Department of Law
Spring Term 2018

Master Programme in Investment Treaty Arbitration
Master’s Thesis 15 ECTS

Title: The Exhaustion of Local Remedies

Subtitle: Substantive Requirement of Exhaustion of Local Remedy Rule in Investment Arbitration

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Abbreviations

BIT  Bilateral Investment Treaty
FCN  Friendship, Commerce and Navigation (Treaty)
FDI  Foreign Direct Investment
ICC  International Chamber of Commerce (in reference to the Arbitration Institute)
ICJ  International Court of Justice
ICSID  International Centre for Settlement of Investment Disputes
IIA  International Investment Agreement
IISD  International Institute for Sustainable Development
ILC  International Law Commission
LCIA  The London Court of International Arbitration
MFN  Most Favoured Nation (Clause)
NAFTA  North American Free Trade Agreement
NGO  Non-Governmental Organization
PCA  Permanent Court of Arbitration
SCC  Stockholm Chamber of Commerce (in reference to the Arbitration Institute)
UNCITRAL  United Nations Commission on International Trade Law
UNCTAD  United Nations Conference on Trade and Development
WBAT  World Bank Administrative Tribunal
FET  fair and equitable treatment
ESLR  Exhaustion of Local Remedies
US  United States
1. INTRODUCTORY REMARKS

The role of investment arbitration has immensely increased in the recent past. Especially the big investors and companies prefer to settle their disputes through arbitration instead of going to the courts which is a cumbersome and lengthy procedure. Mostly the investors invest in that state where there is a bilateral investment treaty between their state and the other state. However, in some Bits there is a clause of exhaustion of local remedy but most of the Bits are silent in this regard. The purpose behind this where it is not explicitly mention in the Bit is to secure investment in their state as mostly the investors avoid investment where they are forced to exhaust local forum or resort to domestic courts because they are mostly preferred to go for international forum for the redressal of their grievance. However, it does not mean that they should not bound to exhaust the local or domestic remedy, in some situations it is imperative to exhaust the local remedy for the determination of international wrong i.e. the breach of FET and in claim of denial of justice. Most of the tribunals decline jurisdiction where the investors have not exhausted local remedy because either there is an effective remedy available in the host state or for the determination of denial of justice claim or international wrong it is necessary to exhaust local forum whether it is an administrative machinery or the local courts.

My thesis is about when the investor should exhaust the local remedy and when it is not necessary to go for domestic forum. It is a very important aspect in investment arbitration as this matter relates to the jurisdiction of the tribunal as well. In many cases the tribunals have not accepted the investors' claims because the claimants have not resorted to the local forum.

1.1 Purpose

My purpose for writing this paper is to discuss the exhaustion of local remedy rule which is still present in investment arbitration in different shapes. I would like to discuss the application and function of this rule where the BITS did not explicitly mention this rule even then it may present in an implicit way. Most of the tribunals decline jurisdiction where the investor did not exhaust the adequate local remedy but at the same time the tribunals also rejected claims where the claimant exhausts the local forum and it gave the findings that the tribunal cannot relitigate the same matter and hence cannot act as a court of appeal like in Mondev case. "It is one thing to deal with remedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the tribunal under NAFTA to act as courts of appeal."1 So it is a catch 22 situation for the investor and it is a very interesting and unresolved matter in the investment arbitration which forced me to discuss in this paper.

The main focus of my paper will be that the investor should ESLR where it is available and that is adequate, reasonable and effective. I will also focus whether there is a substantive requirement or procedural requirement of this rule in international investment arbitration.

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1.2. Brief Introduction of ESLR

There is no deeper expose of the substantive aspect should be conducted. The local remedy means "any forms of redress available to an aggrieved foreign investor under the host State’s domestic legal framework." The “rule” is the requirement that these remedies have to be attempted in one way or another before elevating the matter to the international level. The local remedy has deep roots in international law. Before initiation of the international proceedings it is necessary to exhaust the local remedy a well-established rule in customary international law. The national of the state has to exhaust the local forum available in the host state before the state espouse claim against the host state in international forum. So this rule has developed in the context of diplomatic protection and thus considered to be a procedural requirement with regard to diplomatic immunity. However, in the present days the claimant can claim directly to international forum without depending on his host state. The local remedy availability means any judicial or administrative forum available in the host state for the redressal of his grievance and giving the opportunity to the host state to rectify its wrong for the injury done to the investor. This means that the investor should fully exhaust the local forum, making appeal to the highest level and should obtain a final decision especially when the remedies available are judicial one. But there is an exception to this rule that the investor should not pursue the local remedy where it will serve no purpose and the whole exercise would be futile. Professor Don Wallace Jr. has emphasized that the rule must be applied reasonably and not treated as a rule of infinite pursuit by platonically ideal parties with bottom less wallets to pay legal fees or professors wishing to create new legal theories...

There is no procedural requirement to exhaust the local remedy for establishing the international jurisdiction. This requirement can be included in the merits of the claim but that should be done with great caution. Outside the denial of justice claim and the certain similar claim frame under this standard the local remedy rule has a limited application in investment arbitration.

There are at least eleven cases where this rule has been applied recently in investment arbitration. These cases mostly governed by the ICSID or UNICTRAL Rules. The tribunal found it necessary to apply this rule as a substantive requirement as opposed to procedural requirement even though the treaty excluded such rule. This means that the rule has still wider application in investment arbitration as compare to the past. This tendency and importance shall be discussed in this paper in light of different claims in different cases. Moreover, the development of the rule from the diplomatic immunity to the present trend and evolution will also be the part of this paper. I will also discuss the evolution of BITS in investment arbitration. How the local remedy rule invoked by international tribunals in different cases and the claimant should exhaust the local remedy where it is necessary and should not ESLR where it will serve no purpose. And finally, the conclusion of the above discussion.

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2 Forster 2010, p.204.
4 Finnish Ships Arbitration(Finn. v U.K.) 3 R.I.A.A 1479,1495(1934).
5 Don Wallace,Jr.,Fair and Equitable Treatment and Denial of justice:Loewen v. U.S. and Chattin v Mexico,in International Investment Law and Arbitration,leading cases from NAFTA and ICSID,BILATERAL TREATIES and Customory international law 669,684(T. Wieler ed.,2005).
1.3. Disposition

In the first two chapters of this thesis, I will explain the evolution of the local remedies rule and how it came to be customary international law and the procedural requirement for claiming the diplomatic protection because in the past the investor was unable to initiate international proceedings directly. He was dependent upon the discretion of the home state and he had to ESLR before requesting his host state. Then I will discuss the modern era replaces the diplomatic immunity i.e. BITS. Then different awards rendered by different tribunals by giving due consideration as substantive requirement of the ESLR and lastly the claims of denial of justice and FET etc. and then conclusion.

1.4. Limitation

Owing to the rapid growing importance in investment arbitration I will discuss the procedural and substantive requirement of the ESLR and its applicability in different cases like claims frame under denial of justice and the other claims like expropriation and by failure of using effective means to enforce claimant’s right and what is an available effective remedy and to what extent it should be exhausted.

2.1 Substantive or Procedural requirement

There is a lot of debate whether the local remedy rule is a procedural requirement or the substantial requirement. As far as the procedural requirement is concern it means the claimant at least make some attempt at the local forum before going for international forum in this way it is necessary for the admission his claim before the tribunal. However, in substantive requirement the claim can be admitted to the international tribunal without making any attempt at the local level but the claimant can lose his claim on the merits, as his international right has not been violated.

Now we will see how the local remedy rule and diplomatic immunity as a procedural requirement evolve over a period of time and then it replace by substantive requirement in the modern era being observed by different tribunals which will discuss below.

2.1.1 Back ground of the local remedy

The principle that the domestic forum in the host state should be exhausted before initiation international proceedings is being derived from the concept of law of diplomatic immunity. This rule has its deep roots in international law. This means giving the discretionary right to the state whose citizen has injured to act against that state who has inflicted that injury. In such cases the exhaustion of local remedy rule being regarded as customary international law which is evident from the ILC Draft on diplomatic protection. Through this system the local remedy rule has developed. Before the new developed mechanism of investment treaty scheme the diplomatic protection was the only option for the protection of the investor to claim for the compensation against the host state for the harm done to him.

Protection of the investor is however different from diplomatic protection as it is based on the state concluded agreement with another state and not on the principle of international law. The protection of the investor mechanism has evolved immensely in the last decade and most of its elements remain unclear as they are not tested or argued enough. Whether or not the concept of local remedy rule is

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6 Article 22. See also Interhandel, the first ICJ case establishing this.
derived from diplomatic protection rule applies if nothing contrary is agreed upon is still left for arguments.

The protection was given to alien in another state since at least the 14th century. In its beginning, diplomatic protection was only applied as giving an individual right to reprisal against an individual from the host area, where none was provided there. This kind of private reprisal with public sanction was practiced in international relations for a long time and the injured party needed to exhaust local remedies before requesting right to reprisals. In the 1600s and 1700s, as nation States were formed, the principle that reprisals could only be sought after a failed or delayed attempt at local rectification entered the growing treaty body. As centralized State power grew over time, so did the tendency for States to protect their citizens abroad and exercise their interests; it even grew into an obligation, as opposed to only a right. As private reprisals slowly changed into public ones, the idea that local judicial mechanisms should be tried first persisted.

The first time the local remedies rule was actually applied in a structured context was in 1863, in a case between Peru and USA, before the courts application and long history of tribunals. From the mid-20th century, the local remedies rule grew as customary international law in cases of diplomatic protection, as mentioned in judgements and awards such as Interhandel, Finnish Ships and Ambatielos Arbitration. All of these regarded exhaustive attempts at local remedies as a condition precedent for exercising international diplomatic efforts against the host State, even though the Finnish Ships tribunal found that the remedies had been exhausted in that case. Towards the end of century, the ambitious efforts of the International Law Commission to codify international law diplomatic protection included the local remedies rule in both the first 1996 draft and the current 2006 version.

2.1.2 In what context the ESL rule has been developed

The local remedy rule has not been developed in any legal space. The sovereignty of nations is the basis for the development of the local remedies rule and it is in this context that it has to be understood, even though it existed in more elusive shapes before States. The right to exercise diplomatic protection, and consequently the requirement to exhaust all local remedies, has never been a right assigned to the injured individual but rather to his home State. The aggrieved alien only have rights under international law by virtue of the State to State relationship.

The initial development of the rule was a violent one. In a modern context, resort to peaceful dispute settlement is a natural but it state of war and when there was a lack of rule of law the existence of such rule was an extraordinary principle. In the present century, institutional and organized means to achieve this end of non-violence have been established.

The local remedies rule is a good example of international comity and recognizes that by entering foreign territory, individuals subject themselves to the domestic authorities. So it was a very effective sophisticated tool in a world where international relations otherwise were conducted with the help of

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7 Ibid p.25
8 Ibid p.27
9 The Montano Case, Amerasinge 2004 p.35
10 Arts. 22 and 44 respectively.
11 Amerasinghe 2004 p.45 with case references
armed forces, in one way or another. Its strength and sophistication are demonstrated beyond doubt in
the fact that the rule has survived hundreds of years of international dispute evolution\(^\text{13}\). However, the
certain limitations and exceptions also existed spreading over a period of time, whether reasonable and
effective remedy available or the certain claimants have standing or not etc.

Diplomatic protection has two prone approach, one is the host state against the injured party's home
state and another the home state obligation against the individual. The privilege given to the host state
that the local remedy should be exhausted before its humiliation before the international forum, so the
basis of the rule is "sovereign rights of the host or respondent State should be recognized and
respected".\(^\text{14}\) Judge Córdova marvelously form his separate opinion in the seminal Interhandel case, and
this rule got unequivocal recognition in ICJ practice:

"The main reason for [the local remedies rule's] existence is the absolute necessity of harmonizing
international and national jurisdictions – thus ensuring the respect due to the sovereign jurisdiction of
States – to which nationals and foreigners are subject and in the diplomatic protection of governments
to which only foreigners are entitled. This harmony and respect for the sovereignty of states is achieved
by granting priority to the jurisdiction of the State's domestic courts in cases where foreigners appeal
against an act of its executive or legislative authorities. Such priority is in turn guaranteed only by
respect for the principle of local remedies."\(^\text{15}\)

However, the sovereignty of the host state is the fundamental basis of the local remedy rule, but it does
not mean there are no other interests involve in it. It includes the interest of the home state, the healthy
relationship of the affected state with the international community. The host state does not
unnecessarily involve in it unless force to do so. Since the home state and the host state normally avoid
the matter to take to international forum which may in case of high profile matter bring bad will to the
state, so preferably to be handled at the domestic forum. The logic behind the principle also recognizes
that the host State cannot be held responsible for every single public act by officials within its
jurisdiction, without having been given a change to rectify it.\(^\text{16}\) In this way the protection of the individual
is not the major concern of the state where the major attention cannot be withdrawn. Thus, to avoid
the conflict between the sovereigns at the cost of some individual is not the big deal in the eyes of the
states.

