PRIMARY AND SECONDARY REMEDIES
IN INTERNATIONAL INVESTMENT LAW
AND NATIONAL STATE LIABILITY: A
FUNCTIONAL AND COMPARATIVE VIEW

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I. Introduction

International investment law covers many factual instances of protection of rights or entitlements that are equally found on the national level. The protective provisions in international investment agreements (IIAs)\textsuperscript{1} cover ground similar to that covered by administrative law or state liability law in municipal legal orders, for example expropriation law or (substantive) due process. No wonder international investment law has been called a ‘Species of Global Administrative Law’\textsuperscript{2}. It ever more deals with administrative law for foreign investors, more forcefully so in a regulatory welfare state: ‘the jurisprudence of investment tribunals as a whole contains ingredients of a growing system of international administrative law for foreign investment’\textsuperscript{3}. To put it bluntly: international investment law creates an international level of review for (illegal) national regulations and laws and the

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\textsuperscript{1} IIAs encompass Bilateral Investment Treaties (BITs) as well as Free Trade Agreements with an Investment Chapter, such as NAFTA or the Energy Charter Treaty.


\textsuperscript{3} R Dolzer, ‘The Impact of International Investment Treaties on Domestic Administrative Law’ (2005) 37 NYU JILP 953, 970.
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conduct of administrative entities for foreign investors. It is state liability law for foreign investors.4

In municipal law, the law of available remedies against the state for injured right holders forms part of administrative and, often, constitutional law. In spite of the similarities of factual circumstances, the legal environment for dealing with national investors and the one for foreign investors varies considerably. In national law, a right holder needs to take all (usual administrative and judicial) steps to have the illegality of an act reviewed through primary remedies and only then can claim damages as a remedy of last resort. In investment law, by contrast, the investor often has immediate access to international tribunals without the exhaustion of local remedies and may immediately claim damages, thus secondary remedies. Why is this so? Why does an investor not need to use at least effective remedies in the host state in order for a claim to damages to be ‘ripe’? What are the rationales discussed for the different remedies found in national state liability law and in investment law? And do they have a rational justification in general, and depending on the case in specific circumstances? Those questions justify a functional comparison of national state liability regimes with international investment law.

In this chapter, the remedies in international investment law and the remedies for similarly situated cases in some municipal legal orders are compared. By this comparison, fundamental differences between international investment law and national state liability law in how to deal with state measures interfering with private rights or entitlements are highlighted. In order to carry out a functional analysis, this chapter draws on economic theory of remedies. Here, the seminal article by Guido Calabresi and Douglas Melamed distinguishes between property rules and liability rules, the former granting stronger protection of rights.5 The important point is that we can equate property rules with primary remedies and liability rules with secondary remedies. Of special interest are the circumstances under which a legal order refers a private (legal) person to primary remedies or secondary remedies. Primary remedies are preventive or restorative, whereas secondary remedies are pecuniary damage claims, granted ex post. Remedies are the means by which a legal system—be it a national legal system or the international system—protects and enforces rights; ubi remedium ibi jus. Their design and application is decisive for how strong a right or entitlement is and how it is balanced with public policy goals. This view is explicated most prominently

4 This notion is used in contrast to the notion of state responsibility in international law, which refers to responsibility between states, not between state and individuals or firms, as in investment law. Similarly, G Van Harten, Investment Treaty Arbitration and Public Law (2007) 103, note 46. See also A Aflalo, ‘Constitutionalization through the Back Door: A European Perspective on NAFTA’s Investment Chapter’ (2001) 34 NYU JILP 1.

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II. Terminology

Some clarification of terminology is necessary, as the usage of terms in state liability law varies and can thus be confusing. In all countries state liability has been no easy legal issue area, especially as most of it has been developed by case law. Furthermore, the notion of state liability is used to cover all kinds of liability for state action and omission, whether legal or illegal. It applies to measures by the executive, the legislature, or the judiciary. It encompasses acts by all levels of governments, i.e., at federal, state, and municipal level. It covers consequences that are intentionally and directly caused as well as those unintentionally and indirectly caused. It applies to contractual and tort liability and may even encompass legislative acts. Thus, it covers any law or administrative act which ultimately holds the state liable by damage claims. Thus, for example, damages may be claimed as an ultimate remedy for an illegal administrative or judicial act, such as denying
a construction permit or a simple governmental tort. State liability in a narrow sense encompasses only direct or indirect expropriation.

