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THE URGENCY OF IMPLEMENTING EXHAUSTION OF LOCAL REMEDIES IN INVESTMENT DISPUTE SETTLEMENT REGARDING MINING LICENSES IN INDONESIA

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Abstract

The exhaustion of local remedies (ELR) is a principle viewed as an exception rather than a rule in international investment law. Hence, it tends to be forgotten, and Investor-State Dispute Settlement (ISDS) is preferable in resolving disputes concerning mining licenses. However, this has proven detrimental to Indonesia as a developing country. This research aims to analyze ELR implementation in international investment law and the urgency of implementing ELR for Indonesia as a developing country. This research uses normative and comparative juridical methods to find that ELR remains an important principle despite being generally waived and that there is an urgency for Indonesia as a developing country to implement ELR to (1) reassert sovereignty; (2) minimize financial loss; (3) improve domestic adjudication and strengthen rule of law. Implementing ELR can be done through BITs by referring to India and Argentina as models. An amendment to domestic law and regulation is also needed to ensure the enforceability of ELR in Indonesia.

Keywords: *exhaustion of local remedies; Indonesia; investment dispute settlement; mining licenses*

A. Background

The Exhaustion of Local Remedies (ELR) principle obligates parties to exhaust dispute resolution measures accorded by the national law of the host state before submitting a dispute to an international court.[1] ELR did not originate from international investment law but customary international law.[2] Diplomatic protection and international human rights law view ELR as a rule. However, ELR is an exception rather than a rule in international investment law.[3] Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) regulates that parties approval to arbitration before ICSID overrides other remedies, but they may require ELR as

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[1]Huala Adolf, Hukum Penyelesaian Sengketa Internasional (Jakarta: Sinar Grafika, 2019), 24.
[2] Martin Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law," 2017, 2, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf (accessed on 22/08/2023).
[3] Brauch, 3.

a condition for consent. In international investment law, ELR's inconsistent application is indicated by only a few of the 3,000 BITs that apply it.[4]

ELR is not a foreign concept to Indonesia's legal system. Article 7 of Law No. 39 of 1999 on Human Rights (Human Rights Law) requires ELR before pursuing legal settlement efforts in regional and international forums. ELR was implemented in Article 9 of the Republic of Korea-Indonesia Bilateral Investment Treaty (BIT) 1991. However, Investor-State Dispute Settlement (ISDS) that grants foreign investors the ability to bring a claim opposing the host state by submitting a claim to ICSID[5] is preferred as reflected in Article 32 Paragraph (4) of Law No. 25 of 2007 on Investment (Investment Law) which selects international arbitration to solve disputes that arise between the government and foreign investors. Indonesia also ratified the ICSID Convention through Law No. 5 of 1968 on the Settlement of Disputes between States and Nationals of Other States on Capital Investment. This creates problems related to mining licensing in Indonesia.

Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia asserts that the government has power over Indonesia's natural resources and must be used for the people's best interests. This power manifests in licenses required to conduct mining activities in Indonesia. One of the licenses required is a Mining Business License (MBL). MBL has been the object of several disputes, e.g. Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (Churchill Mining dispute) dispute about MBL revocation[6] and the India Metals & Ferro Alloys LTD (IMFA) v. Republic of Indonesia dispute (IMFA dispute) regarding overlapping MBLs.[7]

Article 57 Paragraph (1) Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia (MEMR Regulation) Number 7 of 2020 on Procedures for Granting Areas, Licensing, and Reporting on Mineral and Coal Mining Business Activities states that the issuance of MBL for foreign investors is carried out by the Minister of Energy and Mineral Resources. This authority is delegated to the Head of the Investment Coordinating Board (BKPM) through Article 1 of the MEMR Regulation Number 25 of 2015 on the Delegation of Authority to Grant Licenses in the Mineral and Coal Mining Sector in the Framework of the Implementation of One-Stop Integrated Services to the Head of the Investment Coordinating Board. In 2022, the Land Use and Investment Management Task Force was formed through Presidential Decree Number 1 of 2022 on Land Use and Investment Management Task Force and one of their