Hence the old roots of this rule can be found in the field of diplomatic protection, where it is regarded as
customary international law. Moreover, it can be seen in different shapes where there is an
international organization claim against the state or the article 26 of the European Convention on
Human Rights.\(^\text{17}\)

The diplomatic protection was the only way for the protection of the alien property before the
development of investment treaty mechanism but by the end of the 20\(^{\text{th}}\) century the exhaustion of local
remedy has also become its part to claim the compensation for the harm done to the foreign investor by
the mistreating host state.

\(^{13}\) Amerasinghe 2009a, p.1
\(^{14}\) Amerasinghe 2004, p.15. See also Interhandel, para 27
\(^{15}\) Interhandel, para 45
\(^{16}\) Dodge 2006, p.6
\(^{17}\) Reparation for Injuries for the first time ICJ recognized the principle within this area
During the 20th century there was a hot debate of the classification of the local remedy rule into diplomatic protection whether it is a procedural or substantive rule. Since considering it is substantive rule means there is no violation of international law unless the remedy is exhausted whereas, in case of procedural requirement it can be taken into international tribunal and the state can be waived this rule. In the early century the substantive requirement was most prevailing but now it has been largely being dispensed with. But it is still prevailing in different shapes and that will be discussed later with regard to different cases.

2.1.3 Modern development of BITS in the era of investment treaties

As we discussed above that in the beginning there was a procedural requirement of the ESLR for claiming the diplomatic immunity but with the passage of time in the modern era the states concluded agreements with each other for the protection of investor and to attract foreign investment which is known as bilateral investment treaties. So the diplomatic immunity has been largely replaced by the BITS which is important to discuss some aspects of it.

The prevailing practice of the protection of the foreign investment through international treaties which has tremendously grown in last couple of decades originally started from the mid-20th century. These treaties are present in the forms of regional, multilateral and bilateral.

The first modern BIT was concluded between Pakistan and West Germany in 1959 and after that more than 2800 active bilateral treaties have been signed.\(^{18}\)\(^{50}\) The development of the treaties during the past 50 years has been exponential, peaking around the end of the previous millennium and now slowing down.\(^{19}\)\(^{51}\) The arbitration has a paralleled growth with the conclusion of the treaties explosion in treaty conclusion has been paralleled with a growth in arbitration on these treaties: in 1995, only six investor-State proceedings were known; that number has now risen to some 400.\(^{20}\)

To establish a good trading relation between the states the most notable ones is the FCN (friendship, commerce and navigation) treaties which was concluded in the late 18th century.\(^{21}\) The BIT practice did not gain speed till 20th century. Unlike its predecessor FCN treaty the later BITS have mainly focused on investment issues. However, the protection of the investors through treaties can be seen by the post-war era, when there was a cold war, spreading of communism and colonial power losing their grip. At this point of time the investments were subject to arbitrary expropriation and political changes. In the early seventies, fifty expropriation of international investments took place every year including outside the Soviet bloc which was previously restricted.\(^{22}\) Under these circumstances it is natural to protect the investor’s right. Thus, the early development of the BITS was initiated by the developed countries to safeguard the global economy. However, the skepticism from the developed world in seventies and eighties has affected its growth. During the first 30 years of the instrument’s lifetime, almost 400 BITs were concluded. In the end of the century, as communist economies failed, and global trade was liberalized, the hostility among developing countries changed and many policies were reevaluated in the changing circumstances. Countries those who were formerly against the treaties scheme they also

\(^{18}\) UNCTAD 2011, p.100
\(^{19}\) UNCTAD 2007, p.1
\(^{20}\) UNCTAD 2011, p.102
\(^{21}\) Vandevelde 2010, p.21
\(^{22}\) Vandevelde 2010, p.46.
began to conclude treaties to attract the foreign direct investment. Hence in early 1990s the vast majority of the active BITs were concluded and since then the BITs were starting concluded between the developed countries on the one hand and the developing countries on the other end. Advanced economies do not normally conclude this type of treaties, mainly because different types of free trade agreements already cover their mutual relations. At the same time, though, treaties are increasingly concluded between two States that are traditionally regarded as “developing”.

It goes without saying that though there are number of treaties but mostly they have the uniform structure since its very inception when the standard was set. Most BITs have contained similar provisions. Only few need to mention to prove they are mostly standardized average BIT contains 10 to 20 provisions, having a basic principle which are as follows;

. Definition of "investor" and "investment"

. Standard of treatment provided to the investor such as "fair and equitable treatment", “full protection and security” or other formulations expressing due process and protection against discrimination) - .Dispute resolution (one of the main reasons for concluding a BIT. This is a major difference between the BIT and the earlier trade treaties). 23

These are the main provisions which compose the BITs, however, they may be mentioned and adapted in different style for each BIT. in recent years BITs has become more diverse adding novel clauses in its "boilerplate" structure. The application of the provisions are beyond traditional investments, liberalization commitments and providing protection for various public interests. 24

2.1.4 Opposition against the BITS regime

Since the BITS have played a pivotal role with regard to the protection of the investment, but it is not out of the place to mention that it has also subject to great criticism. The BITS scheme has taken the matter absolutely away from public to the private parties, whose objective more often do not correspond to the state and its tax payer. Unlike commercial arbitration the investment dispute includes state and the investor in which huge amount is involved hence there is a growing concern of transparency in these matters. A worrisome fact is that the arbitration tribunal as oppose to the court proceedings does not normally allow the third party, becoming the matter purely between private entities. Hence completely excluding the interest of the third party. Another grave concern is the arbitration on environmental issues which favors investor over the interest of the host state. Many commentators criticize this imbalance. 25 The environmental matter is a complex issue and requires certain degree of flexibility at the local authorities. Thus, submitting this issue to the arbitral tribunal, whose obligation to the party and whose interpretation is limited to the brief BIT that does not regulate environmental concern may jeopardize other interest. There are inherent conflicts between the rationale behind investment arbitration which solve this on an ad hoc-basis and environmental regulations, which by definition require a broader perspective. These conflicts risk to restrain national as well as global authorities in their long-term policy planning. 26 The investment arbitration is also be criticized from different angles where the investor sideline the domestic forum and prefer the

23 Vandevelde 2010, p.58
24 UNCTAD 2007, p.1
25 Romson 2012, p.337.
26 For a thorough analysis on this subject, see Åsa Romson’s PhD thesis Romson 2012
international forum. In this way he gives the opportunity to the international forum to review and criticize the local forum hence in a way questioned the absolute sovereignty of the state. In most of the developing countries there is a reservation where the foreign investor went for international forum without exhausting local remedy in the host state hence undermining their adjudication system. Criticizing the investment from this perspective and insisting to exhaust the local forum comes of a diplomatic immunity. The flow of free private capital however is the main reason for the increase role of the BITS. It is often are said to improve institutional modernization and reform in developing countries. To attract the foreign investor, it is a good way to improve the governance and judicial function.

### 2.2.1. Calvo doctrine and the local remedy rule

This doctrine is named after the Argentinean lawyer and foreign minister named Carlos Calvo. What is the standard of treatment should be given to the investor by the host state is a very much relevant to my topic. In 20th century there was hot debate in this area. US was the opinion that it should be according to international standard, other said that it would be no less than national treatment which is no way less than international treatment. The latter view is known to be Calvo doctrine. The emergence of international law is solely related to the strength of the parties involved in it and how the host states react, or control actions taken in its own jurisdiction. The necessity of this doctrine had its origin in mid-20th century when there was no precise form of foreign protection available to the investor except the diplomatic protection which was also viewed by developed countries especially the Calvo dominated Latin America as discriminatory. At that time the investment was mainly focused on the exploitation of natural resources and the expropriation had been taken place through mob attacks and change in political and power scenario. So there was a serious need of foreign protection to the investor. The global investment was badly effected and there was a great outflow foreign capital. The existence of this new doctrine was essential for the investment world.

Under this doctrine the foreign investor while investing in other country consider to be no less than the national of that country. The problem arises where the developed countries investor investing in the countries who has less developed or not that much appreciable fine judicial system. Owing to this reason this doctrine has abolished in a large extent. However, there are still some BITS who insists on the exhaustion of local remedy rule i.e. Calvo doctrine.

As the Calvo doctrine is losing its significance it still observed by the tribunals and it has its reflection in their awards and decision which will be discussed later below. The doctrine has its insistence to exhaust the local forum i.e. the local courts and considered the foreign investor no less than its domestic counterpart. Christoph H Schreuer, who is a great authority in investment arbitration has the opinion that the Carlos Calvo doctrine has though largely not prevailed in modern investment arbitration, but it has still “children and grandchildren that have an uncanny family resemblance to him”. As it can be seen that in arbitral tribunal has given importance while taking the jurisdiction and hence considering it as a substantive requirement in many cases the tribunal decline jurisdiction where the claimant did not

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28 The Bennouna Report, para 29 et seq.  
29 Guatemala and Costa Rica are however currently the only countries on record with reservation notifications to ICSID that they will insist on a clause of this nature, both explicitly insisting on exhaustion of local remedies  
30 Schreuer 2005, p.3.
exhaust the local remedy. Christop H Schreuer called it an "adopted child" which may later transform into the old exhaustion of local remedy rule.\textsuperscript{31} It is relevant to mention here that this rule has still some influence in investment arbitration.

2.2.2. Minimized role of diplomatic protection in the modern investment arbitration

In the modern international investment arbitration the role of diplomatic immunity has greatly dispensed with. In the diplomatic protection the investor has to exhaust local remedy and after that it is a discretion of the state to take up the matter against the host state for the injury done to him. If the home state do so in this way it replaces the investor and the dispute transform into state to state and the investor is no more party to the dispute. This is also the shortcoming of this rule. Moreover, as this rule insists on exhausting local forum the matter may become more public and may benefit other actors who are not the party to the dispute but normally in investment dispute parties prefer to keep the dispute away from public as this can some time effect the credibility of the home state. In modern investment arbitration the host state submit his sovereignty to international arbitration to attract the investor and the investor willing to resolve his dispute outside his own jurisdiction to international forum.

2.2.3. Application of local remedy in investment arbitration

The rule of exhaustion of local remedy though largely dispense with in the present investment BIT regime. The ICSID art 26 which states that the exclusion of other remedy and NAFTA chapter 11 mention no compulsion to invoke this rule. However, if the parties agree they may make it mandatory before going for international tribunal. The united Convention draft has also included this rule.\textsuperscript{32}

Mostly BITS have the same structure and almost majority provisions are uniform. so in modern BITS they are mostly silent about this clause as by including this rule in the BIT the investor may feel reluctant to invest in that country especially in developing countries where the host state can influence administrative and judicial function. in 1960s this rule was likely to be present even there was clause for submitting the dispute to international arbitration. But with the passage of time this rule was started fading away and the interest of the foreign investor is now becoming the major concern. Every BIT has a dispute resolution clause which is normally very short, and they use article 26 of ICSID as it is, and it mostly referred to institutional rules to fill gaps with detailed regulations.\textsuperscript{33} Thus, ICSIDs the exclusive forum for arbitration sideling the domestic legislation.

2.2.4. BITS AND THE LOCAL REMEDY RULE CLAUSE

In modern BITS there is always present a dispute resolution clause which refers the matter to the arbitration. Normally, in case of dispute the matter refers to the ICSID and the claimant has given some discretion to choose other arbitral forms as well the most known of them is the UNICTRAL rules but also the ICC and SCC.\textsuperscript{34} It is relevant to mention here that like commercial contract it has multi tired standard for dispute resolution, meaning thereby is that the BIT may have a clause of negotiation i.e. to settle the matter in amicable manner through negotiation before going to arbitration. But it not normally the

\textsuperscript{31} Ibid, p.17.  
\textsuperscript{32} United Nations Code of Conduct 1989; OECD Draft Convention 1967 art 7(b)  
\textsuperscript{33} UNCTAD 2007, p.100  
\textsuperscript{34} UNCTAD 2005, p.5, Amerasinge 2004, p. 268
obstacle before the arbitral tribunal as far the jurisdiction is concern. The claimant has not needed to give some authentic proof that the negotiation has taken place it is just needed to show some effort for resolving the matter in amicable manner. Hence it is not aground for the opposing side to take objection on this ground. However, there is a waiting period also known as cooling off period in which the arbitration cannot take place. But it also makes no sense to just wait for the expiration of the cooling off period before filing the arbitration.