It goes without saying that it is impossible to cover all of those issues here. Tort damages caused by real acts (ie actions, where no prior administrative decision is involved), such as being negligently hit by a vehicle belonging to the police, or medical malpractice by a doctor employed by a state hospital, will be excluded from the analysis. Furthermore, non-authoritative actions of the state, such as acting in commercial activities, will be excluded. Rather, the focus lies on remedies directed against the exercise of regulatory powers by the state, ie regulatory liability. One needs to distinguish between measures which concern abstract-general (parliamentary) laws, for example measures imposing land or environmental regulation or changing the tax regime, on the one hand, and individual-concrete measures imposed usually through an administrative act, such as the revocation or non-granting of a licence, on the other. Both parliamentary laws per se and the application of laws through administrative (or judicial) procedures infringing fundamental rights or property rights are issue-areas relevant in investment law as well (due process). Most of the cases are brought by investors against substantive regulatory decisions or against the handling of administrative procedures. The concept used here is thus broader than just takings law (state liability law in a narrow sense) as it would include facts which are covered by the investment protection norm of ‘fair and equitable treatment’, including due process.

Furthermore, the notions of primary and secondary remedies have to be clarified. The term primary remedy is used if the action of a citizen is directed against the (illegal) governmental act as such—the remedies are thus preventive or restitutive. They are devised to avoid present and future loss or injury. Those actions are usually called public law remedies and encompass most prominently the action of rescission (Anfechtungsklage), but may also include declaratory actions (Feststellungsklage), mandatory injunctions (Verpflichtungsklage), and an order of mandamus (Leistungsklage). Furthermore, an order of mandamus may also be justified for monetary damages in case of an expropriation. Two kinds of injunctions are possible: prohibitory and mandatory. Primary remedies are thus directed against the governmental action as such and are meant to remedy the current state of affairs.

Secondary remedies, in contrast, are directed at pecuniary damages and form the core of state liability law. For direct and lawful takings, ie the taking of a legal title for a public purpose, due pecuniary compensation is the only appropriate remedy. The same holds true for legal state measures or regulatory actions that inflict a special, disproportionate loss on the right holder, the classic case being a gasoline station losing all its business due to a temporary deviation of the road due to public construction work (Aufopferung—special sacrifice). In those instances,
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international investment law and national state liability law are aligned, and there are no differences in remedies.

This picture changes immediately for all other kinds of rights infringements, ie indirect or regulatory expropriations or (substantive) due process violations. In case the legality of an expropriatory measure is in question or if the delineation between a compensable (legal or illegal) taking or a non-compensable regulatory measure is in question, in municipal legal orders, primary remedies are used primarily, in stark contrast to investment law. Of course, there are differences in the municipal legal orders on the exact alignment between a compensable regulatory expropriation and a non-compensable measure. Furthermore, actions can be brought as an action against tortious liability (Amtshaftung) requiring an illegal act and wrongdoing by the state. Here, cases of ‘fair and equitable treatment’ in investment law come close, for example in cases where a licence has been revoked without due process or where administrative discretion has been misused. Here, complaints for pecuniary damages are usually brought as a ‘last resort’ in municipal law. For parliamentary laws, ie legislative state liability, usually the liability is very restricted in all countries and here, as well, primary remedies, such as constitutional complaints, are used, instead of damage claims.

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States have traditionally been extremely wary of granting monetary damages for any action they take and even more so for omissions. The notion of ‘the king can do no wrong’ or ‘le roi ne peut mal faire’ was well established and usually backed up by state immunity. This did not change for a long time, even after democracies had been established. In France, sovereignty and liability in damages were perceived as mutually exclusive notions, even after the Revolution. Furthermore, a strict notion of separation of powers precluded courts from judging the actions of the other powers. Although this approach has changed considerably, state