[4] Brauch, 4.
[5] Siti Munawaroh and Sugiono, *Hukum Investasi* (Surabaya: Jakad Publishing, 2019), 235–36.
[6] Kementerian Komunikasi dan Informatika, "Pemerintah Indonesia Menang Mutlak Di Forum Arbitrase ICSID," Ministry of Communications and Informatics, 2019, https://www.kominfo.go.id/content/detail/17482/pemerintah-indonesia-menang-mutlak-di-forum-arbitrase-icsid/0/berita.
[7] Indonesia for Global Justice, "Gugatan ISDS: Ketika Korporasi Mengabaikan Kedaulatan Negara Kompilasi Cerita Kasus ISDS Di Indonesia," 2019, 38, https://igj.or.id/wp-content/uploads/2019/10/Majalah-IGJ-ISDS-Lawsuit-compressed.pdf (accessed on August 10, 2023).

tasks, according to Article 3(b) of the Presidential Decree, is to provide recommendations to the Minister of Investment or the Head of the Investment Coordinating Board on MBL revocations.

However, although the government is authorized to revoke or deny MBLs, they could become the reasons for arbitration claims. MBL revocation might violate Indonesia's commitments in BITs, namely Fair and Equitable Treatment (FET) and expropriation. In the Churchill Mining dispute, the Indonesian government, precisely the East Kutai Regent, was accused of indirect expropriation and violating the FET standard in Indonesia-UK BIT and Indonesia-Australia BIT before it was declared that the government did not do any violations in the final ruling.[8]

The current BITs, which tend to implement ISDS without requiring ELR, increase the possibility of an international arbitration claim against Indonesia. Indonesia has been involved in 12 investment disputes between 1990-2016[9], two of which were about mining licenses, namely the Churchill Mining dispute and the IMFA dispute. Implementing ISDS will contribute to the increase in those numbers. Moreover, Administrative Courts (PTUN) in Indonesia are capable of solving disputes regarding mining licenses per Article 1 Paragraph (9) and Article 53 of Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 concerning State Administrative Courts. Indonesia, as a developing country reliant on foreign investment, has been significantly impacted by ISDS. This can encourage the government to prioritize investor interests over national interests.

The aforementioned issues can be addressed by limiting the grounds for international arbitration claims by amending the ISDS clause so that ELR becomes a prerequisite.[10] Moreover, Indonesia supports the ongoing ISDS reform and considers ELR among the reform options.[11] The inconsistent implementation of ELR and its lack of regulation in Indonesia has made Indonesia susceptible to international arbitration claims which negatively impacted Indonesia. Therefore, Indonesia must review and consider consistently implementing ELR in foreign investment disputes regarding mining licenses through BIT.

There were previous studies that have been conducted relating to this issue, namely (1) *The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia*, which focus on the

[8] Kementerian Komunikasi dan Informatika, "Pemerintah".
[9] Sefriani, "The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia," *Jurnal Dinamika Hukum* 18, no. 2 (2018): 245–46, https://doi.org/http://dx.doi.org/10.20884/1.jdh.2018.18.2.1961.
[10] Prita Amalia and Garry Gumelar Pratama, "Indonesia Dan ICSID: Pengecualian Yurisdiksi ICSID Oleh Keputusan Presiden (Indonesia and ICSID: Exclusion of ICSID Jurisdiction by Presidential Decision)," Majalah Hukum Nasional, No.1, 2018, 17, https://doi.org/10.33331/mhn.v48i1.110.
[11] UNCITRAL, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Indonesia A/CN.9/WG.III/WP.156 (New York, 1-5 April 2019)," 2019, 4, https://documents.un.org/doc/undoc/ltd/v18/075/93/pdf/v1807593.pdf?token=S7CG80ohk8ZMyqyICZ&fe=true.

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urgency of IIA and ISDS for Indonesia, this study also discuss IIA and ISDS models that can be implemented in Indonesia by referring to India, Canada, and Australia,[12] and (2) *Crisis and Reform: Dispute Settlement in Bilateral Investment Treaties in Third World Countries*, which compares the response of third world countries such as South Africa, Brazil, and India towards investment dispute settlement crisis.[13]

B. Identified Problems

This paper will discuss the following issues:

1. How is the implementation of ELR in foreign investment dispute settlement concerning mining licenses in international arbitration forums?
2. What is the urgency of implementing ELR in foreign investment disputes related to mining licenses for Indonesia as a developing country?