BIT may has also a clause of exhaustion of local remedy before going to arbitral tribunal. In older times this rule was more strictly followed. This rule is well described in Calvo doctrine and present not only in Latin American countries, but other countries as well. However, the modern practice is that the BIT are mostly silent on it and the arbitral tribunal while taking the jurisdiction interpret the BIT and decide the matter depending on the circumstances and facts of each. There is also a certain modification to the exhaustion of remedy rule in which a certain time limit is mentioned in a BIT clause before filing the arbitration, for instance such clause was mentioned in Art 8 of the UK – Argentinian BIT, which was recently put before an arbitral tribunal set up within the Permanent Court of Arbitration system, and pursuant to the UNCITRAL rules. The BIT states that a claimant shall file the dispute before the domestic court and wait for the decision till 18 months and even after the decision or after lapse of 18 months the dispute still persists then the claimant can resort for international tribunal. However, the claim did not file the claim before the Argentinian courts and took the plea that it would be a futile exercise to wait for the expiration of the 18 months and then resort to inevitable arbitration considering it a procedural obstacle. The tribunal before whom the matter was observed that it was not he exhaustion of local remedy but the claimant should have filed the claim and wait for the decision. The tribunal agreed with the host state that this clause has a mandatory character. Thus, the tribunal decline the jurisdiction in this case because the British investor has made no attempt to file the claim before the local forum.

The Mazeffine case which was based on Argentina and Spain and somehow similar to the above mentioned case. in this case the claimant did not file claim before the local forum as per required by the BIT and he directly went to international tribunal avoiding the clause of the BIT which states that the claimant should file claim before local court and wait for 18 months period of the decision. But the tribunal did not decline jurisdiction and held that because the claimant through MFN clause in the BIT can benefit himself from another BIT which was between Chile and Spain. This BIT was silent on the exhaustion of local remedy rule relating to the dispute resolution clause hence the claimant got this advantage.

In Abaclat case the tribunal ruled “it would have been unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement.” In this case the tribunal did not much emphasis on this provision and regarded as an ineffective mode of dispute resolution clause. The tribunal allowed to disregard this local remedy rule and considered it as mere theoretical one.

35 07 China – Côte d’Ivoire art 9(3), Netherlands – Jamaica art 9. Austria – Armenia art 13(2). Romania has furthermore introduced the rule on a regular basis.  
36 ICS Inspection  
37 Ibid, para. 251  
38 Abaclat, para 583
In all these cases Abaclat, Mazeffine ICS inspection the tribunal did not focus on the substantive or procedural requirement but had focused on the major aspect of the remedy available. The tribunal had interpreted the cooling off period in different awards in different ways.

2.2.5. BITS and implied application of rule of local remedy

We see before 1980s in BITS this rule of local remedy either clearly mention or expressly excluded. But after that waiver started appearing in most of the BITS and now in most modern BITS it is nowhere to be found. BITS which whose languages are vague and not clear about this rule, the arbitral tribunal shall consider the application of local remedy rule according to the facts and the circumstances of the case, and considering the intentions of the parties. However, completely silent BITS has forced the tribunal for the implied application of the local remedy rule. Ralph Alexander Lorz has however investigated many sample of BITs, especially taking account of 148 treaties concluded by Germany and their application with local remedy rule. He concludes that some tendencies can be detected in the treaty practice of Germany, a major BIT player. Lorz believes that Germany tried many solutions over a period of time but its treaty partner and Germany itself came to the conclusion that waiver the rule is the most suitable option. So it can be said if we see in the BIT which clearly excluded this rule it would be an old BIT and if there is a plain language and the matter is referring to the ICSID it will not clearly waive the rule entirely that would be the case in the modern BIT which is concluded in 21st century. So it can be concluded there is a no clear regulation of the local remedy rule in investment arbitration because we see that older BITS which have clearly excluded this rule are still valid and the modern BITS leave some discretion to the claimant to choose the arbitral form. Apart from ICSID, all other alternative options are silent to this rule.

3. Substantive Requirement of ESLR in International Investment Arbitration

From the above discussion we can conclude that the now the BITS are considered to be the main source of resolving the disputes between states and investor. Unlike in the past where the investor depended upon the home state to initiate international proceedings and had to ESLR in the context of diplomatic immunity, now the investor can directly resort to international tribunal. Unless there is a clause in the BIT which explicitly mention to ESLR the claimant is not bound to exhaust the local forum. But we see in practice the mostly BITS are silent on the ESLR issue and it depends upon the circumstances, facts and the intentions of the parties while concluding agreement with each other. And the question whether the claimant should exhaust the local remedy has to be interpreted by the tribunal according to the circumstances and facts of each case. It is pertinent to mention here that the tribunal while deciding this issue must consider whether the remedy available is reasonable, effective and adequate.

The most important aspect is that nowadays the procedural requirement of the ESLR has almost lost its importance. Even in Mazeffine case where there was a procedural requirement of cooling off period of 18 months (BIT clause) had to be observed before going to international tribunal but the tribunal dispensed with that procedural requirement and allowed the claim by widening the scope of the MFN clause in the same BIT. Thus, most of the tribunal dispensed with this requirement and accept the jurisdiction. Hence there is a substantive requirement of this rule which has been given due consideration and that can be seen in the cases discussed below.

39 Lorz 2009, p.47
40 Ibid p.48
According to Sir Robert Jennings, the local remedies rule is essentially confined to the cases of diplomatic protection. Other commentators do not agree with that Garcia-Amador in his article on state responsibility prepared for ILC in 1960. Article 21 states that "once the local remedies have been exhausted, to submit an international claim to obtain reparation injury suffered by him."

Professor James Crawford SC. rapporteur on state responsibility of the ILC has stated the exhaustion of "local remedies is not limited to diplomatic protection"².

Professor Greenwood in his First Opinion refers to "the principle that a court decision which can be challenged through the judicial process does not tantamount to a denial of justice."³ The principle is supported by many United State Mexican Tribunal.

We will discuss few cases here where the investor went to international arbitration and the respondent state took the defense that the claimant did not exhaust the local remedies, hence the tribunal did not have jurisdiction and what did the tribunal observed and decided. The basic test to exhaust the local remedy is whether the remedy available to the investor is effective and adequate or not. In these cases we will discuss whether the remedy was available and whether it was effective and adequate or not. The meaning of remedy available its effectiveness and adequacy is given as under:

Availability: The applicant must be able to pursue the local remedy without any difficulty or impediment, whether practical or legal have conditions of exercising the remedy; and make use of it in the circumstances of the case. The remedy must exist not only in theory but also in practice and have a certain degree of immediacy.

• Effectiveness: The remedy must exist in the domestic legal system which provide effective redressal in relation to the case, with a reasonable prospect of success and without undue delay. The investor does not need to exhaust futile or unhelpful remedies.

Adequacy or sufficiency:

The remedy must be capable of providing redress to the applicant in relation to the specific harm alleged.

• Futility or ineffectiveness: Local remedies need not be exhausted if they “are obviously futile,” “offer no reasonable prospect of success,” or “provide no reasonable possibility of effective redress.” The foreigner must prove not only a low likelihood of success, but the inability of the domestic system to provide effective relief.⁴²

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⁴² Id. art. 15, cmt. 2; Id. cmt. 4.
Undue delay caused by the allegedly responsible state in the conduct of domestic proceedings is another exception. No precise time limit can be abstractly determined, as this depends on circumstances such as the volume of work required for the case to be thoroughly examined.\textsuperscript{43}

Lack of a relevant connection between the foreigner and the allegedly responsible state is an exception that covers circumstances in which requiring ELR would be unreasonable or unfair, or cause great hardship.\textsuperscript{44}

Waiver of the requirement by the allegedly responsible state: The waiver may appear in a pre-existing treaty, a contract between the state and the foreigner or an ad hoc arbitration agreement, or be implied or inferred from the state’s conduct.\textsuperscript{45}

\subsection*{3.1.1. Loewen 2003}

Treaty: NAFTA

Arbitral rules: ICSID

Material claim: Mistreatment in domestic court proceedings violating fair and equitable treatment.

Local remedies: Substantive. Claimant could, at least in theory, have appealed the court’s decision to the Supreme Court and failure to do so made the claim fail on its merits.

The Loewen vs U.S.A. case is quite relevant in this regard. The brief facts of the case are the Loewen group (LG) is the owner of the chain of funeral homes in Canada and O Keefe is the same business in Mississippi. The dispute arises between them and after having failed to settle their dispute amicably O Keefe goes to the Mississippi jury, which awarded O’Keefe $500 million dollars in damages, including $75 million for emotional distress and $400 million in punitive damages. Mississippi law requires a 125\% bond to stay execution of judgment pending appeal. The Loewen filed an affidavit that it was unable to provide such a huge amount in an appeal bond which was necessary for the supreme court and surety companies. It also moved for the new trial on various grounds including challenging the verdict as to liability as well as punitive and compensatory damages. But it was also turned down by the court. Later, the Loewen goes to the Missippi Supreme Court for the relaxation of the surety bond which is necessary for filing appeal the request also rejected by the supreme court after giving interim stay they also cancelled it.

After the adverse bonding decision by the Supreme court Loewen left no other option but to have settlement with the plaintiff O Keefe.

Loewen initiate arbitration proceedings against the USA under chapter 11 of NAFTA for the violation of articles 1102, 1105 and 110 which is national treatment, minimum standard of treatment and hence resulting expropriation.

Respondent while taking the jurisdictional objection contended that the claimant should have exhausted the local remedy to the last resort. It further stated by the respondent that it cannot claim the violation

\textsuperscript{43} Id. cmt. 5.
\textsuperscript{44} Id. cmt. 7
\textsuperscript{45} Id. cmt. 12–14
of NAFTA because the claimant could (i) file appeal to the supreme court (ii) sought relief under Bankruptcy Code (iii) filed writ of Certiorari and sought stay of execution in Supreme Court.

The United States further argued that the Mississippi judgments were not "adopted or maintained by a Party," because "State responsibility only arises when there is final action by the State’s judicial system as a whole." Apparently in order to avoid the argument that Article 1121 of NAFTA waives the procedural-exhaustion requirement of the local remedies rule, the United States characterized the rule of judicial finality as a substantive requirement of denial of justice claims.

The claimant contended that the under article 1121 (1)(b) of NAFTA the requirement was not to exhaust the local remedy, but it was mentioned to waive it.

Article 1121

A disputing investor may submit a claim under article 1116 to arbitration only if:

The investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any party or other dispute settlement procedure any proceedings with respect to the measure of the disputing party that is alleged to a breach referred in article 1116.

It further added that the principle of finality is no different to the local remedies rule and the international tribunal have reviewed the decision of Municipal courts where the local remedy is waived or inapplicable.

In the present case was there an effective and meaningful remedy available to the claimant the answer was no because (I) by filing appeal to the Supreme court without posting bond the claimant would have lost his assets (ii) by seeking relief under Bankruptcy Code it would be damaging for its business and it had the bad impact on its share price and thirdly by filing writ of certiorari there was not very likely to get the successful result as it was fact related case and the Supreme court won't go into that. Moreover, there was a dispute between the parties about the bonding requirement that whether it precluded the judicial review of the judgment and lastly the substantial punitive damages awarded would be not be considered by the supreme court.

The claimant in the case in hand tried to exhaust the local legal system but after realizing the behavior of the courts he won't be able to get the grievance redress hence it can be said that there was not effective, meaningful and reasonable remedy available to the claimant.

Although LG did not establish that the judge or jury was biased against it, the tribunal concluded that "bad faith or malicious intention" was not required. "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough. In this case, the

\[46\] Loewen award (jurisdiction), para. 61
\[47\] Id para. 61
\[48\] Loewen awards(merits )para 137
\[49\] Id., para. 132. 21
\[50\] The tribunal also quoted with approval two other formulations of a standard for denial of justice: (1) the formulation of the Mondev tribunal, id. para. 133, see infra note 47 and accompanying text; and (2) a phrase from the ELSI case on which the tribunal in Pope & Talbot, para. 63,41 ILM at 1358, had relied. See Loewen award (merits), supra note 2, para. 131 (quoting Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 ICJ REP. 15, 76 (July 20)
tribunal said that "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.\(^{51v9}\)

Nevertheless, the tribunal rejected LG's Article 1105 claim because LG had failed to pursue local remedies however, the tribunal conclusion requires "qualification" on its statement in the award on jurisdiction first it said, "that the rule of judicial finality is no different from the rule of local remedies"\(^{10}\) but then in its decision it stated, that rules were distinct”.\(^{52}\) And that whatever impact Article 1121 might have on the local remedies rule with respect to non-judicial measures, "it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level".\(^{53}\)

This decision was not much appreciable as the facts and circumstances were so clear that the Loewen was left no other option except to go for settlement with the O Keefe and the exhaustion of the legal remedy to the highest level would be fruitless.

However, the tribunal gave his observation that it won't encourage the investor to take the matter directly under NAFTA because it has a sophisticated legal system and give somehow surprising result, furthermore it is not the wish of the parties to go for NAFTA arbitration without recourse to domestic appeal or review because they provide wide range of review of the case as they are not limited to breaches of international law. The tribunal emphasis on the substantive requirement of denial of justice claim even if NAFTA art 1121 procedural dispensed with. The concept of denial of justice has defined indifferent ways in different times but he most frequently used definition offered by the Harvard law of school researchers in 1930 ,"denial if justice exists when there is a denial unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable for the proper administration of justice or manifestly unjust judgement.an error of a national court which does not produce manifest injustice is not a denial of justice.\(^{54}\)By the tribunal held that the Loewen failed to explain why he did not go for certiorari and other remedy available instead of settlement. Hence dismissed his case.