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7 For comparative work on state liability, see Zhang (ed) (n 6 above), covering Korea, Taiwan, China, Japan, Indonesia, the Netherlands, and Germany; Fairgrieve (n 6 above), covering France and Britain; I Römermann, *Aufopferungshaftung in Europa* (2007), covering Germany, France, Britain, and the EU on questions of special sacrifice liability, ie legal acts.
8 Fairgrieve (n 6 above) 9 et seq.
liability in the form of damages is still rather restricted.\textsuperscript{9} States usually require the use of primary remedies before right holders can claim damages against the state. The principle of ‘do not acquiesce and liquidate’ (‘Kein Dulde und Liquidiere’) still holds true in most legal orders, although legal orders vary in the way they implement that principle, just as they vary in the strictness conditions of state liability. In municipal legal orders, seeking redress for governmental wrongs usually consists in challenging the state measure as such. Citizens which are adversely affected in their rights or entitlements have to use the administrative proceedings or courts to challenge the state measure allegedly infringing their rights. Damage liability is commonly only the last form of redress available for regulatory measures. Furthermore, the separation of powers doctrine usually precludes courts from an encompassing review of administrative action. Even though courts review—although to a varying extent in the different legal orders—all administrative decisions, they do so only by respecting the discretion of the executive branch. The courts usually control the limits of discretion, basically a good faith review of the legality, but not the expediency of administrative action. When controlling for legislative acts, the prerogative of the parliament usually also prevents courts from reviewing the expediency of the act in-depth. Rather, they defer to the prerogative of parliament. I will not deal here, however, with the substantive differences in state liability, as this would considerably exceed the space limit.\textsuperscript{10} Rather, I focus only on procedures and remedies which allow for pecuniary damages to be claimed. One needs to stress, though, that there is traditionally a difference in private law between common law and civil law countries in the use of remedies: whereas in common law countries damages is the primarily used remedy, civil law countries order specific performance as a remedy to be used first.\textsuperscript{11} This difference in private law influences the public law remedies as well.

For direct takings, pecuniary compensation is the adequate remedy in all legal orders, although by no means is full compensation of the fair market value always required.\textsuperscript{12} As direct takings are often lawful, pecuniary compensation is also the

\textsuperscript{9} This is certainly true for Germany but also for France, the UK, and China, although there are gradual differences.

\textsuperscript{10} But see the attempt of the OECD to compile a comparison between indirect regulatory takings doctrines in OECD countries. The motivation for this undertaking has been the relevance of national law for international investment law. See OECD Doc DAF/INV/WP/WD(2006)1 of 18 July 2006 (on file with the author). Unfortunately the project has been given up for the moment and the result, to date, is not satisfactory from a legal comparative point of view.

\textsuperscript{11} See K Zweigert and U Drobnig (eds), \textit{International Encyclopedia of Comparative Law}, Vol VII (Contracts), Ch 16 (1976); Vol XI (Torts), Chs 4 (1976), and 7 to 11 (1971 and 1972).

only means of redress. More interesting for the purpose of this chapter are the remedies for indirect and unlawful takings as well as violations of the equivalent laws to ‘fair and equitable treatment’. Here, regulatory measures come to the fore. How do municipal legal orders deal with those? In most municipal legal orders, a claim for pecuniary damages is subsidiary. This result is achieved through procedural means.

Let us start with the United States. Here, the US Supreme Court has developed a doctrine of ‘ripeness’ that requires a property owner to allow the governmental entity to reach a final decision before a takings claim can be brought. Property owners must take all steps to allow regulatory agencies to exercise their full discretion. In the Palazzolo case the principle and rationale is clearly stated:

...the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner’s first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

The ripeness principle for takings claims under the Fifth Amendment to the US Constitution is a general principle requiring the right holder to pursue unsuccessfully the administrative or judicial procedure that the federal or state government has provided for seeking compensation or other remedies. Primary remedies have to be taken against regulatory takings, in order to have a firm establishment that there is a takings claim under the Fifth Amendment, before a claim for pecuniary damages can be made. US law, therefore, requests primary remedies, in the form of administrative review, before a claim for pecuniary damages as secondary

13 Seminal Williamson County Regional Planning Commission v Hamilton Bank of Johnson City 473 US 172, 186, 194 (1985). See also Hodel v Virginia Surface Mining & Reclamation Association Inc 452 US 264, 297 (1981): ‘There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.’ Similarly Penn Central Transportation Co v New York City 438 US104, 136–7 (1978).


A remedy can be made. Of course, in municipal law, as in investment law, the delineation between regulatory takings and non-compensable measures poses a huge problem. In the *Lingle* case the Supreme Court explicitly held that takings claims and substantive due process claims were doctrinally and analytically distinct. Whereas the former are focused on the regulation’s effects, and the remedy is compensation, the latter are focused on the regulation’s validity and the remedy is invalidation. Due process violations or substantive due process violations, as a violation of constitutional rights that are not a taking, thus have to be remedied first through primary remedies. In short: under US law, for an unlawful taking and indirect expropriation compensation needs to be paid, but only after the claim is ‘ripe’, i.e., after review through administrative and judicial procedures; for other illegal administrative actions, restitution through invalidation is the primary remedy.

