

# Analisis penerapan doktrin clean hands dalam putusan arbitrase sengketa investasi asing: studi kasus Hesham Al Warraq v. Republic of Indonesia dan Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia = Analysis of the clean hands doctrine in international investment arbitration award: case study of Hesham Al Warraq v. Republic of Indonesia and Churchill Mining PLC and planet mining Pty Ltd v. Republic of Indonesia

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## Abstrak

Dalam perjanjian investasi internasional pada umumnya, penanam modal asing diberikan hak untuk menggugat negara penerima investasi secara langsung (Investor-State Dispute Settlement / "ISDS"). Dalam beberapa putusan arbitrase, adanya unsur pelanggaran hukum dalam kegiatan investasi mengakibatkan tidak dapat diterimanya gugatan ISDS dengan berlandaskan kepada doktrin clean hands. Doktrin clean hands pada esensinya menekankan adanya kewajiban penanam modal asing untuk memiliki 'tangan yang bersih' atau bebas dari pelanggaran hukum agar ia berhak mengajukan gugatan. Skripsi ini membahas kedudukan doktrin clean hands hukum investasi dan penerapannya dalam beberapa yurisprudensi, yakni putusan arbitrase Hesham Al Warraq v. Republic of Indonesia dan Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia. Penelitian ini adalah penelitian hukum dengan metode pendekatan yuridis-normatif yang bersifat deskriptif analitis untuk menggambarkan berbagai pandangan mengenai kedudukan doktrin clean hands dalam hukum investasi dan penerapannya dalam beberapa yurisprudensi. Hasil penelitian dari skripsi ini menyimpulkan bahwa kedudukan doktrin clean hands dalam sumber hukum investasi masih menuai pro dan kontra dari berbagai pihak. Sebagian menilai bahwa doktrin ini telah menjelma menjadi prinsip hukum umum dalam Pasal 38 ayat (1) ICJ Statute, sedangkan sebagian lagi menilai bahwa doktrin ini masih berstatus doktrin semata. Namun, konsep dasar doktrin ini telah termanifestasi dalam beberapa putusan arbitrase untuk menolak gugatan ISDS penanam modal asing yang telah melakukan pelanggaran hukum, termasuk dalam studi kasus Hesham Al Warraq v. Republic of Indonesia dan Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia.

.....Most of international investment agreement granted foreign investors the right to resolve disputes with the government of the host state where their investment was made (Investor- State Dispute Settlement / "ISDS"). In several arbitral awards, an incomppliance or illegal conduct related to the investment has rendered the claims deemed inadmissible based on the clean hands doctrine. Clean hands doctrine requires a claimant to comply with the law in order to be entitled to sue and obtain remedies. This thesis addresses the status of clean hands doctrine in investment law and its manifestation in Hesham Al Warraq v. Republic of Indonesia's and Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia's arbitral awards. This research is a legal study with normative juridicial approach and descriptive analytical analysis which aim is to illustrate the status of clean hands doctrine in investment law and its application in various jurisprudences. The result of this thesis concludes that the status of clean hands doctrine as one of the source of international law is remain unclear. There are debates regarding its status as a general principle of law

stated in Article 38 (1) ICJ Statute. Nonetheless, the fundamental concept of this doctrine has been manifested in some of the arbitral awards as a bar relief for the claims brought by investors which investments were either made or operated in violation with the host state's domestic law, including in the Hesham Al Warraq v. Republic of Indonesia's and Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia's case.