with Indonesian government procurement of imported goods. It does not conduct quantitative measurement of regulatory effectiveness, economic modelling of counterpurchase transactions, interviews with government officials or foreign suppliers, or empirical assessment of individual contractual disputes. Consequently, the study does not claim to measure the actual frequency of non-compliance or the statistical effectiveness of administrative sanctions. Its contribution instead lies in identifying normative and conceptual weaknesses within the existing framework and explaining how those weaknesses affect the

relationship between formal protection and substantive legal certainty. These limitations also indicate the need for future socio-legal and empirical research examining how counterpurchase rules are implemented, negotiated, and enforced in practice.

RESULTS AND DISCUSSION

A. Counterpurchase as a Hybrid Regulatory-Contractual Institution: Between Party Autonomy and State Economic Policy

Counterpurchase cannot be reduced to an ordinary sale-and-purchase agreement because its legal structure combines private contractual commitments with public economic objectives. Indonesian contract law recognizes freedom of contract under Article 1338 of the Civil Code, giving parties authority to determine the substance of their agreement. Counterpurchase, however, adds a legally structured reciprocal obligation requiring foreign suppliers to purchase or market Indonesian products as part of government procurement involving imported goods.¹⁰ The obligation is not created solely through autonomous commercial bargaining. State regulation determines essential elements of reciprocal performance and links private contractual relations to national trade objectives. This combination places counterpurchase at the intersection of contract law, trade regulation, and public economic policy.

The application of freedom of contract to counterpurchase is consequently more limited than in conventional commercial agreements. Parties retain contractual autonomy, yet that autonomy operates inside a regulatory structure established to secure broader economic interests. Foreign suppliers may negotiate commercial terms, but the reciprocal purchase obligation cannot simply be treated as an optional contractual clause because it forms part of a state-directed procurement mechanism. Such legal construction reveals that freedom of contract does not always signify complete independence from regulatory intervention. Instead, contractual autonomy may coexist with mandatory economic obligations when the state uses procurement as an instrument to support national exports.¹¹ The binding character of counterpurchase thus originates from both contractual consent and regulatory authority.

This dual source of obligation affects the legal character of counterpurchase. A conventional sale generally focuses on the exchange of goods and payment between seller and buyer, while counterpurchase adds a secondary commitment requiring foreign suppliers to generate reciprocal economic value for the importing state. The foreign supplier is not only expected to complete the primary procurement transaction but also to participate in purchasing or marketing Indonesian products. Such an arrangement creates a wider set of legal expectations

¹⁰ Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, "The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?," *Regulation & Governance* 17, no. 4 (2023): 853–69, <https://doi.org/10.1111/regg.12526>.

¹¹ Paulo De Sousa Mendes, "Responsive Regulation, Enforced Self-Regulation, and Corporate Liability," *Criminal Law Forum* 33, no. 4 (2022): 285–321, <https://doi.org/10.1007/s10609-022-09445-5>.

than ordinary bilateral exchange.¹² The contractual relationship consequently serves two interests at once: fulfillment of commercial performance and realization of state economic policy. This duality supports the view that counterpurchase is better understood as a hybrid regulatory-contractual institution rather than a purely private commercial agreement.

The Letter of Undertaking strengthens this hybrid structure because it converts policy expectations into identifiable contractual commitments. Foreign suppliers are required to state their willingness to purchase Indonesian agricultural or industrial products, use or market those products according to agreed destinations, begin performance according to the prescribed period, and submit evidence of shipment or other proof of realization. The document may also contain price arrangements, delivery mechanisms, exchange values, and detailed descriptions of the goods involved. These elements show that reciprocal obligations are not abstract policy statements. They are translated into specific commitments capable of generating legal consequences when performance fails.

The structure becomes more complex because counterpurchase may involve separate primary and secondary contracts connected through a master agreement, protocol, or Letter of Undertaking. The primary contract concerns the foreign supplier's delivery of imported goods, while the secondary contract concerns the purchase or marketing of Indonesian products. Payment and delivery may proceed separately even though both contracts are economically connected. Such separation creates a distinctive legal architecture: each contract may have its own performance requirements, yet the overall transaction depends upon their combined realization.¹³ Counterpurchase consequently functions as a contractual network rather than a single reciprocal exchange, making legal responsibility more difficult to assess when failure occurs in only one part of the arrangement.