The German doctrine is similar. Primary remedies equally must be taken before a damage claim can be brought, with the exception of direct takings, in case of which the law has to provide for pecuniary compensation. The German state liability law is primarily case law and therefore quite complicated and differentiated, but two cases will be illustrated: the case of regulatory expropriation and the equivalent case for a violation of fair and equitable treatment. In tort cases, or cases similar to a violation of fair and equitable treatment, for example a violation of the rule of law or a violation of due process, damages may only be claimed if the claimant has taken primary remedies first. If the right holder fails to use the available remedies, he or she is barred from claiming damages. By the German doctrine, this rationale is viewed as being part of contributory negligence, thus excluding the claim in its entirety. It is, thus, well accepted that damage claims as secondary remedies are subsidiary to primary remedies in administrative misapplication of the law.

The same holds true for indirect expropriation claims. Since a seminal decision of the German Federal Constitutional Court in 1982, it is settled doctrine that

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16 On the differences between the US system requiring more internal administrative review before claims in court can be brought and the German system which requires less administrative review before a claimant may use the court system, see FW Scharff, *Die politischen Kosten des Rechtsstaates. Eine vergleichende Studie der deutschen und amerikanischen Verwaltungskontrollen* (1970).

17 In the US, the doctrine got a bit more clarified and is more similar to the German doctrine now in *Lingle v Chevron* 544 US 528 (2005). For details, see M Fenster, ‘The Stubborn Incoherence of Regulatory Takings’ (2009) 28 Stan ELJ 525.

18 Under US law, substantive due process forms part of the Due Process Clause of the Fourteenth Amendment, US Constitution, amendment XIV, § 1 which provides that no state ‘shall . . . deprive any person of life, liberty, or property, without due process of law’.

19 Fenster (n 17 above) 13 et seq.

20 ibid 15 et seq.

21 See BGB, art 839(3).


23 BVerfGE 58, 300 (‘Naßauskiesungsentscheidung’). The case was about the constitutionality of a groundwater regulation law where the law did not declare its norms to be a taking. It was unclear whether the law constituted a compensable taking or a non-compensable regulation of
in case a statute is not declared to be an expropriatory act, and therefore provides no pecuniary damages, but the right holder feels that an indirect expropriation has occurred, he or she has to use primary remedies—usually in the form of an action of rescission—to attack the law as illegal before administrative courts (and before that through administrative review). There is no choice of remedies for the right holder. If she fails to use primary remedies and the state measure has become unappealable, any claim to pecuniary damages is precluded. It is viewed as a general principle of law that failure to take primary remedies results in an exclusion of the liability of the state. In Switzerland, basically the same doctrine as in Germany applies for state liability law, including liability for legal acts that demand a special sacrifice of the right holder. Primary remedies have to be used first before secondary remedies are available. The failure to use primary remedies precludes any damage claims against the state. For direct and indirect expropriation, article 26(2) of the Swiss Constitution (Bundesverfassung, BV) provides for pecuniary damages. Basically the same applies for state liability in France (responsabilité de l'administration). As in Swiss and German law, liability may arise for damages caused by legal acts, either because the state action involves certain risks (responsabilité pour risque) or for especially grace and special damages (responsabilité pour rupture de l'égalité devant les charges publiques). Generally speaking, French law as well as Spanish law have a stricter liability for the state than the other countries. It covers the full range of administrative activities with its implied general duty of adequate administration. Nevertheless, in France also, often primary remedies have to be used first. In Nigeria, as well, courts tend to issue primary remedies, ie injunction or specific performance, especially when dealing with mineral rights regulations or the revocation of licences. The same holds true for several East Asian countries.

The reasons cited for those restrictions are manifold and are repeated not only in the United States or German discussion but also in the United Kingdom and France (although in the latter case to a lesser extent). First, formerly, liability was claimed against the responsible civil servant. Here, it was feared that there could be a crippling of administrative decision-making due to fear of personal liability of the civil servant. Even without personal liability of the public office holder (as is the case nowadays), extensive pecuniary damages could lead to a paralysis of property. The Court clarified in this decision, in principle, the relationship between those two possibilities.