The tribunal did not exercise its jurisdiction in Loewen's case however he realized the US Courts prejudicial remarks to Loewen during hearing, the tribunal favoring the Loewen in the beginning but surprisingly it declined its jurisdiction saying that the claimant had to exhaust the remedy to the last

\(^{51}\) Loewen award (merits), para. 137

\(^{52}\) Loewen award (merits), para. 137

\(^{53}\) Id para. 161. As a condition precedent to submitting a claim, Article 1121 requires the investor and the enterprise to waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged for breach except for injunctive,declaratory,or other extraordinary relief not involving the payment of damages...

resort it can be said in the present case the tribunal was influenced by the US as US had never lost the case under NAFTA.


Treaty: Ukraine - US BIT

Arbitral rules: ICSID

Material claim: Investment was spoiled through administrative acts and omissions tantamount to expropriation. Local remedies: Not applied as a procedural requirement but “expropriation is doubtful in the absence of a reasonable [...] effort by the investor to obtain correction.

This tribunal chaired by the Jan Paulsson a prominent arbitrator, practitioner and scholar who issued a decision in this case. The tribunal was of the view that every act of trivial nature or the grievance which related to the non-judicial administrative act cannot be directly taken up to the international forum which can be redressed by pursuing at the domestic forum. This case has been very influential in local remedies cases.55

In the present case the Generation Ukraine was US Company who invested in the Ukrainian Project. He alleges that the Ukrainian state breaches the BIT through the series of acts or omissions by its administrative body which cumulatively tantamount to expropriation.

The tribunal was of the view that every act of the non-judicial body cannot be treated as breach of BIT and the claimant should pursue the local authorities and courts for the rectification of the acts or omissions on the part of administrative authority so he rules that this defect of non-pursuing rendered the claim of the claimant defective on the merits.56 It further explained by the tribunal that it did not mean that it is necessary to exhaust local remedy for the treaty claim but it is sometimes important for the determination of expropriation as well in this way it turned this issue on local Ukrainian laws. The tribunal felt that it is incumbent upon the claimant to seek a ruling on the issue of expropriation from the domestic Ukrainian Courts.57

So, the tribunal emphasizes that the investor should pursue local remedy in case of any act or omission by any administrative authority where it has the opportunity to redress his claim and the wrong can be rectified at domestic level without seeking remedy at international level. Since every act or omission of non-judicial body cannot be attributed to the breach of treaty it further added that it is not for the purpose to pursue local remedy because it necessary in the ICSID or BIT but to succeed claim on merits in international tribunal. The tribunal ruled;

"It is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the governmental authority to abandon his investment without any effort at overturning the administrative fault; and thus claim to international delict on the theory that there had been an

55 see e.g. Robert Benton Love. Potential Local Remedies Issues in Venezuelan investment Treaty Disputes, Special Issue on Venezuela. The Battle Of Contract Sanctity vs Resource Sovereignty, TRANSNAT’L DISP. MGMT. 2(2008)(The Generation Ukraine Decision is the most prominent suit of decision to reasonably pursue the local remedies when alleging an investment treaty violation.
56 Generation Ukraine Award 20.30,20.33.
57 Generation Ukraine Award 20.33.
uncompensated virtual expropriation. In such instances, an international tribunal may deem failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable not necessarily exhaustive – effort by the investor to obtain correction.\textsuperscript{58}

Finally, the tribunal asserted that for the validity of treaty claim, the claimant must show that there is a denial of justice in handling his claims\textsuperscript{59}.

### 3.1.3. Waste management

**Treaty:** NAFTA  
**Arbitral rules:** ICSID  
**Material claim:** Expropriation due to mistreatment by City authorities and local courts, tantamount to violation of “fair and equitable treatment”- clause. Local remedies: “Incorporated into the substantive standard and not only a procedural prerequisite”.\textsuperscript{123} City’s mistreatment could not be expropriation as long as claimant could have sought redress; the Court’s mistreatment had to meet the bar of denial of justice, which was not the case.

This claim was brought by US investor, Waste Management who entered into a concession agreement through its wholly owned subsidiary Acaverde, with the City of Acapulco to provide waste disposal services. The claimant alleges that the Mexican State has violated the NAFTA fair and equitable treatment provision and thus expropriated its investment. These claims arises out of the allegation that the City has failed to enforce key exclusivity right and has failed to pay the amount due to the Acaverde. Moreover, the Mexican state does not enforce the right of Acaverde vis-a-vis state owned enterprise Banobras, under a separate agreement.\textsuperscript{60} As per the concession agreement the Acaverde initiated the arbitration proceedings against the City before the Mexican courts.\textsuperscript{61} However, he did not pursue that arbitration to the ruling.\textsuperscript{62}

The Acaverde also sought relief in two separate proceedings in Mexican courts to enforce Banobras guarantee, but the courts decline to give relief on technical grounds as well as on the ground that the arbitration proceedings must be ripened up and determine the liability of the City liability by the Mexican Arbitration.\textsuperscript{63}

In the present case NAFTA decline its jurisdiction as the claimant cannot claim for the violation of fair and equitable treatment and acts which tantamount to expropriation unless he has exhausted the forum available under the concession agreement for his redress.

\textsuperscript{58} Id 20.30  
\textsuperscript{59} Id.  
\textsuperscript{60} Waste Management Inc.vs United Mexican State || ICSID Case No.ARB(AF)00/3, Final Award,Apr,30,2004.40,43.IL.M.67 (2004).para74, 86-87,155-156.  
\textsuperscript{61} Id 120-23  
\textsuperscript{62} Id  
\textsuperscript{63} Id 129,132.
It was observed by the tribunal that the investor should sue in appropriate court (domestic forum) to remedy the breach. If that access is legally or practically foreclosed in that case it amounts to denial of justice and the expropriation provision of the treaty shall come into play. The tribunal further added that the non-compliance of the contractual obligation by the government was not the same thing which tantamount to expropriation. The claimant in the present case has the available forum to enforce its contractual right…it is necessary to show that there was an effective repudiation of its right, unredressed by the remedy available to the claimant entirely or substantially.\footnote{Id 174-75}

The tribunal held that there was breach of treaty only in case the treatment towards Acaverde rises to the level which amounts to the denial of justice which element lacking in the present case.\footnote{Id 130-32} In addition, the tribunal gave substantial deference to the Mexican court’s decision and held that the claim of the investor was unfounded according to Mexican Law and NAFTA tribunal cannot act as a court of appeal of the NAFTA parties.\footnote{Id 129}

So it can be concluded that the tribunal gave so much weightage to the denial of justice element that it is necessary to prove in case to go against the determination of the national. in this case the tribunal relied on the previous tribunals decision for instance in Azinian v Mexico, the tribunal was of the view that to make the claim successful the claimant has to show that he pursued the local remedy and denial of justice done to him.\footnote{Id 102} the Azinian tribunal defines the denial of justice claim as where the national courts of the host state have refused to entertain the claimant’s claim, there was an undue delay in deciding the matter, administration of justice in a seriously inadequate way \footnote{Id 103} or commit a clear and malicious misapplication of law.\footnote{Id 68}

3.1.4. EnCan\textsuperscript{a}\textsuperscript{70} 2006

Treaty: Canada - Ecuador BIT

Arbitral rules: UNCITRAL

Material claim: Local authorities failed to allow VAT refunds and claimed those previously granted should be refunded. Claimant argued this was tantamount to expropriation. Local remedies: Applied as part of the merits and used to deny the claim. Dissent from Co-Arbitrator Naón arguing that the majority tried to reintroduce the rule when it was not in the BIT.

This case was brought by the Canadian oil company Encana under Canada-Ecuador BIT. Its claim was based on a decision made Ecuador Tax Authority to cease the granting certain VAT reimbursements to Encana subsidiaries in Ecuador. That decision Encana claimed it as expropriation.\footnote{Id 1,107} The majority of the tribunal held the view the Encana has an opportunity to challenge the decision in Ecuador’s court which he has not invoked.

\footnote{Azinian,Davitian & Beca V Mexico ICSID Case Nr.ARB(AF)972,Award,99,(Nov.1,1999),5 ICSID Rep.272(2002)}
\footnote{Encana V Republic Of Ecuador,LCIA Case No.UN 348 Award Feb 3, 2006.London Court Of Int’l Arb.}
According to the BIT the executive is entitled to take the position against the individual claim. Though the position taken may be wrong, but it should be based on good will...An executive agency does not expropriate the value represented by a statutory obligation to make a payment or refund by mere refusal to pay provided at least that refusal not merely willful courts are opened to the aggrieved party and the court`s decisions are not themselves overridden or repudiated by the state.  

In dissent the co arbitrator Horacio Grigera Naon criticized the decision on the basis that the majority applied the procedural local remedy rule which was not applicable in the present case.  

However, the majority responded in the footnote where they mentioned the procedural and substantive distinction. They explained that they did not apply the procedural local remedy rule, instead, it has to be seen as a matter of substance whether the investor`s right was expropriated or not and it not a question that whether the claim is admissible or not. Neither the tax payer nor the tax collector can definitely determine whether the right exist...in the circumstances set out it cannot be said the mere position of an executive agency whether right or wrong if it is not accompanied by the abuse of authority or exercise of undue prerogative constitute expropriation.  

3.1.5. MCI  

In this case the arbitration was filed by two US companies under US-Ecuador BIT. The claimant alleged for the breach of contract by the Ecuador owned entity, INECEL. The Seacost, which was a subsidiary of claimant`s company had a contract with the INECEL to construct and operate power plant, and to sell the electrical power to the INECEL. The claimants alleged before the domestic courts that there was a breach of contract on the part of the INECEL who had failed to pay invoices which led the claimant to suspend the operation of power plants. The claimants also contended that the Ecuadorian administration had cancelled its operating permit on the ground that they are no longer involved in Ecuador business. Although the cancellation could have been appealed before the administrative court but the claimants had made no such appeals. Furthermore, the claimant contended that the contract claim dismissed by the court because its operating permit has been cancelled.  

So, the claimant alleges before the tribunal that he had been denied of fair and equitable treatment and by arbitrary and discriminatory action of the administrative and judicial body effected its investment which encompassed with uncompensated expropriation.  

The ICSID tribunal rejected the claim altogether and gave the ruling that however the local remedy rule is not relevant to the discriminatory and arbitrary impairment of the investment, but it should be considered with regard to fair and equitable treatment and expropriation especially when the claim was reviewable by the administrative and judicial body. Furthermore, he added that the Seacoast (claimant) was defective on the merits because he remained silent on the cancellation of the operating permit by

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72 Id 194(Grigera Non dissenting part)  
73 Id 9, 28-36.  
74 Encana Award 200n.138.  
75 MCI Power Grp. L.C. V Republic Of Ecuador ICSID Case Nbr. ARB3/06, Award (July 31, 2007)
not reviewing before the administrative body 76 and not appealing before the court who dismissed his claim. 77

3.1.6. Parkerings 78 2008

Treaty: Norway - Lithuania BIT

Arbitral rules: ICSID

Material claim: Expropriation and violation of fair and equitable treatment through City mistreatment and termination of contract. Local remedies: Applied as substantive: no treaty violation (expropriation) since no complaint had been brought before appropriate local courts.

Parkerings was a Norwegian company whose subsidiary Baltijos Parkingas UAB (BP) who entered into a concession agreement with the City of Vilnius in Lithuania to maintain and provide parking facilities in historic town. A dispute arose when the City terminated the contract on the ground that the certain aspects of the contract re against the law of Lithuania and the BP had failed to perform its obligation.

The tribunal held that it had jurisdiction on treaty claim as well as contractual claim because of the word of "any dispute" in the BIT. After taking jurisdiction the tribunal rejected the claim on merits 79 on the ground that the breach of FET and the expropriation claim, the termination of the concession agreement has not been challenged before the Lithuania's court as per forum selection clause in the BIT. 80 The tribunal stated:

In most cases a preliminary determination by the competent court is necessary that whether the contract was breached under municipal law. This determination is even more necessary if the party to the contract have agreed to the forum for all the dispute arising out of the contract. However, if the parties denied access to the domestic court and thus denied opportunity to redress its claim and then claim about those contractual breaches then the tribunal can decide that whether the lack of remedies had effected investment or whether there is a violation of international law has occurred. 81

With regard to expropriation claim the tribunal held that it cannot be proved unless it has the following elements. i) state act was sovereign not a contractual ii) the claimant has legally or practically deprived of the opportunity to seek remedy in the host state, iii) and the breach has substantially decrease the value of the investment. 82 So, the tribunal came to the conclusion that these elements were not met in the present case and City did not do anything except the termination of the contract as contracting party and the claimant was free to pursue before the Lithuania courts. 83 However, the tribunal did not discuss the national treatment in relevant to the local remedy. Instead the logic behind rejecting that

76 Id 302.
77 Id 349-50
79 Id 465
80 Id 318.
81 Id 316-17.
82 Id 443,449,455
83 Id 445,453.
claim was that there was a valid reason for this disparate treatment accorded to the BP as compared to other companies alleged to have more favorable treatment.  