C. Research Methods

This paper used the normative juridical method that focuses on examining rules or norms application in positive law and the comparative juridical method to describe a systematic study of legal traditions and specific legal regulations on a comparative basis.[14] This paper focuses explicitly on comparing ELR implementation in different areas of law and international investment dispute cases concerning mining licenses, specifically Corona Materials, LLC v. Dominican Republic and Tethyan Copper Company Pty Limited v. the Islamic Republic of Pakistan (TCC v. Pakistan) by analyzing BITs violations connected to mining licenses to formulate a specific BIT regulation regarding ELR. Then, the India and Argentina BITs are analyzed to formulate an ideal ELR implementation for Indonesia. An array of legal sources is used, including Article 33 Paragraph (3) of the Constitution, Law No. 25 of 2007 on Investment, Law No. 4 of 2009 on Mineral and Coal Mining, India-Kyrgyzstan BIT 2019, United Kingdom-Argentina BIT 1993, and other laws concerning mining licensing and investment dispute settlements to determine whether changes are needed to implement ELR in Indonesia. Secondary legal sources including books, scientific articles, and media concerning ELR are used to explain and strengthen the research.[15] The data analysis method used in this study is the qualitative juridical method by collecting and compiling legal sources in a certain framework, then

[12] Sefriani, "The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia," 245–50.
[13] Syahrul Fauzul Kabir, "Krisis Dan Reformasi: Penyelesaian Sengketa Dalam Perjanjian Investasi Bilateral Di Negara Dunia Ketiga," *Mimbar Hukum* 33, no. 2 (2021): 401–35, https://doi.org/https://doi.org/10.22146/mh.v33i2.3728.
[14] Andriensjah, *Hak Desain Industri Berdasarkan Penilaian Kebaruan Desain Industri* (Bandung: Penerbit PT. Alumni, 2013), 40.
[15] Bachtiar, *Mendesain Penelitian Hukum* (Yogyakarta: Penerbitan Deepublish, 2021), 102.

the legal sources is analyzed through legal interpretation, legal construction, and legal argumentation.[16]

D. Research Findings and Discussions

1. Exhaustion of Local Remedies in International Investment Law and Other Fields of Law

ELR aims to give the state where the violation transpired the chance to rectify the breach within its national system before the state's international responsibility can be questioned.[17] ELR stemmed from diplomatic protection, which is an action performed by one state against another state attributed to mistreatment or negligence to a person or a national property.[18] Regulations on ELR in diplomatic protection are established in the International Law Commission Draft Articles on Diplomatic Protection (ILC ADP). Article 14 established ELR as a rule by requiring it before submitting an international claim. However, Article 15 stipulated exceptions for ELR, which included:

a. The absence of reasonably accessible domestic remedies to render adequate relief or there are no reasonable opportunities to obtain such relief;
b. An excessive deferment in the remedial proceeding that can be ascribable to the country presumed to be liable;
c. The injured party and the country presumed to be liable had no meaningful relationship at the date of injury;
d. Domestic remedies are unattainable for the injured party;
e. The country presumed to be liable has renounced its right to implement ELR.

ELR, as a rule, is reinforced in the Electronica Sicula S.p.A. (ELSI) case, where ICJ stated that they were incapable of accepting that an essential customary international law principle, like ELR, could be implicitly waived in the absence of any statements indicating a purpose to do so.[19] In the Interhandel case, ICJ also declared ELR as a "well-established principle" of customary international law.[20] Similarly, international human rights law views ELR as an obligation. Article 41(c) of the International Covenant on Civil and Political Rights states that the

[16] Kalimatul Jumroh and Ade Kosasih, *Pengembalian Aset Negara Dari Pelaku Tindak Pidana Korupsi (Studi Undang-Undang Tentang Pemberantasan Korupsi Dan United Nation Convention Against Corruption 2003)* (Bengukulu: Penerbit CV. Zigie Utama, 2015), 39.
[17] Brauch, "Exhaustion", 2.
[18] Made Selly Dwi Suryanti and Melpayanty Sinaga, "Indonesian Government Diplomacy on Protecting Indonesian Migrant Workers in Papua New Guinea During COVID-19 Pandemic," Nation State: Journal of International Studies 5, No. 1 (July 2022): 51–52, https://doi.org/10.24076/nsjis.v5i1.716.
[19] ELSI Case (United States of America v. Italy) Judgment of 20 July 1989 (1989), 42.
[20] Interhandel Case (Switzerland v. United States of America) Preliminary Objections (1959), 27.