This contractual interdependence has direct consequences for legal certainty. A foreign supplier may successfully complete the primary procurement obligation while failing to fulfill the counterpurchase commitment. The government may already have received the imported goods, but the expected reciprocal economic benefit remains unrealized. Such a situation raises a legal problem that cannot be solved merely by confirming whether the main procurement contract was performed. The legal system must determine the status of the secondary obligation, the consequences of partial performance, and the appropriate remedy when only one contractual component is breached.¹⁴ Legal certainty requires a clear connection between contractual structure and enforcement consequences rather than treating each obligation as legally isolated.

¹² Jay P Shimshack and Michael B Ward, "Costly Sanctions and the Treatment of Frequent Violators in Regulatory Settings," *Journal of Environmental Economics and Management* 116 (2022): 102745, <https://doi.org/10.1016/j.jeem.2022.102745>.

¹³ Yoshinobu Nakanishi, "Accountability Pressure and Intraorganizational Dynamics in Japan's Public Procurement," *Administration & Society* 55, no. 4 (2023): 696–725, <https://doi.org/10.1177/00953997221147237>.

¹⁴ Johannes Jarlebring, "Blacklisting and the EU as a Global Regulator: The Institutionally Predisposed Norm Breaker," *JCMS: Journal of Common Market Studies* 61, no. 4 (2023): 1007–25, <https://doi.org/10.1111/jcms.13443>.

The same issue arises when non-performance results from conditions affecting Indonesian products rather than deliberate refusal by the foreign supplier. Several obstacles may occur, including product unavailability, insufficient production capacity, failure to meet export standards, technical certification problems, weak competitiveness, and higher prices compared with competing products. These obstacles complicate the assessment of breach because the supplier's legal obligation may remain valid even when fulfillment becomes commercially difficult.¹⁵ A rigid enforcement model risks treating objective market barriers as equivalent to intentional non-compliance, while excessive flexibility may reduce the binding force of the agreement. Effective protection requires legal standards capable of distinguishing genuine performance barriers from neglect, opportunistic behavior, or bad faith.

Such differentiation is important because legal certainty is not identical to strict punishment. A predictable legal system should clarify when non-performance constitutes breach, what evidence may justify non-performance, which institution evaluates the circumstances, and what consequence follows each category of failure. Counterpurchase requires this level of precision because performance may depend on several actors, including foreign suppliers, Indonesian producers, exporters, government agencies, and intermediary entities. When responsibility is distributed across a contractual network, uncertainty may arise over who bears the risk when domestic products are unavailable or commercially unsuitable. A credible legal framework must allocate those risks clearly before a dispute occurs rather than rely on discretionary assessment after performance has already failed.¹⁶

The regulatory purpose of counterpurchase further distinguishes it from ordinary commercial exchange. The mechanism seeks to increase national exports, expand access to foreign markets, strengthen the competitiveness of Indonesian products, and generate reciprocal benefits from government procurement involving imported goods. These objectives show that counterpurchase is designed to produce public economic outcomes beyond the immediate interests of the contracting parties. The foreign supplier's performance is expected to contribute to national trade strategy, while the government uses procurement power to secure broader economic benefits.¹⁷ Contractual obligations consequently become a vehicle for economic governance, and their effectiveness must be measured partly by whether they support the policy objectives that justify the regulatory intervention.

The state's position also differs from that of an ordinary contracting party. It participates in the contractual relationship while simultaneously creating the regulatory rules governing reciprocal obligations, monitoring performance, and determining sanctions for non-compliance.

¹⁵ Wafda Vivid Izziyana et al., "Strategic Legal Diplomacy Alignment in Protecting Indonesian Migrant Workers under the Kafala System in Saudi Arabia," *Lex Journal: Kajian Hukum Dan Keadilan* 10, no. 3 (2026), <https://doi.org/https://doi.org/10.25139/lex.v10i3.12561>.

¹⁶ Carolina Arlota and Brian McCall, "When Federal Law Goes Unnoticed: Assessing the CISG's Applicability Across U.S. Courts Based on an Empirical Research of Decisions from 1988 to 2020," *American Business Law Journal* 60, no. 3 (2023): 541–98, <https://doi.org/10.1111/ablj.12230>.