3.1.7. Helnan  

Treaty: Denmark - Egypt BIT  

Arbitral rules: ICSID  

Material claim: The State and the claimant’s contractual counterpart conspired to force claimant to give up ownership of a luxury hotel, awaiting the State’s ambition to privatize it. These actions amounted to expropriation and violated the “fair and equitable treatment”-clause of the BIT. Local remedies: Applied as substantive.

Helnan was a hotel management company who contracted with the state-owned company EGOTH for the management of five-star hotel in Cairo. In 2003 the Egyptian ministry of tourism inspected the hotel and downgraded to the four star. In the wake of that event the EGOTH initiated the arbitration proceedings before the Egyptian arbitration institution. In this proceedings the arbitrator held that though none of the parties breached the contract but under the given circumstances it is not possible for the parties to perform the contract because of downgrading of the Hotel. so they terminate the contract. Helnan went to the Egyptian court against the decision but the court upheld the decision.

Helnan then initiated the ICSID arbitration under the Denmark-Egypt BIT. He alleges that the Egypt in connivance with EGOTH has managed to downgrade the hotel and terminate the contract just remove him as an obstacle in the privatization of the Hotel. so he contended that these amount to expropriation and breach of FET accompanying other violations of the provisions of the BIT.

The ICSID dismiss the Helnan claim in its entirety and held that the act of the host state has not been challenged before administrative Egyptian courts. "The ministerial decision to downgrade the hotel not challenge before the Egyptian administrative courts cannot be seen as a breach of treaty by the Egypt. it needs more to become an international delict for which Egypt to be held responsible for the breach of treaty." The tribunal further added that if the Helnan has brought the claim before the Egyptian courts the tribunal cannot review the matter as a court of instance. On the contrary it will accept the findings of the court unless the deficiency in procedure or substance is which is not acceptable under international law such as in denial of justice cases.

After ICSID the claimant went to the Annulment Committee for the Annulment of Award. The Committee partially granted the claim by emphasizing that the tribunal unnecessarily gave significance to pursue the local remedy and thus exceeded its mandate. The Committee comprised of three members one of which was Professor Campbell Mclachlan who criticized the rationale and holding the local remedy in early cases.

The Committee ruled that the Helnan tribunal was misguided by giving the substantive relevance to failure to pursue the local remedy and labelled it to do by the back door the ICSID Convention which

84 Id 396,430.  
85 Helnan v Republic Of Egypt ICSID Case Nbr.ARB/05/19,Award( july 3, 2008).  
86 Id 148  
87 Id 106.
excluded from the front door. Art 26 of the ICSID Convention. It further added that it will badly affect the development of investment arbitration, despite the parties clear intention not to pursue the local remedy as a pre-condition for arbitration, such requirement were to be read back in as a part of the substantive cause of action.88

However, the Committee also recognizes the importance of availability of local remedy by saying that to a successful treaty claim on merits it is in some cases necessary to pursue the local remedies. "A claimant prospect of success in pursuing treaty claim based on the decision of inferior official or courts, which has not been challenged through the available appeal process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system justifying international intervention.89" Furthermore, the committee also draw distinction between the Helnan and Generation Ukraine case and criticizes the tribunal decision. He stated that in Generation Ukraine case the decision of the inferior official is involved but in the present case it is the verdict given by the Minister which is the highest official in the government ranks. The decision given by the highest level of the government in the host state definitely comes under international law if the state breaches its obligation.90 Resultantly, committee annul that portion of the Award by saying that is the exceed of power by the tribunal by requiring that Ministry decision should have been appealed. It is pertinent to mention here that the Committee did not Annul the whole award. is is pointed out the local remedies were one of the alternative grounds for the dismissal of the claim and there was no basis to annul the holding of the tribunal on the other ground.

3.1.8. Jan de Null91

This case was filed by Belgian investor under the BIT between Belgo-Luxembourg Economic Union and Egypt. In the present case the investor alleges that he was fraudulently induced to enter into a contract to dredge the Suez Canal by concealing the facts that the Egypt state had already conducted the test, which showed that the dredging the Suez Canal would be more expensive and time consuming than the claimant believed. The claimant further stated that he initiated proceedings before the Egypt courts to declare the contract null and void, but they conducted undue delay and eventually dismissed the claim without justification in violation of the BITs which amounts to breach of fair and equitable treatment.92

However, the tribunal rejected the claim of the investor by emphasizing that to prove breach of fair and equitable treatment the claimant must prove that the denial of justice done to him and the claimant assertion that the judicial conduct could be challenged on the basis of fair and equitable treatment even where there was denial of justice is not maintainable.93 It was added by the tribunal to allow the claim other denial of justice would amount to circumvent the standard of denial of justice.94

The tribunal relied on Loewen case with regard to standard denial of justice applied therein and the element of local remedy mentioned in that case consider them as “good guidance.” By taking guidance from that case the tribunal held there was no denial of justice committed by the Egyptian Courts even

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88 Helnan Annulment Decision, 47.
89 Id 48.
90 Id 51.
91 Jan de Null N.V. v Arab Republic Of Egypt ICSID Case No.ARB/4/13,Award (Nov.6,2008).
92 Id 112
93 Id 178,191,259.
94 Id 191.
though there was an undue delay of a decade because the complexity was involved in the matter.  

Furthermore, the tribunal gave his observation that its holdings might have been different if the claimant proved the discrimination and severe impropriety in court proceedings. the tribunal also rejected the claimant assertion that the lower court judgement was substantively improper, being unconceived by the claimant’s fraud allegation. The tribunal further ruled that the claimant has not exhausted the local remedy as certain appeals are still pending. So, for the all above foregoing reasons the tribunal rejected the fair and equitable claim.

3.1.9. Saipem

Treaty: Italy - Bangladesh BIT

Arbitral rules: ICSID

Material claim: State courts collaborated with claimant’s contractual counterpart in order to set aside an ICC award in which claimant was awarded damages. Claimant argued that this was expropriation under the BIT. Local remedies: Held not to apply to expropriation claims as a matter of principle (but to denial of justice). In this case, the investor had framed the claim as an expropriation and spent so much time litigating the matter that the success of further appeals was improbable. Local remedies were found to have been reasonably exhausted

Saipem was an Italian company who brought the claim against the Bangladesh under the Italy-Bangladesh BIT. It alleges that the Bangladesh has violated the BIT by refusing to enforce the arbitral Award against the Bangladeshi energy company, Petrobangla, which it has obtained from ICC and which the Bangladeshi courts has declared invalid.

Actually, the dispute arose between the Saipem and Petrobangla over the latter performance under the contract for the construction of natural gas and condensate pipeline. When the Saipem initiated ICC arbitration the Petrobangla went to the Bangladeshi courts to stop the arbitration. Thus, courts ordered the injunction to Saipem from continuing with the arbitration as well as purporting to revoke the arbitral authority of the tribunal. Nonetheless, the arbitration proceedings continued and eventually award the damages in favor of the Saipem. 

resultantly, Petrobangla went to the Bangladeshi court to annul the award who in return held that there was no need of annulment of award as the award obtained from ICC lacked jurisdiction and was unlawful.so the Saipem effected with the decision of Bangladeshi courts filed the Arbitration before ICSID that his rights was expropriated under BIT.

The respondent raised various arguments before ICSID including that the claimant had not exhausted the appeals against the impugned order of the courts. The tribunal one of which the arbitrator was Christoph Schreuer accepted the exhaustion of local remedy as substantive element with regard to denial of justice, but he pointed out that the present case involved expropriation not denial of justice.

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95 Id 204.
96 Id 206.
97 Id 254.
98 Id 260.
99 Saipem v Republic Of Bangladesh ICSID Case Nbr.ARB/05/07,Award (june30,2009).
100 Id 34-41
101 Id 48.
102 Id 52.
However, the tribunal some doubts on expropriation claim as well but they were of the view in the present case the claimant has adequately pursued the local remedy and would have satisfied even there is a requirement of local remedy exhaustion. As the claimant had litigated several issues before the different courts for a long period of time and though appeals were available but here was very likelihood that their favorable outcome was improbable. So, it can be said that the claimant has exhausted reasonable local remedy. So, the tribunal came to the conclusion that other elements of expropriation has been met and awarded the damages award in favor of the Saipem.

3.1.10 Pantechniki

In this the Greek construction company have an agreement with the Albanian state to build road and it suffered damage to its equipment due to antigovernment riots. Since there was a provision in the contract through which state would be liable for the loss occurred due to civil disturbances. so the claimant requested for damages, but the state offered only a portion of it and the claimant accepted that offer. Then both the parties entered into settlement agreement but afterwards the state did not pay that amount. Then the claimant filed the suit before the Albanian courts on the basis of that settlement agreement. The court of appeal dismissed the claim by ruling that the placing the loss of risk for civil disturbances on the state was under the contract was null and void under the Albanian law. Feeling affected from the decision the claimant filed the appeal before the Albanian Supreme Court but later did not pursue that appeal and initiated ICSID arbitration under Greece-Albanian BIT.

The claimant raised many objections before the ICSID. He asserted that there was a violation of full protection and security clause by which the state failed to provide adequate security necessary for preventing physical damage to its investment. He also raised the claim fair and equitable treatment on the basis that the Albanian courts had committed the denial of justice. Lastly, he claimed for the failure to honor the settlement agreement.

The Jaun Paulsson was the sole arbitrator in the case in hand and he rejected all the claims filed by the claimant. with regard to the claim of providing full protection and security he did not feel necessary to exhaust the local remedy for that claim instead he was of the view the state lacked necessary resources to prevent damage. However, for the fair and equitable claim he held that it was necessary to exhaust the local remedy. He added the claimant prematurely abandoned his appeal before the Albanian courts so therefore the claim was defective on the merits for failure to exhaust the adequate local remedy. And for the honor of the settlement agreement he found that it was barred by the fork in the rod clause in the treaty. It meant that the claimant had to make one choice on the available forum and subsequently precluded the investor to take the same dispute on different forums. Paulsson

103 Saipem jurisdictional Decision,151.
104 Saipem Award, 181-82.
105 Saipem Award,183.
106 Id 170,201,216.
108 Id 3,23.
109 Id 28-29
110 Id 82.
111 Id 101-102.
112 Id 61-67.
declared that the claimant had already taken up the matter of the breach of the contract before the Albanian Courts so the same claim cannot be filed before the ICSID.

3.1.11. Chevron-Texaco\textsuperscript{113}

This claim was filed by the US oil giant and its wholly own subsidiary Texaco Petroleum (TexPet) against the Ecuador for the violation of US-Ecuador BIT. Since 1960 to 1990 the TexPet operated an oil field in Ecuador. Due to which heavy pollution occurred in its operating area which affected the Ecuadorian rain forest and the local communities. Feeling threatened from the local communities from filing case against the TexPet it files several claim against the Ecuador in Ecuadorian courts for the breaches of the contract.\textsuperscript{114} As of 2006 many lawsuits have been dismissed or still pending in Ecuadorian for the damages he claimed against the Chevron and the Texpet for the pollution related harm.\textsuperscript{115} At that point the Chevron and the Texpet initiated the arbitration against the Ecuador. He alleged the Ecuadorian courts for the breaches of substantive protection treaty provisions in handling his cases of the breached of the contract claims and thus committed violation of fair and equitable treatment. It also alleged by the claimant that the Ecuadorian courts had failed to provide "effective means" necessary to enforce its rights with respect to investment, investment agreements and investment authorization.\textsuperscript{116}

The Ecuadorian raised various agreements including the claim was defective on merits as the claimant had not adequately pursued the local remedy. He further contended that the claimant should have taken his claims in the Ecuadorian courts towards conclusion or should have taken necessary steps to expedite the matter for adjudication.

The tribunal on March 3, 2010 rendered the partial award in favor of Chevron and Texpet in relation to the effective means clause.\textsuperscript{117} The tribunal in its award stated that the obligation imposed by that clause significantly overlap the prohibition of denial of justice under customary international law,\textsuperscript{118} but that "a distinct and potentially less demanding test is applicable under this provision as compared to denial of justice."\textsuperscript{119} He further emphasized that under effective means the state has an obligation to adjudicate matter brought by the covered investor in local courts without indefinite or undue delay.\textsuperscript{120} The tribunal found that the local courts have not adjudicated the matter with reasonable dispatch and hence committed violation.\textsuperscript{121}

However, it is relevant to mention here that the tribunal accepted of the Ecuadorian argument that in effective means claim the claimant should have exhausted the local remedy.\textsuperscript{122} He further added there that the high likelihood of success of these remedies is not required in order to expect a claimant to

\textsuperscript{113} Chevron v
\textsuperscript{114} Chevron Texaco partial Award 134-35.
\textsuperscript{115} Id 145,149.
\textsuperscript{116} Id 205,such effective means clause are found in US BITS Energy Charter and some handful of BITS.
\textsuperscript{117} Id 253-56,270.
\textsuperscript{118} Id 242.
\textsuperscript{119} Id 244.
\textsuperscript{120} Id 250.
\textsuperscript{121} Id 256.
\textsuperscript{122} Id 323,326.
Furthermore, the tribunal asserted this did not disqualify the claim as it is convinced that the Texpet had no mechanism available which accelerate the resolution of the lawsuits.