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Human Rights Committee will only handle an issue if ELR has been invoked, except if the process is unjustly extended.

ELR is obligatory in customary international law and international human rights law. However, rather than requiring ELR, international investment law gives discretion in deciding whether to implement ELR. Article 26 of the ICSID Convention stated that approval to arbitration before ICSID will be assumed to exempt other legal remedies. Still, the exhaustion of domestic judicial or administrative remedies may be required as a prerequisite. It can be concurred that a state's decision to implement ELR should be explicitly stated, and failure to do so means waiving it. The same notion is implemented in non-ICSID cases.[21]

ELR can be applied as a procedural or substantive requirement. As a procedural requirement, it is only related to claims admissibility, while as a substantive requirement, it is a fundamental element of the wrong.[22] For example, denial of justice only emerges when ELR has been invoked.

ELR implementation in BITs differs from the original notion. BITs often stipulate a time limitation before the ELR requirement disappears even if a final ruling has not been given, as demonstrated in the United Kingdom-Argentina BIT 1993 (UK-Argentina BIT 1993). Some argued that this is not ELR.[23] However, the UN interpreted the pursuit of local remedies within a specified time in BITs as ELR.[24]

The absence of a law on ELR in Indonesia has left its interpretation vague in Indonesia's investment law. In the Human Rights Law, Article 7 interpreted ELR as pursuing domestic proceedings to the highest level, namely the Supreme Court. Meanwhile, similarly to the UN, Article 9 of the Korea-Indonesia BIT 1991 interprets the pursuit of local remedies within 12 months as ELR. This BIT did not specify what "local remedies" meant, but generally, ELR is understood to include administrative or judicial remedies, which do not include procedures like negotiation and mediation.

Although ELR remains an option for resolving investment disputes, ISDS is preferred due to the widespread belief that ISDS is the determining factor in foreign direct investment (FDI) entry. However, several researches proved that ISDS is not the first determinant factor and only becomes crucial as a last resort if the relationship between states

[21] Mmiselo Freedom Qumba, "The Exhaustion of Local Judicial Remedies in Investor-State Dispute Settlement: A Proposal for the African Continental Free Trade Agreement on Investment Protocol," Law, Democracy and Development, VOLUME 25 (2021): 163, https://doi.org/10.17159/2077.
[22] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), 174.
[23] Raul Emilio Vinuesa, "Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience," *Law and Business Review of the Americas* 8, no. 4 (2002): 509, https://scholar.smu.edu/lbra/vol8/iss4/2http://digitalrepository.smu.edu.
[24] Wintershall Aktiengesellschaft v. Argentine Republic Award (2008), 74.

deteriorates.[25] Another factor is competitiveness since studies showed FDI competitors signing BITs containing ISDS encouraged developing countries to do the same. Studies on the link between BITs and FID inflows yield inconclusive and conditional conclusions.[26] Nevertheless, the need for foreign investment was among the main motivations for countries to implement ISDS.

2. Exhaustion of Local Remedies in Investment Dispute Settlement Regarding Mining Licenses

Despite its standing in international investment law, ELR is still implemented in international investment disputes regarding mining licenses, especially concerning denial of justice. One example is Corona Materials, LLC v. Dominican Republic, which is about a mining project in the Dominican Republic called the Joama project. In 2007, Corona applied to operate the Joama Exploitation Concession and then applied to the Ministry of Environment for an environmental license a few months later which was rejected on August 18, 2010, because the project was "not environmentally viable".[27]

On October 5, 2010, Corona filed a reconsideration request, but the Dominican Republic did not provide a formal response as the deadline had expired.[28] Then, Corona filed for arbitration against the Dominican Republic on these matters: (i) The license denial was claimed to violate the Dominican Republic-Central America Free Trade Area (CAFTA-DR) provisions regarding national treatment and minimum standard of treatment (including FET and full protection and security) and tantamounts to indirect expropriation;[29] (ii) the lack of response to the reconsideration request constitutes a denial of justice.[30] Dominican Republic rejected the entire claim and opposed the jurisdiction of the tribunal because the presumed acts occurred beyond the three-year limitation for submitting arbitration claims in Article 10.18.1 of the CAFTA-DR.[31] The Tribunal agreed with Corona and therefore, had no jurisdiction.[32]