¹⁷ Jeroen van der Heijden, "Why Meta-Research Matters to Regulation and Governance Scholarship: An Illustrative Evidence Synthesis of Responsive Regulation Research," *Regulation & Governance* 15, no. S1 (2021): S123–42, <https://doi.org/10.1111/regg.12378>.

This combination produces an asymmetrical legal structure because regulatory authority and contractual participation are located on the same side of the transaction. Such asymmetry does not necessarily undermine contractual fairness, but it requires strong procedural safeguards and clear institutional boundaries. Foreign suppliers must be able to identify the applicable obligations, enforcement procedures, competent authorities, and consequences of breach. Without such clarity, state intervention intended to protect national economic interests may itself generate uncertainty regarding the limits of contractual autonomy and administrative discretion.

This dual role also tests the conventional application of *pacta sunt servanda*. The principle remains essential because counterpurchase obligations derive legal force from agreements voluntarily accepted by the parties. Yet the practical strength of *pacta sunt servanda* depends upon whether institutions can enforce the obligations once breach occurs. A contractual promise may be formally binding while remaining practically weak if supervision is inconsistent or sanctions are uncertain. The issue is not whether the agreement possesses normative validity, but whether that validity is supported by an enforcement structure capable of producing predictable consequences. Counterpurchase exposes the difference between contractual binding force as a legal principle and contractual effectiveness as an institutional achievement.

Legal protection must consequently be assessed through both private-law and regulatory dimensions. The private-law dimension concerns consent, obligations, performance, breach, and remedies. The regulatory dimension concerns supervision, administrative authority, enforcement procedures, sanctions, and policy objectives. Treating only one dimension as decisive produces an incomplete account of the legal relationship. Contract doctrine alone cannot explain why reciprocal obligations are imposed for national economic purposes, while regulatory law alone cannot explain the contractual expectations and remedies arising between the parties. The hybrid approach connects both dimensions and provides a stronger basis for evaluating whether the existing system creates meaningful legal certainty.¹⁸

The hybrid character also reveals a tension between economic policy and contractual fairness. Government procurement may legitimately be used to encourage national exports, yet foreign suppliers require predictable obligations before assuming contractual risks. Regulatory requirements that are too flexible may weaken policy effectiveness, while requirements that are too rigid may make performance commercially unrealistic when domestic products cannot meet quantity or quality requirements. The legal framework must therefore balance policy ambition with contractual feasibility. Such balance is particularly important for counterpurchase because success depends not only upon foreign supplier compliance but also upon the readiness of domestic producers to supply competitive goods capable of meeting international market standards.

The effectiveness of counterpurchase should consequently be evaluated through the relationship between legal design and institutional capacity. A well-drafted agreement cannot guarantee reciprocal economic benefits when monitoring is weak, institutional responsibilities

¹⁸ Hal Hill and Jayant Menon, "Trade Policy in Indonesia and Thailand," *The World Economy* 44, no. 12 (2021): 3492–3506, <https://doi.org/10.1111/twec.13231>.

overlap, or enforcement is inconsistent. Uncertainty concerning supervision and coordination among institutions responsible for evaluating and enforcing counterpurchase obligations may weaken the credibility of contractual commitments. Parties may perceive enforcement as dependent on administrative discretion rather than predictable legal procedures. Legal certainty requires a framework where contractual duties, supervisory powers, and enforcement mechanisms operate as parts of a single coherent structure.

The analysis therefore supports the characterization of Indonesian counterpurchase as a hybrid regulatory-contractual institution. This concept offers greater explanatory power than classifying counterpurchase merely as an unnamed contract or as a trade policy instrument. Its contractual dimension explains why foreign suppliers are legally bound to perform agreed reciprocal obligations, while its regulatory dimension explains why the state imposes, supervises, and enforces those obligations to pursue public economic goals. The central challenge is to ensure that both dimensions reinforce rather than weaken each other. When contractual validity is supported by clear regulatory supervision, counterpurchase can create predictable obligations and credible economic benefits. When the two dimensions operate separately, formal legality may persist while substantive legal certainty remains fragile.