The tribunal did not consider other treaty claims because they would not have increased the quantum of damages even if that claims are successful.

4. The critical appraisal of the local remedy rule in views of different scholars and how the ESLR is applicable under different claims

The ESLR can be discussed in views of different scholars. Most of the scholars agreed on the point that where the question of denial of justice raises the investor should exhaust local remedy so considering it a substantive requirement in the context of denial of justice claim. In order to establish an unlawful judicial act at the international level, an aberrant decision by a lower official does not generally suffice – the main reason for this that such an act can be corrected at a higher level, and no injustice can be said done to the investor unless the system has been given that chance to rectify the wrong done by him. There can thus be no denial without exhaustion. The most detailed academic text published on the issue is written by George K. Foster, he is of the view that other than denial of justice claim, other issues also can become substantive part of the local remedy rule and this can be seen and it is observed by different arbitral tribunal in most arguable cases which supports the stance of Foster. The alternative assertions where the local remedy may play role are as follows:

4.1.1. Denial of justice

In the denial of justice claims it requires the host state to provide the effective and proper judicial system to the investor for the rectification of the alleged wrong done by the organ of the state. In this way the wrong or injury inflicted by the organ of the state imposes responsibility on the host state for the injury inflicted to the investor, but every single act of any individual cannot be attributed to the host state unless the whole system is tested. In words of Paulsson it is the very nature of the delict of the denial of justice that a state is judged by the final product or at least sufficiently final product of its administration of justice. A denial of justice cannot be consummated by the decision of court of first instance...a trial judge who misconducts himself simply does not commit a fully constituted international delict imputable to the state.

Professor Christoph Schreuer also agrees with the substantive element of denial of justice in local remedy. That for the substantive violation of the international obligation in context of denial of justice claim it is necessary to adequately and sufficiently redress has been sought in local courts. Denial of justice committed only where the appeal against the decisions are unsuccessful so it can be said to raise the claim to the international for the denial of justice claim the whole system should be tested. But he is

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123 Id.
124 Id 269,332.
125 Id 275.
127 Paulsson 2005, p.111
128 Foster,2010.
129 Pulsson 171, 108-09
cautiously skeptical towards allowing it to be included in other claims. Schreuer draws parallels to the almost-abandoned Calvo doctrine, calling it an adopted child of this school of thought.\textsuperscript{131}

However, the Mclachlan and his co-author Shore and Weininger, who in their ambitious work on investment arbitration in 2007 held that it would empty the development of investment arbitration of its force and its effects to require the exhaustion of local remedy where the parties have clear intention not to pursue it.\textsuperscript{132} In case reviewing the case of Helnan where the Mclachlan sat in the Annulment Committee he and his co-authors in 2007 held the view the tribunal in Loewen case has failed to take into account the fact that the act of the lower judicial officers are the act of the state, and all the acts of lower judicial officers and agencies were the acts attributed to the state because the state has a single personality.\textsuperscript{133}

It does not necessarily means that the decision to eliminate the procedural requirement of local remedy implies the elimination of the substantive element of the local remedy. Conversely, it can be said where there is substantive requirement of a local remedy in a claim then there must be a procedural requirement as well. Refusing to draw such interpretation tantamount to make the treaty nonsensical and meaningless.\textsuperscript{134} This does not mean that local remedies are relevant in every claim but the claims which the tribunal finds them relevant are fair and equitable treatment, expropriation and effective means. The decision for the elimination of the procedural requirement rule by these tribunals by no means pointless or insignificant.

Every act of the lower judicial officer or agency is attributed to the state. This will confuse the concept of attribution and the breach. It is clearly mentioned in the ILC Draft which deals separately with two concepts.\textsuperscript{135} As Professor James Crawford pointed in his special Rapporteur on ILC.\textsuperscript{136} "an aberrant decision by the lower hierarchy which is capable of being reconsidered does not itself amounts to an unlawful act."

This does not mean the approach taken by the tribunal in Loewen Case was correct. There was no remedy available to the claimant in that case and if it was there being no likelihood of its success. The tribunal decision in Loewen was criticized by many scholars and arbitrators. The approach taken in Saipem case was more convincing as the tribunal in that case was of the view that the claimant had exhausted the adequate remedy and pursuing further would be a futile exercise.\textsuperscript{137} Now we discuss the claim which frame other than denial of justice claims which are as follows;

4.1.2. Fair and equitable treatment

This is standard BIT clause which is included in every BIT. the investor often raises his claim on this ground that he is not fairly treated and there is a violation of international standard of fair and equitable

\textsuperscript{131} Ibid, p.13.
\textsuperscript{132} McLachlan et al 2007 p.233.
\textsuperscript{133} Ibid, p.232.
\textsuperscript{136} Saipem Award,183.
treatment. Owing to his ambiguous formulation it is left for the tribunal to interpret that whether the FET right is violated or not. George K. Foster is of the view that single wrong attributed to the state cannot constitute violation of FET unless its judicial system has been a given chance for the rectification. So in its view it’s necessary to test the host system before establishing the violation of FET in the international forum.\textsuperscript{138} so it can be said apart of “denial of justice claim” in case of fair and equitable treatment claim as well the claimant has to be appeal the impugned judicial decision as well. the claimant cannot simply directly take the matter to the international forum because it is not denial of justice claim. in the opinion of K. Foster every claim has to be seen in the light of denial of justice claim. The tribunal in the case of Loewen and Jan de Nul also supported this version. In Saipem claim the tribunal held that without actually determination of the claim that whether it was frame as the one under expropriation the local remedies rules are irrelevant. th standard of FET is interpreted by the tribunal in a liberal manner.\textsuperscript{139} The professor Muchlinski has asserted: it is obligation of the host state with regard to governance to act in a consistent manner, free from ambiguity, total transparency and without arbitrariness on the principles of good faith. in addition, investors can expect due process in handling of his claim and the host authorities act in a non-discriminatory manner, proportionate to the policy aims involved.

The term fair and equitable should be interpreted in the ordinary meaning of the language of the treaty. Muchlinski has interpreted the term "fair" under the Concise Oxford Dictionary as just, unbiased according to the rules.\textsuperscript{140} He further noted the term "equity" as “a balance process weighing up what is right in all the circumstances. "Leaving upon the possibility to see not only the person who must act fairly but also the person who has acted upon."\textsuperscript{141} In other words Muchlinski is of the view that the tribunal should not asses the treatment of the host state but also the conduct of the investor. in this way the arbitral tribunal should take into account the whole circumstances of the case.\textsuperscript{142}

The investor cannot hold liable the host state if it’s wrong act can be undone through appeal and the investor does not exercise that right, hence not giving the opportunity to the host state directly goes to international forum. Then there is a likelihood the claim of the investor shall be unsuccessful, and he may be unable to prove that the treatment given by the host state was unjust and unfair. Of course, it is of the assumption that the redressal for his grievance must be given without undue delay or burden.

Therefore, the judicial conduct which cannot equate to the denial of justice and the investor challenges on the ground violation of fair and equitable, its chances of getting the claim successful are very less, because the claimant did not exhaust the remedy available at the local forum of the host state.

The support of this argument can be found in US jurisprudence involving claims for the violations of Due Process under 14\textsuperscript{th} amendment of the Constitution, the US Supreme Court held that a denial of procedural Due Process by a state organ is incomplete in the sense of amounting the constitutional

\textsuperscript{138} Foster 2010, p.245
\textsuperscript{139} Wagiuh Elie George Siag v The Arab Republic of Egypt ICSID case no, ARB/5/15 Award and dissenting opinion 450 June 1, 2009
\textsuperscript{140} Peter Muchlinski Caveat investor "The Relevance of The Conduct of The Investor under the FET Standard, 55 INTL & COMP.L.Q. 527,530-31(2006).
\textsuperscript{141} Id 532.
\textsuperscript{142} Id 556.
injury unless and until the aggrieved party has exhausted the available state remedies.\textsuperscript{143} In order to ascertain whether the denial of due process has occurred the aggrieved party should have tested the entire procedural system in the host state. But there is an exception provided in the US system against exhaustion of local remedy rule if the investor proves that there is no adequate and effective remedy available to him or it would be a futile exercise such right or the state is unable to provide adequate remedy for deprivation.\textsuperscript{144}

4.1.3. Fork in the rod clause (should be interpreted narrowly to trigger the use of local remedy rule).

Except Argentina BITS who consented arbitration with the condition to resolve the matter first through amicable manner or resort to the domestic forum most of the BITS leave some discretion to the investor/claimant for the selection forum i.e. which forum he wants to opt to initiate proceeding for the resolution of the dispute. This is combined with the fork in the road clause which means once the claimant has opted the forum he must stick to it .then he will not allow to exhaust any alternative forum.\textsuperscript{145} It is to be understood that the investor must make a careful choice whether he wants to settle the dispute before the domestic forum or will go for international forum. Meaning thereby, the fork in the road does not stop the investor to go for arbitration instead it gives the choice that where and how the proceedings the claimant wants to initiate proceedings, and then he must follow that as after that he will lose any other option. one has to expressly mention in the BIT if they don’t want to apply this rule.

The fork in the road clause should be interpreted narrowly, so it rarely triggered by the pursuit of local remedy. in case Patchenki the tribunal rejected the claimant’s claim because he had already presented his case before the domestic forum which was the breach of the contract. The reason for the rejection of claim basically he filed the same claim on the same fact and against the same party so it was the similar case that filed before the domestic forum, thus the tribunal declined to take up the matter as it was barred by the relevant BIT. in the BIT it was mentioned that the investor has to make selection of one of the forum available to hear the dispute and then subsequently it is barred by the BIT to file the same dispute in second forum. This case was an exception as it rarely happened that the investor file the same dispute on the same fact. Normally they change the fact of the case as in domestic forum it is treated under national law and breach of contract while in international fora it is the BIT and international law which governs the claim and has independent standard. Even in Pantechniki only one claim was rejected which was breach of contract while the other claims i.e. full protection and security and fair and equitable treatment were remained open which was ultimately rejected on other grounds.

Likewise, where the investor invokes the domestic forum for the compensation of expropriated property before filing treaty arbitration it cannot be said it is an identical claim if he subsequently files the expropriation claim under BIT, as the former is founded under national and latter is under BIT.

The distinction between the treaty claim and the national claim are very important. If the two claims are conflated and the fork in the rod clause interpreted liberally then pursuing the local remedy would be damaging for the investor. This distinction has not been understood by one tribunal, he ruled that the by pursuing the local remedy the investor is barred from filing the subsequent treaty claim with the

\textsuperscript{143} Zinermon v Burch, 494 u/s 113,125 (1990)
\textsuperscript{144} see Urban vs Jefferson County Sch, Dist.R-1, 89 F.3d 720, 724(10th Cir.1996).
\textsuperscript{145} See for example those concluded between France – Argentina art 8(2) and US – Czech
application of the fork in the rod clause. However, this considered to be an anomaly, and in any way that aspect of the verdict is obiter dictum.\textsuperscript{146} In practice when the investor files the claim before the local courts it is considered to be the contractual claim and subsequently he can file in international forum under the treaty claim.

4.1.4. Expropriation

Expropriation means the taking away the property by the state from the investor. It is allowed if the expropriation is for public purpose and the investor is adequately and promptly compensated in investment arbitration. In the opinion of George K. Foster the claimant should claim the compensation at the local forum before going for international tribunal. Foster has a US analogy, the Supreme Court’s jurisprudence on the Fifth Amendment’s Takings Clause. Under this doctrine, uncompensated expropriation is not allowed but in order to establish such an expropriation compensation has to be sought and denied.\textsuperscript{147} This requirement reduces the need for federal intervention and protects state sovereignty.\textsuperscript{148} So, if this approach applies in investment treaty it can be said the investor should exhaust the domestic mechanism i.e. local remedy against the decision of the lower court for the taking away his property he must exercise his right of appeal for proving its claim of unlawful expropriation. It is pertinent to mention here the procedure to obtain relief through appeal should be effective, prompt and adequate.