Moreover, the Tribunal does not believe that an administrative act at a first-instance decision-maker level could amount to a denial of justice according to customary international law when additional remedies might be available. This aligned with the NAFTA tribunal in Loewen v. United

[25] Sefriani, "The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia," 247.
[26] Srividya Jandhyala, "Why Do Countries Commit to ISDS for Disputes with Foreign Investors?," *AIB Insights* 16, no. 1 (2016): 8, https://doi.org/https://doi.org/10.46697/001c.16892.
[27] Corona Materials, LLC v. Dominican Republic Award, 10-11.
[28] Corona Materials, LLC, 12.
[29] Corona Materials, LLC, 23-29.
[30] Corona Materials, LLC, 52.
[31] Corona Materials, LLC, 18.
[32] Corona Materials, LLC, 81.

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States, which stated that to constitute a denial of justice, ELR should be fulfilled despite a waiver of the treaty.[33]

Denial of justice is a rule in customary international law addressing the defects suffered by aliens in the domestic administration of justice.[34] ELR is applied in this context as a substantive requirement since it is a fundamental component of denial of justice. In this case, Corona failed to implement ELR as there was no administrative adjudicatory proceeding when the Motion for Reconsideration was submitted, and no legal action was taken without a formal response.

ELR was questioned in the TCC v. Pakistan dispute about a mining license application denial. TCC claimed that Pakistan breached Article 3 Paragraph (2) of the Australia-Pakistan BIT on FET. The FET standard generally includes (1) investor's legitimate expectations protection; (2) denial of justice and due process; (3) responsibility of vigilance and protection; (4) stability and transparency; (5) non-arbitrary and non-discrimination; (6) proportionality; and (7) authority abuse.[35]

TCC claimed that Pakistan breached due process in the mining lease denial process by not providing proper notice and the reasons for the rejection, failing to address the concerns about the application, and breaching TCC's fundamental due process rights by advancing the appeal date on short notice and issuing the verdict without proper reasoning. Pakistan argued that TCC did not complain about the lack of due process before the Supreme Court, to which TCC responded that ELR was not required. The Tribunal's decision implies that ELR is unnecessary in determining a lack of due process. The inadequacy of the license denial justifications and Pakistan's refusal to provide more information or meetings were sufficient evidence.[36] Pakistan tried to apply ELR as a substantive requirement for FET but failed because it was not mandatory.

The disputes above illustrate ELR's importance as a prominent principle in international investment law despite most BITs waiving it and the fact that domestic courts remain an inseparable component of investment dispute settlement. These disputes could have been settled through domestic courts, but the general waiver of ELR prevented it. It only made sense for the domestic judiciary to be involved in matters involving investments in a state's territory, particularly mining licenses.

3. The Urgency of Exhaustion of Local Remedies for Indonesia as a Developing Country

[33] The Loewen Group, Inc. and Raymond L. Loewen v. United States of America Award (2003), 47.
[34] Jarrod Hepburn, "The International Extension of Denial of Justice," *Modern Law Review* 85, no. 6 (2022): 1357, https://doi.org/10.1111/1468-2230.12743.
[35] Mas Rahmah, *Hukum Investasi* (Jakarta: Prenadamedia Group, 2020), 56.
[36] Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan Decision on Jurisdiction and Liability (2017), 236.

The implementation of ISDS marks the end of ELR in investment disputes. But nowadays, as a developing country, Indonesia must require ELR in international investment dispute settlement regarding mining licenses.

First, ISDS restricts Indonesia's sovereign rights to control its domestic affairs,[37] including its natural resources, as stated in the Constitution. Mining license regulations embody Indonesia's sovereignty to assure that the mining activities in Indonesia are performed in the state's interest. However, ISDS allows foreign investors to file a claim opposing any host state's measures concerning mining licenses that they deem unfavorable, even if it aims to protect public rights, or[38], even if they violate the applicable law. This could make the government refrain from adopting measures for the public interest. This is known as regulatory chill, where the government's concern over a possible arbitration claim from foreign investors influences policy development.[39] The Indonesian government has acknowledged this as a concern in Working Group III ISDS Reform.[40] Therefore, it is urgent to reassert Indonesia's sovereignty through implementing ELR.