B. From Formal Sanctions to Enforceable Certainty: Reconstructing Indonesia's Counterpurchase Enforcement Framework

The main weakness of Indonesia's counterpurchase regime does not arise from the absence of legal rules, but from the gap between formal regulation and effective enforcement. Counterpurchase obligations are supported by contractual commitments and legal consequences for non-performance, including warnings, penalties, and administrative restrictions. The existence of these instruments indicates that the legal system formally recognizes the need to secure compliance by foreign suppliers. Yet formal recognition alone does not ensure that obligations will be fulfilled.¹⁹ Legal protection becomes meaningful only when sanctions can be applied consistently, predictably, and effectively. The central issue therefore concerns the operational strength of enforcement rather than the mere availability of legal provisions.

This distinction separates formal legal protection from enforceable legal protection. Formal protection exists when legislation and contractual documents define obligations, rights, sanctions, and institutional authority. Enforceable protection requires those norms to produce real consequences once a breach occurs. A counterpurchase obligation may appear legally strong because it is written into an agreement and supported by sanctions, yet its practical value decreases when enforcement depends on uncertain procedures or inconsistent institutional responses. Legal certainty cannot rest solely upon the wording of regulatory provisions.²⁰ It also

¹⁹ Elizabeth Acorn, "Just a Business Decision? Debarment in Public Procurement in Canada and the United States," *Canadian Public Administration* 64, no. 2 (2021): 238–56, <https://doi.org/10.1111/capa.12413>.

²⁰ Garth J Bouwers, "Tacit Choice of Law in International Commercial Contracts: An Analysis of Asian Jurisdictions and the Asian Principles of Private International Law," *Uniform Law Review* 26, no. 1 (2021): 14–42, <https://doi.org/10.1093/ulr/unab002>.

requires a credible expectation that non-performance will trigger a foreseeable and proportionate legal response.

The enforcement problem becomes visible when warnings function as the dominant response to non-compliance. Written warnings may serve a legitimate corrective purpose by allowing foreign suppliers an opportunity to fulfil outstanding obligations before stronger measures are imposed. Their effectiveness, however, depends upon a clear escalation mechanism. Repeated warnings that are not followed by credible consequences may transform an enforcement instrument into an administrative formality.²¹ Such a pattern weakens the deterrent effect of the regulatory framework and may create an incentive for delayed compliance. An effective system should therefore ensure that each stage of enforcement has a defined purpose, legal threshold, time limit, and consequence.

Penalties are intended to strengthen the coercive force of counterpurchase obligations, particularly where non-performance results from negligence or bad faith. Their legal significance lies in attaching an economic consequence to the failure to realize agreed reciprocal commitments. A penalty that exists only as a normative possibility, however, cannot perform its deterrent function. The effectiveness of a monetary sanction depends upon whether the amount can be calculated clearly, imposed through an identifiable procedure, and enforced against the responsible party. Uncertainty surrounding any of these elements reduces the sanction's credibility. The issue is therefore not the severity of the penalty alone, but whether the entire enforcement chain is capable of producing an executable outcome.

Blacklisting presents a different enforcement logic. Unlike a financial penalty, blacklisting restricts the foreign supplier's opportunity to participate in future procurement or counterpurchase arrangements. It may create reputational and commercial consequences that encourage compliance, especially for suppliers seeking continued access to Indonesian government procurement. Yet blacklisting primarily affects future commercial opportunities rather than repairing the consequences of an existing breach.²² If a supplier has already failed to purchase or market Indonesian products, exclusion from future tenders does not automatically recover the economic value that should have been generated. Blacklisting therefore operates more effectively as a preventive measure than as a complete remedy for non-performance.

This distinction between sanction and remedy is essential to the reconstruction of legal protection. A sanction aims to discourage or punish non-compliance, while a remedy seeks to address the legal and economic loss resulting from breach. Counterpurchase requires both functions because failure to perform may undermine contractual expectations as well as public economic objectives. A supplier may be punished through administrative exclusion, yet the expected export transaction may still remain unrealized. An enforcement framework that focuses only on punishment risks leaving the underlying contractual failure unresolved.

²¹ Feyza Adha Alsyanda, Wafda Vivid Izziyana, and Helen Intania Surayda, "Analisis Yuridis Gugatan Uni Eropa Kepada WTO Terkait Kebijakan Hilirisasi Nikel Indonesia Perspektif Hukum Perdagangan Internasional," *Semarang Law Review* 5, no. 1 (2024): 13–25.