However, the view of the George K. Foster in case of expropriation he emphasizes that the key element involve is compensation. He added that the most BITS allows the expropriation and the state has to meet the higher standard to seize the property and it does not prejudice the way of chooses compensation to the investor. The investor should seek compensation and have denied in the host state to make his claim successful in international forum.\textsuperscript{149} This view is relevant to the cases such as Waste Management, Generation Ukraine, En Canna, Saipem and Parkerings. But this view can be criticized on the ground that nowadays the expropriation cannot be said that simply taking away the property of the investor for public grounds, rather by the studied arbitral award it can be said that the public actions such as tax measures, contract termination, obstructions are alleged to tantamount expropriation or indirect expropriation. Taking this kind of claims it is not easy to say what the expropriation really is how it is different from denial of justice claims. So there are important differences in the latter case with regard to the local remedy rule. In denial of justice there has to be shown a series of judicial or administrative to constitute the international claim. Thus, there is a need to check the whole domestic system while in expropriation a single sovereign act is enough to establish the international claim. The cases mentioned above the state acted as a commercial counterpart and the act was not sovereign as in the cases of denial of justice.

4.1.5. Invoke effective means by the investor provided by the host state

As the single court decision against the investor cannot be held liable the host state unless the claimant have exhausted the judicial procedure available in the host state. In the same way the state cannot be

\textsuperscript{146} Mytilineos Holdings SA v The State Union of Serb. & Montenegro, UNICTRAL Arbitration, Partial Award On Jurisdiction 221, Sept 2006
\textsuperscript{147} Ibid, p.249 with references
\textsuperscript{148} Ibid
\textsuperscript{149} George K. Foster, Striking a Balance between Investor’s Protection and national Sovereignty, the relevance of local remedies in Investment arbitration. vol.49, p.249. Date: 01/01/2011.
held liable to provide effective means for asserting investor’s claim and enforcing his rights if the claimant has not resorted to the domestic mechanism for the enforcement of his right or in furtherance of his claim. It is necessary for the claimant to actively participate in the litigation judicial system of the host state so the tribunal can assess the effectiveness of the host state judicial system. In Chevron Texaco case there was the consideration of whether the means provided by the state to assert claims and enforce rights are sufficiently effective...the tribunal consider whether the claimant has done its part by properly using the means placed at its disposal. The failure to use these means may preclude recovery if it prevents a proper assessment of the effectiveness of the system for asserting claims and enforcing rights.  

4.1.6. Sound policy reasoning behind exhaustion of local remedy rule

There is a solid policy reasoning for the pursuit of local remedy rule while challenging the judicial conduct of the host state which according to Dodge, if investor were required to pursue local remedy before filing NAFTA claim "most trial errors would be corrected in domestic courts, through a process that is more determinate, more accountable more legitimate and less intrusive about sovereignty than chapter 11 review."

Professor Andrea Bjorklund has clarified how many errors corrected if investor pursue local remedies:

By the time issue reaches to the appellate it has become more crystallized and chances of it being decided correctly are greater. More people, judges and attorneys alike, will have had a chance to evaluate the issue, to make more different and better arguments. Errors may be corrected, juries may be reined in and justice may be done. Yet, it cannot be ignored that the pursuing appeal may be time consuming and expensive exercise on the part of the investor. The investors are reluctant to go for the appellate court as there is always apprehension of the judge being biased in favor of the host state. For these reasons, the investor may be excused for pursuing any further the local judicial process.

The application of local remedy as a substantive element has benefited effect for the investor in the long run. This will definitely reduce the claim before the international tribunal and hence reduce the ill will of the host state which he has to face in case of high profile international arbitration proceedings. Such resentment feels not only towards the claimant who claim against the state but also the general foreign investor and eventually it has bad effect on investor- state arbitration. Essentially, Bolivia, Ecuador, and Venezuela have faced a plethora of international claim, which posed threat to their national sovereignty as well. Resultantly, they denounce the ICSID and declined to renew the BIT for which they were party. Therefore, it can be said if there will less international claim and the dispute is being resolved domestically more, the state feel less oppress to adhere domestic claim. Then the state will be more than willing to sign new investment treaties and the more countries shall become part of the BITs. Such a trend would be helpful for the investor as he has adequate international forum for filing his claim against the host state when it is genuinely required.

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150  Chevron Corp. V The Republic Of Ecuador,Unictral Arbitration,partial award on the Merits (Mar 30.2010)


152  Carberra Diaz,Venezula surprises the Netherlands with the Termination Notice for BIT. Treaty has been used by many investors to Route investment into Venezuela

153  Carbrera Diaz,Ecuador continues to exit from ICSID INVEST. TREATY NEWS, June 8,2009.
4.1.7. Reviewable decision of the administrative machinery and the local remedy

In most of the treaty cases the claim was rejected by the tribunal where there was a room to challenge the decision of the lower administrative authority and the investor did not exhaust that forum. There is mixed opinion about the challenging the conduct of the administrative or judicial authority on the higher local forum. But even though it is always good for the investor to take the matter to the highest judicial or administrative authority as in case of he chooses to go for international tribunal afterwards it would be easy for the tribunal to understand the complex local law system of the host state which has been interpreted from lower to the highest forum and more likely to be discussed from all aspects. And their input is extremely helpful for the tribunal. In US there is also limited requirement of exhaustion local administrative remedy before seeking the judicial review of the administrative conduct. Notably, the US Supreme Court observed that the benefit of the exhaustion of local requirements is to give the administrative authority opportunity to make the correction of its own wrong and secondly it also use as record for the subsequent judicial consideration where the complex and technical facts are involved. Furthermore, if the investor on every occasion rush to the international forum then any furthering the matter at the local level this will have a chilling effect on the function of the administrative authority. They feel reluctant to give findings against the investor as it will convert the matter to the high profile international dispute. On the contrary, the administrative official may feel more comfortable to exercise his authority in case he thinks that the safety net of review mechanism available to the domestic authority. There are obviously many benefits comes out of it especially in the matter relating to protection of environment and public health by the efficient performance of the official.

It is relevant to mention here that there is no difference between the administrative decision and the judicial decision in most of the countries the administrative authority acts as a court of first instance. They can adjudicate the matter if they see any violation of the regulation can give findings against the investor just like in Helnan case. They may also decide whether the investor should allow tax refund, entitlement of permit according to their interpretation of law and the facts of each case. Cases like Generation Ukraine, En Canna and MCI are the examples of this. Hence, they collect evidence, interpret law and apply to the facts just like being done in the court proceedings. Most of its decision are also subject to review just like the lower court decision and cannot have the international delict like breach of fair and equitable treatment which is imputable to state unless the matter was taken up to the highest authority and subject to review. It includes Minister as well whose decision is subject to judicial review.

Schreuer however against this view and the opponent of the decision which was given in Generation Ukraine, but he supports that there is no substantive violation of international law unless the redress has been exhaustively sought at the domestic court level in the context of denial of justice claim, however, he argues that it is inappropriate to fault the investor on merits if he has not exhausted local remedy in case of non-judicial conduct.

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155 Feldman v Mex ICSID case no. ARB(AF)99/1 Award on Merits 103,(Dec 16 2002 ),7 ICSID.Rep341(2005)
Schreuer criticize that the case Generation Ukraine introduces the local remedy through backdoor.\textsuperscript{156} He further adds that it is not inherently unreasonable that investor should make some efforts for his redressal at the local forum before going to international tribunal so the investor while doing away the local remedy in investment state arbitration act consciously and for good reasons.\textsuperscript{157} Schreuer with respect to Generation Ukraine case raises the specter of a slippery slope and argues that once it requires the investor to make some attempts for pursuing the local remedied it will then not stop at the lowest court. It means once we require that reasonable appeal be taken then it goes to demanding the exhaustive level.\textsuperscript{158} Schreuer is of the view that the arbitrator will not be able to apply substantive local remedies requirement with sufficient restrain or flexibility, it will require strict exhaustion.

It raises valid concern in Loewen case where the tribunal has given rigid approach towards local remedy but the Schreuer holds that the decision in Saipem given by the tribunal is having a more practical approach in which it was observed that though the investor has adequately pursued the local remedies despite having not exhausted the appeal fully.\textsuperscript{159} Other Scholars however supports the Generation Ukraine case and express concerns over Schreuer opinion. Muchlinski, nevertheless holds that there should be the balance between the right of the host state and the right of the investor to regulate the investment, he added that provided the host state offers reliable and effective dispute settlement system, it is in the interest of both the parties to recourse to the local courts and the tribunal first.\textsuperscript{160} In addition, the Dodge is of the view that there is no reason to differentiate between the court judgements with other measures with respect to exhaustion, as long as remedies available in response to such measures.\textsuperscript{161} There is no difference between claims on appealable judgement and appealable administrative decision. Conversely, for several reasons they are treated on equivalent basis in this context.

4.1.8. Deference to the national court decision by international tribunal

This is also a cardinal principle in the context of exhaustion of local remedy rule. Where the investor pursues the local remedy before filing the claim before the international tribunal, the tribunal should defer to the decision of the local courts unless the claimant proves that there is denial of justice committed by the national courts. The Dodge is of the view that the decision taken in the case of Waste Management and Azinian has effectively created the res judicata effect.... He criticized those decisions and contended that it will discourage the investor to exhaust local forum. ...it will deprive the opportunity to the host state to rectify the wrong committed by him.\textsuperscript{162} He further added that the

\textsuperscript{157} Id at 16.
\textsuperscript{158} Id at 15.
\textsuperscript{159} SAIPEM Award ICSID Case nbr. ARB/05/07 June 30, 2009.
deference to the national court be made in case of denial of justice claim, instead it should be replaced with the rule which permits the relitigating of the same issue decided by the national courts.  

Professor Robert Ahdeih has an opinion he noted that the tendency of the NAFTA tribunal to the deference of national court even where there is no denial of justice claim. In this way he differs from Dodge. In his opinion this deference would enhance the legitimacy of treaty-based arbitration, by acknowledging the autonomy and independence of the national courts. However, he holds the view that in extreme cases the NAFTA tribunal can reject the deference to the domestic courts and it will enhance the constructive innovation at domestic level. He adds that though the decision of the NAFTA tribunal may add prompt reform at the national courts but in turn the tribunal may also get influenced by responses of the domestic courts.

George K. Foster also see merits in both the approaches and suggests that the tribunal treats the findings of the national courts presumptively as correct unless the claimant proves that the findings of the national court is incorrect on the basis of concrete and convincing evidence. This would accord the degree of deference to national courts and enhance the legitimacy of treaty-based arbitration from the perspective of the host state as opined by the Robert Ahdieh and at the same time avoid the discouragement of pursuing the local remedy from the Dodge perspective.

4.1.9. Clear and convincing evidence

The clear and convincing evidence standard is employed in number of contexts of Anglo-American jurisprudence. The US Supreme court held that it requires the decision makers to possess an abiding conviction so that dispute at hand is highly probable. Other courts also favor this standard and held that it would avoid the awarding of relief where the evidence is ambiguous unconvincing and contradictory. In this context it can be concluded that international tribunal defer to the national court decision unless through reliable evidence it is convinced that there is a high possibility that the evidence was erroneous.

Why the standard of clear and convincing evidence should apply it is necessary to discuss its origin and the application of it in US litigation today. This standard was developed by The Court of Chancery in England during the eighteenth century. That court deals with the notion of fairness and equity rather than law. The court was empowered to order non-monetary relief such as injunction, specific

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163 Id at 383.
165 Id 2093
166 Ahdeih supra note 265, at 2064,2068
167 Id. at 2078-79
169 Id.
170 Colorado Vs Mexico, 467 U.S.310,316(1984)
171 See Welles vs Acad of Motion Picture Arts & Scis, 2004 U.S.Dist.LEXIS 5756 at 9(C.D Cal., 4 Mar 2004) contrasting clear & convincing evidence with loose , equivocal or contradictory
performance, enforcements of trusts and it has a more serious impact on the party than mere award of money.\textsuperscript{173} These relief were not available anywhere else and it has more impact than the monetary relief. Owing to loose standard associated with this extraordinary relief the courts came to the conclusion to require clear and convincing standard of evidence rather than preponderance of evidence which was required in other cases.\textsuperscript{174}

The US courts inherit this approach from their English predecessor and have long application of this standard when it was acted as court of equity.\textsuperscript{175} Even today where there is a merger of law and equity the US Courts still apply this standard where there is the involvement of important interests beyond the money claim.\textsuperscript{176} However, before international tribunal the non-monetary interests comes into play when the claimant asks to reject the findings of the national courts. If the tribunal decline the findings of the court while second guessing the decision of the national court, then in the words of Ahdieh it will undermine the treaty-based arbitration in the host state.\textsuperscript{177} In this situation it can be therefore said to implicate the interest beyond the claimants alleged entitlement of the money and requires great caution on the part of the tribunals. It is relevant to mention here that the national courts are in a better position to interpret their own law and unlike international tribunal they have more access to evidence to make finding of the facts for instance subpoena power over witness are not subject to international tribunal, moreover to examine witness and review the documents in their own language are sound reasons that the tribunal should not reject the decision of the national court in a casual manner.