Second, international arbitration is expensive and considered burdensome to state finances.[41] In the IMFA dispute, the proposed compensation amount was US$ 469 million or approximately Rp 6,68 trillion.[42] Albeit it was decided that Indonesia did not have to pay the compensation, there is no guarantee that the same ruling will be given in the future. As long as foreign investors are given direct access to international arbitration, there will always be the possibility of Indonesia having to compensate in a high amount. Other developing countries have fallen victim to this. Before escaping through an out-of-court settlement, ICSID penalized Pakistan to compensate TCC for $5.8 billion, equivalent to approximately 2% of Pakistan's GDP.[43] ELR can help avoid a similar fate by resolving disputes before reaching international arbitration.

[37] Kabir, "Krisis Dan Reformasi: Penyelesaian Sengketa Dalam Perjanjian Investasi Bilateral Di Negara Dunia Ketiga," 404.
[38] Munawaroh and Sugiono, Hukum, 236.
[39] Axtamova Yulduz Axtamovna, "'Regulatory Chill' in ISDS," Web of Humanities: Journal of Social Science and Humanitarian Research 2, no. 02 (February 2024): 141, https://webofjournals.com/index.php/9/article/view/747/724.
[40] UNCITRAL, "Possible," 3 (accessed on 04/02/2024).
[41] Muhammad Kodri, "Peniadaan Mekanisme ISDS Dalam RCEP," detiknews, 2020, https://news.detik.com/kolom/d-5279487/peniadaan-mekanisme-isds-dalam-rcep (accessed on 20/04/2024).
[42] Handoyo, "Indonesia Menang Gugatan Arbitrase IMFA, Uang Negara Terselamatkan Rp 6,68 Triliun," Kontan.co.id, 2019, https://nasional.kontan.co.id/news/indonesia-menang-gugatan-arbitrase-imfa-uang-negara-terselamatkan-rp-668-triliun (accessed on 21/03/2024).
[43] Munir Ahmed and Elaine Kurtenbach, "World Bank Stays $5.8B Fine on Pakistan in Reko Diq Mine Case," AP News, 2020, https://apnews.com/general-news-38600f6a7ead6b16f1b4919af4b8a444 (accessed on 01/04/2024).

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Third, implementing ELR helps develop domestic adjudication in Indonesia, but doing the opposite may encourage them to improve their quality.[44] PTUN has proven its competency and neutrality in resolving foreign investment disputes regarding mining licenses. In 2017, PT Sriwijaya Bintang Tiga Energi and PT Brayan Bintang Tiga Energi, a company involving two investors from India, claimed before PTUN Palembang that the Governor of South Sumatra had no authority to withdraw their MBL. The judges granted the claims and declared that the revocation was invalid.[45] This shows that Indonesia's courts can be impartial in matters involving foreign investors, and ELR would further develop them. It will also strengthen the rule of law in Indonesia.[46] These improvements could elevate foreign investors' trust in Indonesia and increase investment.

In conclusion, the government should consider implementing ELR in foreign mining license investment disputes for national interests. Regarding the concern that ELR would drive foreign investors away, Argentina has implemented ELR in UK-Argentina BIT 1993 and still received investment from the United Kingdom amounting to £8.5 billion in 2021.[47]

4. Exhaustion of Local Remedies Implementation in Developing Countries as a Model for Indonesia

The ICSID Convention's rule that ELR is waived in investment treaties unless otherwise stated means that to implement it, ELR must be explicitly included. Therefore, ELR inclusion through BITs and adjustments in national law are needed. Other developing countries, such as India and Argentina, have implemented ELR in their investment dispute settlement processes, and it can be used as a model for Indonesia.

India implemented ELR through the India-Kyrgyzstan BIT 2019 and explicitly required ELR before international arbitration. Article 15.1 obliges the disputing investor to exhaust domestic remedies for an obligation breach in Chapter II of the BIT, which includes expropriation and excludes Articles 9 and 10. Article 5.6 states that ELR is considered when assessing an alleged expropriation breach.