²² Mukarrum Ahmed, "The Nature and Enforcement of Choice of Law Agreements," *Journal of Private International Law* 14, no. 3 (2018): 500–531, <https://doi.org/10.1080/17441048.2018.1525062>.

Effective legal protection should therefore connect administrative sanctions with mechanisms capable of securing performance, compensation, or another legally measurable form of restoration.²³

Institutional fragmentation further weakens enforceability. Counterpurchase involves regulatory supervision, procurement authorities, contractual parties, domestic producers, and potentially other government institutions responsible for monitoring or evaluating performance. When responsibility for supervision and enforcement is distributed without a precise division of authority, uncertainty may arise over which institution should verify compliance, determine breach, impose sanctions, and evaluate corrective action. Such ambiguity is not merely administrative.²⁴ It directly affects legal certainty because parties cannot predict how the state will respond to non-performance. A credible enforcement structure requires a clearly identified institutional chain of responsibility rather than overlapping or fragmented authority.

Institutional clarity also affects accountability. Each stage of counterpurchase enforcement should be attached to an authority responsible for making and justifying a particular decision. Monitoring should determine whether contractual milestones have been achieved, evaluation should identify the nature and cause of non-performance, and sanctioning should follow established legal criteria. When these functions are not clearly separated or coordinated, enforcement may become dependent upon discretionary administrative responses. Excessive discretion creates a risk of inconsistent treatment between similar cases. Legal certainty requires decisions that can be traced to identifiable legal standards, competent institutions, and transparent procedures rather than informal or ad hoc practices.

The transnational character of counterpurchase creates another enforcement difficulty. Foreign suppliers may operate outside Indonesian territorial jurisdiction, while their assets, corporate structures, or commercial activities may be located across several countries. This condition limits the practical value of domestic sanctions when enforcement mechanisms do not reach the supplier's relevant assets or contractual interests.²⁵ A legal obligation may therefore be valid under Indonesian law yet remain difficult to enforce beyond national borders. Counterpurchase agreements must anticipate this problem through contractual mechanisms that strengthen jurisdictional certainty, dispute resolution, payment security, and execution of legal consequences before a breach occurs.

The Letter of Undertaking plays an important role in addressing this problem because it records the foreign supplier's reciprocal commitment and links that commitment to the wider counterpurchase arrangement. Its effectiveness, however, depends on the precision of its substantive terms. The document should identify the value of the obligation, type of products, realization period, evidence of performance, applicable consequences, and relationship with the

²³ Amin Dawwas, "Dépeçage of Contract in Choice of Law: Hague Principles and Arab Laws Compared," *Journal of Private International Law* 17, no. 3 (2021): 473–96, <https://doi.org/10.1080/17441048.2021.1967622>.

²⁴ David Collins, "Government Procurement with Strings Attached: The Uneven Control of Offsets by the World Trade Organization and Regional Trade Agreements," *Asian Journal of International Law* 8, no. 2 (2018): 301–21, <https://doi.org/10.1017/S2044251316000278>.

²⁵ Unggul Heriqbaldi, "Do National Export Promotion Programs in Indonesia Support Export Competitiveness?," *Heliyon* 9, no. 6 (2023): e16918, <https://doi.org/10.1016/j.heliyon.2023.e16918>.

principal and secondary contracts.²⁶ Ambiguous commitments may create difficulties when authorities attempt to determine whether a breach has occurred. A stronger enforcement architecture therefore requires contractual documents that convert policy expectations into measurable and legally verifiable obligations rather than broadly formulated commitments.

Enforcement must also account for the cause of non-performance. Failure may result from deliberate refusal, negligence, weak commercial planning, product unavailability, insufficient domestic production, quality deficiencies, technical standards, or limited international competitiveness. Treating all failures as legally identical would ignore relevant differences in responsibility. Yet allowing every commercial obstacle to excuse performance would undermine the binding force of the agreement.²⁷ A proportionate framework should distinguish culpable non-performance from objective impediments through predetermined criteria. Such criteria should clarify the evidence required, the authority responsible for assessment, and the legal consequences attached to each category of failure.