The heightened standard of proof will refrain the investor to have second bite of an apple and hence the claimant will not be able to relitigate the same issue which has already adjudicated elsewhere. But the tribunal should be careful to apply the heightened standard of evidence.

The clear and convincing standard is preferable to denial of justice for several reasons:

Firstly, it will not cast aspersions on the character judicial officer who has rendered the decision in the lower court, which the tribunal may also not willing to do as well and which of course has also instigating effect on the host state. In contrast, the denial of justice claim requires that the judge has acted in bad faith, finding of misconduct and prejudice are the elements involve in it.

Secondly in clear and convincing standard the claimant has more chances to success where it has pursued the local remedy. In this case the claimant takes the plea the decision was wrong, and the tribunal is in more comfortable position to disregard it. On the contrary, in denial of justice claim the claimant has to prove that the court has maliciously misapplied the law and denied the due process.\textsuperscript{178} And most of the cases it is seen the court has given many opportunities to the claimant to present his case and have decided the case according to the rules and procedure, moreover, it is always difficult for the claimant to prove malice on the part of the court. So if the tribunal limit himself on the

\textsuperscript{173} Id 278-279.
\textsuperscript{174} See Appellate Review In The Federal Court Of Findings Requiring More Than a Preponderance Of Evidence 60 HARV.L.REV.111,112 (1946).
\textsuperscript{175} See JOHN G.HENDERSON,CHANCERY PRACTICE 490(1904)
\textsuperscript{176} See Addington vs Texas 441 U.S. 418,424(1979).
\textsuperscript{178} See Azinian,Davitian,&Baca v Mex ICISID Case No.ARB(AF)97/2,Award 102-03(Nov 1,1999),5 ICSID Rep. 272(2002).
denial of justice it will insulate the host state from its liability. Furthermore, it will tilt the balance to the host state and undermine the legitimacy of investment treaty arbitration from the perspective of the investors and capital exporting states. From the above discussion it can be concluded that the tribunal may give decision without endorsing or rejecting the findings of the national court where the claimant have pursued the local remedy. For instance, if the host state legalizes the discrimination of the claimant companies on the basis of ethnicity and nationality, or where the host state expropriated the property of the investor without compensation and the national court endorses the act of his state against the claim brought before him. In the given situation if the matter brings before the international tribunal the tribunal can hold the host state liable for the breach of the BIT, according to the contents of the law, without endorsing or evaluating the decision of the national court decision. Tribunal readily take such steps in these kinds of cases however, it may refrain from revisiting the issue already decided by the national courts.

Nevertheless the tribunal may revisit the issue where the host state has expropriated the property of the investor and he seek for compensation and there is an issue before the court for the determination of the ownership of the expropriated property that whether he is an owner of that property or not before the determination of the expropriation claim. in this matter it is not necessary for the tribunal to agree with the findings of the national court but the deference in the form of clear and convincing standard may be acceptable.

The Saipem is good example in this regard. The tribunal gave some respect to the Bangladeshi court decision however the Saipem has made the tribunal convinced that the national court has made some determinations which legally lacked justifications and was unfounded.\textsuperscript{179} but the tribunal avoided to make the correction as it observed that under Bangladeshi law it has some justifications as it is more understandable by the local courts though it has flaws under international law. in other words the tribunal avoided the questioning of the local court decision with regard to local law, but where the question arises of giving the independent view on issues the tribunal ready to reject the findings of the national court after showing convincing evidence that the findings were baseless.

4.1.10. The local remedies are relevant but not always in case of a breach of a contract by the host state

In the case discussed above of Waste Management and Parkerings both the tribunals have observed that it is necessary to exhaust the local remedy to prove in case of expropriation or breach of fair and equitable treatment. The host state as a Contracting party has acted in good faith and he has not foreclosed the local remedy. so the tribunal was of the view that the claimant should adequately exhaust local remedy in a case of breach of a contract claim by the host state before coming to international forum for the treaty claim predicated breach of a contract. in Siemens vs Argentina the tribunal cited some multiple cases in which it was clearly held that the “for the behavior of the state as party to be considered a breach of investment treaty, such behavior must be beyond an ordinary contracting party could adopt and involve state interference with the operation of the contract.”\textsuperscript{180} Likewise, in Glamis Gold v U.S. the tribunal gave his finding that the mere breach of contract does not suffice the claim of breach of fair and equitable treatment it has to prove further that the discrimination or denial of justice

\textsuperscript{179} Saipem v The People Republic Of Bangladesh ICSID Case No. ARB 05/07 Award, 155-73 (June 30, 2009).
\textsuperscript{180} Siemens v Argentina ICSID Case No. ARB/2/8, Award 248 (Feb 6, 2007).
was done to him. The state can be held for the breach of a contract on international forum where the act of the host state was discriminatory, motivated by non-commercial considerations and compensatory damages were not paid. Or where the national was not given an adequate forum for the repudiation or breach determined to have occurred.

Schreuer also have thinking in the same line and believe that the claimant should prove beyond simple breach of the contract to establish the breach of fair and equitable treatment. He said that the mere breach of the contract is normal course of business and the investor should keep that risk in his mind without recourse to treaty remedy while on the other hand willful refusal by the government to abide by his contractual obligations, abuse of authority to evade investor agreements and act in bad faith in the performance of the contract will lead to the standard that there is a breach of fair and equitable treatment.

George K. Foster also having the same view that if the simple breach of contract should allow to treaty claim then they will effectively punish, and its sovereignty will be affected ....in this way it will create obstacles to protect the public interest.... It would unreasonably discourage the state to take position which they are entitle under the contract.....furthermore, treaty arbitration having a higher profile as it is a case of violation of international law than simple breach of contract shall attach bad name to the state, from a policy aspect the state should be encouraged to pursue vigorously in exercise of its contractual right...so the George K.Foster emphasis the investor to pursue the local contractual forum before going for treaty claim to establish the wrongdoing of the state.

It is necessary to mention that the investor is not always bound to pursue the contractual forum to prove the breach of fair and equitable treatment or expropriation where it has the contract with the host state which refers the dispute to such courts.in Vivendi 1 the adhoc annulment Committee ruled that it is not necessary for the investor to national courts despite having the forum selection clause. The investor is free to go for treaty arbitration without exercising such formality. The reason for that the act of the state is the sovereign act and cannot be considered as a private act, so it is definitely considered to be treaty breaches as distinguish from contractual breaches.

In case of extra contractual conduct alleged by the claimant to the judicial or administrative authority and it is yet to be appealable. The claimant should exercise the right otherwise there is always chances to lose the treaty claim on merits.

From the above discussion of local remedy cases and authorities it can be inferred that the claimant need not go for contractual forum before filing treaty arbitration where

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181 Glamis Gold v U.S. UNICTRAL Arbitration, Award 620, (June 8, 2009).
182 RESTATEMENT(THIRD) OF FOREIGN RELATION LAWS 712(2)(1986).
183 Christoph Schreuer Fair And Equitable Treatment In Arbitral Practice 6j, World Invest & Trade 357, 380 (2005).
184 Striking a balance between investor protections and national sovereignty: the relevance of local remedies in investment treaty arbitration

Author: George K Foster Journal: The Columbia journal of transnational law ISSN: 0010-1931 Date: 01/01/2011 Volume: 49, page 256

. The host state act was discriminatory.\textsuperscript{186}

. The host state has not provided the claimant with adequate domestic forum.\textsuperscript{187}

. The BIT authorizes the investor to pursue local forum before going to international tribunal but the investor even than can go directly as every act of the state is sovereign and constitute treaty claim.

. The treaty contains an umbrella clause through which the state bound himself to fulfil its obligation with respect to investment.\textsuperscript{188}

5. Conclusion

From all the above discussions and in the light of different cases we came to the conclusion that though with the more emphasis on the protection of the foreign investor this rule has still gained importance in the investment arbitration. Especially speaking in the case of denial of justice claims and the certain claims framed under the same standard most of the eminent scholars agreed to exhaust the local remedy, so it can be proved on international forum that the justice has not done to the investor. so mostly in this kinds of claims single act of the host is not enough and the claimant has to exhaustively or reasonably exhaust the local remedy. However, I differ with the view of George K. Foster that expropriation comes under denial of justice claims. Expropriation is in traditional sense, when the host State seizes assets from private entities because it is necessary on alleged public grounds, seems to be uncommon. A regular feature in most of the studied arbitral awards is rather that a series of different public actions – tax decisions, contract terminations, obstructions – are alleged to be “tantamount to expropriation” or “indirect expropriation”. Formulating claims in this manner, it might not be entirely clear what an expropriation really is and how this differs from a denial of justice. There are however important differences, explaining the local remedies rule’s vital function in the latter case. in denial of justice the claimant has to establish the series of acts to prove his case on the contrary in expropriation a single act of the state may constitute expropriation. Furthermore, in the cases at hand, the alleged expropriation has been connected to contractual rights the host acted as a commercial counterpart but n in denial of justice cases State exercising its sovereign authority. Given the emphasis in addition in Generation Ukraine case the tribunal rightly observed that the every trivial matter or the wrong which can be rectified by pursuing the local machinery should not be taken directly to the international forum. However, in case of the fork in the rod clause in the BIT is concerned it should be interpreted narrowly to trigger the use of the local remedy rule. in practice we see, if the claimant exhausts the local forum even after fork in the rod clause in the contact the claimant still goes to for the treaty claim by taking the plea the matter taken at the domestic forum was on the contractual basis and the claim filed before the international tribunal is under treaty claim which are two different claims.

It is well accepted and supported by majority of the arbitrators that the host state who has been alleged by the claimant for any wrong should be provided opportunity to redress that wrong. If the investor goes directly to the international tribunal without giving him any opportunity, then it may be a source of

\textsuperscript{186} RESTATEMENT( THIRD) FOREIGN RELATION LAW supra note
\textsuperscript{187} Id para
\textsuperscript{188} Stephan W. Schill Enabling Private Ordering: Function, Scope And Effect on Umbrella Clauses in International Investment Treaties Arbitration, 18 MiNN. J. INT’L L & I 5-7 (2009), noting that the application of the umbrella clause is one of the most contentious issues in investment arbitration.
humiliation and embarrassment for the host state especially in the high-profile cases. This will discourage the host states to enter in any such treaty in future. In this way, the investor can lose the international forum for the redressal of his grievance and has to rely on domestic forum which is not good for the investor as well. Moreover, if the claimant rely more on domestic forum this can make the host state obliged to make its judicial or administrative more efficient and effective.

It is pertinent to mention here that the ICSID and NAFTA has not specifically mention this rule but even then, it is present in implicit ways. We see in most of the recent cases where the BITS did not explicitly mention the local remedy rule the tribunals still apply this rule and dismiss the claim because the claimant has not exhausted the local remedy.

However, it is relevant to say that there is no need to exhaust the local remedy where it is evident from the behavior of the local courts or administrative body that the outcome would be improbable or where there is no adequate, effective and reasonable remedy available to the claimant. In this case, the Loewen case is very relevant and the decision given by the tribunal is criticized by the majority of the practicing arbitrators and scholars because in that case there was no adequate, effective and reasonable remedy available to the claimant even then the tribunal decline jurisdiction.

It can be said there is no procedural requirement for the exhaustion of local remedy (which may be relevant in case of diplomatic protection) and it is considered to be the substantive requirement where there is a denial of justice and FET claims. I agreed with the view of the George K. Foster that it is more probable to take the matter in international forum on the basis of clear and convincing evidence. It means that the claimant can claim that the decision was based on the erroneous evidence. And in that case, it is not necessary to prove the malice or to cast aspersions on the conduct of the judge. In this way the tribunal will feel more comfortable to disregard the decision of the judge.

There should be maintained certain balance between the state sovereignty and the protection of the investor. The investor should respect to the certain extent to affording him the opportunity for the correction of its wrong in return the host state should also provide the effective means so the investor can enforce its rights. Furthermore, to attract the foreign investment host state will make his judicial and administrative system more efficient which also gives the incentive to the investor to exhaust the local remedy.

Before summing up it is necessary to discuss the function of the local remedy rule where BITS are silent. It is incumbent upon the judge to fill in the gaps according to the intentions of the parties and treating the matter individually, depending upon the circumstances of each case. In silent BITS there are two countering interests are at stake and need to be balanced against each other: on one end is the investors’ interest and those of an efficient arbitration system. On the other are opposing interests that are public in their nature and stress the host State’s rights. All authorities would probably agree that the local remedies requirement should be applied flexibly. An implied waiver would require special circumstances in the individual case and when interpreting any unclear legal situation, each situation is unique and should be treated accordingly.

To wrap up this text and answer the initial question, there should be no general implicit procedural requirement to exhaust local remedies, in the sense that a failure to do so would deprive the tribunal of its jurisdiction. Such a principle can however be read into the substantive part of a claim, as has been done on several instances in recent arbitral awards.
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