Expropriation is a state's sovereign right that is only lawful if conducted following international investment law and investment

[44] Gabrielle Kaufmann-Kohler and Michele Potestà, *European Yearbook of International Economic Law: Investor-State Dispute Settlement and National Courts Current Framework and Reform Options* (Cham: Springer Nature Switzerland AG, 2020), 51, https://doi.org/https://doi.org/10.1007/978-3-030-44164-7.
[45] Palembang State Administrative Court Decision Number 26/G/2017/PTUN-PL (2017), 133.
[46] Kaufmann-Kohler and Potestà, European, 49.
[47] Department for Business and Trade United Kingdom, "Trade and Investment Fact Sheets: Argentina," 2024, https://assets.publishing.service.gov.uk/media/65f959dded6b8d0011861630/argentina-trade-and-investment-factsheet-2024-03-21.pdf (accessed on 24/03/2024).

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agreements.[48] However, there is no clarity on what amounts to indirect expropriation. According to UNCTAD, the ambiguity of the interference level with ownership rights necessary for an action or set of actions to qualify as indirect expropriation is among the most contentious topics.[49] Since mining license revocation or rejection can be seen as government interference with an investor's rights, and it can be claimed as indirect expropriation, like in Corona Materials, LLC v. Dominican Republic.

Revocation or denial of a mining license is also considered a breach of FET in TCC v. Pakistan. The FET clause in BITs aims to shield investors from unfair practices, i.e., canceling licenses arbitrarily.[50] While the FET clause in UK-Argentina BIT 1993 had a restrictive approach, Article 3.1 of the India-Kyrgyzstan BIT 2019 did not directly mention FET but prohibits customary international law violations, e.g., due process and denial of justice violation.

To implement ELR in BITs, Indonesia can establish certain substantive standards violations, e.g. expropriation and FET standards, that require ELR before international arbitration. By obliging ELR for an expropriation and FET claim, investment disputes regarding mining licenses that are often considered violations of those regulations must first be solved through domestic remedies like PTUN. Therefore, it decreases the possibility of an international arbitration claim concerning a mining license.

Meanwhile, Argentina implemented ELR through the UK-Argentina BIT 1993 with a scope that is not as narrow as India. While India only implements ELR for particular breaches, Article 8 Paragraph (1) applies ELR for all disputes between a host state and a foreign investor arising from the BIT that have yet to be resolved amicably. This is another alternative to implementing ELR. Rather than limiting ELR applicability, it can be obligatory for all investment disputes, including those concerning mining licenses.

Implementing ELR does not mean that Indonesia has to refrain from ISDS altogether. A time limit to pursue ELR before international arbitration can be established allows the parties to resolve their disputes through domestic remedies. It also prevents the investors from waiting for

[48] Syahrul Fauzul Kabir, Fariz Farrih Izadi, and Asep Hakim Zakiran, "Sovereignty or State Responsibility? Expropriation and the Right to Regulate in International Law on Foreign Investment," *KnE Social Sciences* 2023 (October 2023): 25, https://doi.org/10.18502/kss.v8i18.14193.

[49] Christopher Gibson, "A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation," American University International Law Review 25, Issue 3 (2010): 378, http://digitalcommons.wcl.american.edu/auilr.

[50] Ana De Carvalho Maria Soares and Widya Rainnisa Karlina, "The Difference of Interests between Host State and Investors Related to Fair and Equitable Treatment in Bilateral Investment Treaty," International Journal of Multicultural and Multireligious Understanding 7, no. 6 (July 2020): 212, https://doi.org/10.18415/ijmmu.v7i6.1656.

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an unreasonably long time and is preferable in investment treaties. The time limitation varies and can range between a few months and years.