24 ibid 324. 25 ibid.
26 For details, see U Häfelin et al, Allgemeines Verwaltungsrecht (2006) 469 et seq.
27 For details, see C Harlow, 'Fault Liability in French and English Public Law' (1976) 39 MLR 516; and Fairgrieve (n 6 above).
29 See the compilation in Zhang (n 6 above).
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administrative and regulatory action in order to avoid liability.\textsuperscript{30} It is feared that monetary liability could be too burdensome for state budgets.\textsuperscript{31} Secondly, it is argued that wrong incentives would be set for citizens to claim damages instead of using the procedural possibilities to seek injunction or specific performance. This could lead to a ‘dangerous increase in “compensation culture”’.\textsuperscript{32} As expressed by a British Law Lord:

\ldots it is not really in the interests of society as a whole if you spend your time concentrating on rights of individuals to damages—because that is what we are talking about, financial compensation—against public authorities who are charged with looking after society as a whole and doing their best to perform a social welfare function; the creation of ever more duties giving rise to financial compensation is actually counterproductive in a society.\textsuperscript{33}

Clearly this statement leaves out behavioural consequences of damage awards on the conduct of the state (and its agents)—an aspect which, in my view, should be taken into account if one does not take the view that the state is always benevolent—and that would amount to a Panglossian approach.\textsuperscript{34} Thirdly, especially in developing countries, those kinds of possibilities of protecting rights through the development of an administrative state as well as the possibility of review and control by courts through public law (or primary) remedies is considered as a rule of law achievement, since preventive remedies give a stronger protection to citizens than damage claims \textit{ex post}.\textsuperscript{35} Also, in investment law, empirical research shows that the idea of good governance of host states is not necessarily helped by an opt-out system for foreign investors.\textsuperscript{36}

\section*{IV. Remedies in International Law and Investment Law}

Remedies in international investment law are—contrary to municipal law and large parts of international law—most commonly pecuniary damages, thus secondary remedies in our terminology. What are the reasons for that? Let us first turn to remedies in international law generally and then to international investment law.

\textsuperscript{30} Fairgrieve (n 6 above) 130 \textit{et seq.}, for France and Great Britain, with a comparative view also to other states, and ibid 182. \textsuperscript{31} ibid 13, 32; Ossenbühl (n 22 above) 9 \textit{et seq.}

\textsuperscript{32} Fairgrieve (n 6 above) 133. \textsuperscript{33} Cited from ibid 133.


\textsuperscript{35} This at least is the view in Asia, T Fuke, ‘Historical Phases of State Liability as Law of Remedies—Some Introductory Remarks’ in Zhang (n 6 above) 4 \textit{et seq}. It is in conformity with economic analysis, see Part V below.

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A. Remedies in Public International Law

There is no principle in international law which remedy should apply and courts and tribunals have varied quite a bit on that question. It is clear that restitution and declaratory relief are available remedies in international law. Tribunals, thus, can issue relief for specific performance or injunctions, ie primary remedies or public law remedies. Furthermore, declaratory decisions are always possible. Only if those are impossible or impractical, should pecuniary damages be awarded. By no means are remedies in international law confined to pecuniary damages. The ILC Articles on State Responsibility set out all kinds of legal consequences of an internationally wrongful act (Articles 28 et seq). As the Permanent Court of International Justice stated in the *Chórzow Factory* case:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. *Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear*; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The line of jurisprudence of the *Chórzow Factory* case has been followed in many cases of the International Court of Justice (ICJ). The Court has held consistently that the obligation of a state responsible for an internationally wrongful act to put an end to that act is well established under general international law. In several cases, it has issued decisions ordering specific performance (sometimes in conjunction with pecuniary damages). Thus, at least in state-to-state disputes,

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40 *Factory at Chorzów (Germany v Poland)* Merits, 13 September 1928, PCIJ Series A, No 17, p 47 (emphasis added).

41 eg *Case Concerning United States Diplomatic and Consular Staff in Teheran (US v Iran)* Judgment, 24 May 1980, ICJ Reports 1980, 3; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment, 14 February 2002, ICJ Reports 2002, 3; *LaGrand Case (Germany v US)* Judgment,
primary remedies such as specific performance or a declaratory judgment finding illegality are the common remedy. Nevertheless, the ICJ carefully takes into consideration the sovereignty concerns of nation-state governments. In the *Avena* case, the ICJ rejected Mexico’s submission that the United States was obliged to annul the convictions and sentences by way of *restitutio in integrum*—thus restoring the *status quo ante*. The United States objected that to require specific acts by the United States in its municipal criminal justice systems would intrude deeply into the independence of its courts. The ICJ, therefore, found that the ‘appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals’.