Proportionality therefore forms an important component of substantive legal certainty. Predictability does not require automatic imposition of the harshest sanction whenever an obligation remains incomplete. It requires parties to understand the relationship between the seriousness of the breach and the corresponding legal consequence. Minor delay, partial realization, negligent non-performance, and intentional avoidance should not necessarily produce identical responses.²⁸ A graduated enforcement system can preserve contractual discipline while avoiding excessive sanctions. Warnings, corrective periods, monetary penalties, contractual remedies, and blacklisting should operate as connected stages based on the seriousness, duration, cause, and economic impact of non-compliance.

A reconstructed enforcement framework should consequently integrate contractual and administrative mechanisms rather than allowing them to operate separately. Contractual documents should establish measurable obligations and consequences of breach, while regulatory institutions should monitor compliance and activate sanctions according to clear procedures. Financial penalties should be linked to identifiable enforcement authority, and blacklisting should function as a final administrative consequence rather than the sole meaningful response to persistent breach. Dispute settlement provisions should also support enforcement when disagreements arise concerning performance, liability, or calculation of obligations. Integration would reduce the distance between contractual promises and the institutional capacity needed to make those promises effective.

The economic purpose of counterpurchase must remain central to any enforcement reform. Sanctions should not become an end in themselves because the policy objective is not simply to punish foreign suppliers. Counterpurchase seeks to generate reciprocal economic

²⁶ Małgorzata Pohl-Michalek, "CISG Exclusion during Legal Proceedings," *The Chinese Journal of Comparative Law* 11, no. 1 (2023): cxad003, <https://doi.org/10.1093/cjcl/cxad003>.

²⁷ Wafda Vivid Izziyana et al., "The Implementation Of The Employment Agreement For Indonesian Migrant Workers In Saudi Arabia," *Jurnal Sociological Jurisprudence* 2, no. 2 (2019): 73–80, <https://doi.org/https://doi.org/10.22225/scj.2.2.899.73-80>.

²⁸ Stella Ladi and Dimitris Tsarouhas, "International Diffusion of Regulatory Governance: EU Actorness in Public Procurement," *Regulation & Governance* 11, no. 4 (2017): 388–403, <https://doi.org/10.1111/rego.12163>.

value through purchases or marketing of Indonesian products, support export opportunities, and strengthen national competitiveness. Enforcement is effective when it increases the likelihood that these objectives will actually be achieved. A system that successfully imposes penalties but repeatedly fails to secure the agreed reciprocal economic benefit would still represent incomplete regulatory success. Performance, compliance, and restoration should therefore become the primary measures of enforcement effectiveness.

Legal certainty ultimately depends upon the connection between normative clarity and institutional capability. Indonesia's counterpurchase regime already contains contractual obligations and legal consequences for non-performance, yet their protective value depends upon how reliably those rules can be implemented. Reconstruction should focus on four connected elements: precise contractual obligations, clearly allocated institutional authority, proportional and sequential sanctions, and enforceable remedies capable of responding to cross-border non-performance. This model moves legal protection beyond formal recognition toward operational certainty. Counterpurchase can then function not merely as a legally documented trade mechanism, but as an enforceable regulatory-contractual arrangement capable of protecting contractual expectations while advancing Indonesia's national economic interests.

CONCLUSION

Indonesia's counterpurchase regime demonstrates that formal regulation alone cannot guarantee effective legal protection. Counterpurchase should be understood as a hybrid regulatory-contractual institution because it combines contractual autonomy, reciprocal commercial obligations, administrative supervision, and state economic policy. The main legal weakness lies in the gap between formally recognized sanctions and their enforceability, particularly when institutional responsibilities, enforcement procedures, and remedies are not fully integrated. Legal certainty therefore requires more than written obligations and administrative penalties; it depends on clear contractual standards, identifiable institutional authority, proportional sanctions, effective monitoring, and enforceable remedies for cross-border non-performance. A reconstructed framework should connect the Letter of Undertaking, primary and secondary contracts, regulatory supervision, and sanction mechanisms into a coherent enforcement structure. Such reconstruction would strengthen contractual predictability, improve compliance, protect the legitimate interests of the parties, and enhance the ability of counterpurchase to support Indonesia's export development and broader national economic objectives.

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