In Article 8 Paragraph (2) of the UK-Argentina BIT 1993, disputes can only be applied to either ICSID or an *ad hoc* arbitral tribunal or an international arbitrator chosen by a specific agreement or created under UNCITRAL if the domestic court has not made any decision in eighteen months or if the dispute continues even after a final decision, or if they agreed. The dispute shall be submitted to UNCITRAL if they cannot agree on a procedure within three months of written claim notification. However, these rules can be adjusted if the parties agree in writing.[51]

Unlike Argentina, India stipulated a longer time for ELR with more prerequisites for international arbitration. Article 15.1 of the India-Kyrgyzstan BIT 2019 gives the injured investor one year from the date it learned about the alleged breach to pursue local remedies. If a satisfying resolution is not achieved in at least five years, the investor can give a notice of the dispute to the host state and is given no more than six months after receiving it to solve the dispute through third-party procedures such as consultation, negotiation, or others.[52] Overall, investors must wait six years before an international proceeding can commence.

Creating an investment climate that can emphasize national interest without burdening foreign investors is important. Accordingly, a shorter time for ELR should be established, such as 18 months, just like in Argentina, which is also the standard time for ELR,[53] to ensure that a reasonable amount of time is given without making investors wait too long. Furthermore, international arbitration can commence if the dispute continues even after a final judgment is rendered, as in UK-Argentina BIT 1993.

The India-Kyrgyzstan BIT 2019 also regulates exceptions to ELR. Article 15.1 states that the ELR does not apply if the claimant can prove that no domestic remedies can legitimately provide any relief for the alleged breach. This is similar to the 'futility' condition in Article 15 of the ILC ADP, which is said to be applied in a narrow sense.[54] Article 15.5 (iii) and (iv) also stated that a waiver of ELR by the injured parties was an exception. Meanwhile, according to Article 8 Paragraph (2)(b) of the UK-Argentina BIT 1993, ELR can be waived if the parties agree. Indonesia can refer to these treaties or the conditions detailed in the ILC ADP.

Amendments to the applicable law are also needed to ensure ELR enforceability in Indonesia. The regulations currently in force on investment disputes between the government and a foreign investor in

[51] Article 8 Paragraph (3) of the Argentina-United Kingdom Bilateral Investment Treaty 1993.
[52] Article 15.2 and Article 15.4 of the India-Kyrgyzstan Bilateral Investment Treaty 2019.
[53] Kaufmann-Kohler and Potestà, European, 51.
[54] Kaufmann-Kohler and Potestà, 47.

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Article 32 Paragraph (4) of the Investment Law state that the dispute can be solved through international arbitration, which the parties must agree upon. ELR should be included in formulating investment dispute settlement by becoming a prerequisite before international arbitration.

There should also be an amendment to Article 154 of Law No. 4 of 2009 on Mineral and Coal Mining (Mining Law), which regulates that any disputes resulting from the implementation of MBL, IPR, or IUPK are settled by domestic courts and arbitration in compliance with statutory provisions. In practice, most investment disputes regarding mining licenses involving foreign investors are settled directly through international arbitration. This should be revised, and disputes involving foreign investors should be mentioned. By amending these regulations, the BITs and the applicable law will align, making it legally binding to pursue ELR in international dispute settlement regarding mining licenses in Indonesia.

E. Conclusions

Exhaustion of Local Remedies (ELR) is a known doctrine and a rule in customary international law and international human rights law. However, international investment law waives ELR unless stated otherwise, and ISDS is preferable because it brings investment into the country. However, ELR is still applied in investment dispute settlements regarding mining licenses, like in the Corona Materials, LLC v. Dominican Republic concerning denial of justice and TCC v. Pakistan regarding the FET standard. This shows that ELR remains a prominent principle in international investment law.

Nowadays, Indonesia has an urgency to implement ELR more consistently in investment disputes regarding mining licenses through BITs inclusion, namely (1) To reassert Indonesia's sovereignty over its domestic affairs; (2) International arbitration can be detrimental to the state's financials; (3) To improve the existing domestic adjudication and strengthen the rule of law.

Implementing ELR through BITs can be done by requiring ELR in claims involving violations often linked with mining license disputes, e.g., indirect expropriation and FET standards, or by requiring ELR for all disputes arising from the agreement. Moreover, ISDS can still be implemented by stipulating time limitations that must pass before international arbitration can commence. The standard period for ELR is eighteen months. Additionally, a regulation regarding exceptions to ELR can be included with a narrow or detailed scope, like the ILC ADP. Lastly, Investment and Mining Law amendments are needed to ensure ELR enforceability in Indonesia.

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