There are other fields of public international law where international courts and tribunals predominantly use primary remedies. This is not only true for WTO law, where pecuniary damages are rarely used, although not legally excluded. The same holds true for international human rights law. Here, mostly declaratory judgments are issued. Although also (small) pecuniary damages are awarded, courts have been less and less reluctant to issue not only declaratory decisions but also to order specific performance.

27 June 2001, ICJ Reports 2001, 466; *Case Concerning Avena and other Mexican Nationals (Mexico v US)* Judgment, 31 March 2004, ICJ Reports 2004, 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, 9 July 2004, ICJ Reports 2004, 136, para 163, where the Court issued an injunction, required the revocation of legislative and regulatory acts, and ordered reparation. It clearly stated (in para 151) that since the construction of the wall is illegal under international law, the cessation of the violation includes the repeal or rendering ineffective of all legislative and regulatory acts. This amounts to specific performance.

42 cf also Schreuer (n 37 above) 327.
43 Although making crystal clear that there is no restriction of its jurisdiction concerning remedies, the ICJ in the *Avena* case (n 41 above) para 34, ‘recall(s) in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation’. 44 ibid para 31.
45 ibid para 32.
46 ibid para 153.
47 DSU, Art 22. They are not used as the non-compliant party has to agree to them. See M Bronckers and N van den Broek, ‘Financial Compensation in the WTO. Improving the Remedies of WTO Dispute Settlement’ (2005) 8 JI Econ L 101.
48 In the European Court of Human Rights Case *Assanidze v Georgia* [Grand Chamber], Judgment, 8 April 2004, ECHR 2004-II, the Court found in the operative part of its judgment that the applicant was illegally detained and ordered specific performance, ie his immediate release. It thereby followed a process that had been commenced in *Scozzari and Giunta v Italy* [GC], Judgment, 13 July 2000, ECHR 2000-VIII, para 249. In *Scozzari and Giunta* the Court, for the first time, applied the language of Art 41 of the Convention in conjunction with Art 46, to the effect that, taken together, they require the state to do away with the situation which had caused the violation (‘*restitutio in integrum*’) in the first place. This practice was confirmed in the operative part (at 4) of *Broniowski v Poland* [GC], Judgment, 22 June 2004, ECHR 2004-V.

Similarly, the Inter-American Court of Human Rights goes very far in its choice of remedies, cf *American Convention on Human Rights*, Art 63(1). See eg *Aloeboetoe and ors v Suriname* Judgment, 10 September 1993, IACHR Series C, No 15, where the Court not only ordered material and immaterial damages for the whole tribe (because 7 of its members were murdered), but
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rights law, the principle of ‘exhaustion of local remedies’—ie usually primary remedies—is applicable, with exceptions for those cases where the use of local remedies is futile.49

In international law, the exhaustion of local remedies, and thus the use of primary, non-pecuniary damages, on the national plane, is the general principle. This is true not only in human rights law as just mentioned, but also in diplomatic protection, which is traditionally afforded only if the aggrieved party has used local remedies before. Thus, a final national court decision is usually needed to jump to the international plane. As the Rapporteur to the International Law Commission, James Crawford, held: ‘an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act’.50 As Jan Paulsson states:

International law attaches state responsibility for judicial action only if it is shown that there was no reasonable available national mechanism to correct the challenged action. In the case of denial of justice, finality is thus a substantive element of the international delict. States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct.51

This problem of ‘denial of justice’ has been tested extensively in international investment law, to which we will now turn.

B. Remedies in International Investment Law

International investment law is not to be read in ‘clinical isolation’ (just as WTO law is not),52 but forms part of public international law.53 In principle, public international law norms and decisions are guiding for investment law, unless there are specific norms in investment treaties54 or in the arbitral law applicable.

The specificities of investment law will be dealt with in the following order. First, the remedies commonly used and the usual arguments for it will be discussed. Secondly, the problem of interaction between local remedies (primary remedies)

also requested the establishment of 2 trust funds and a foundation, as well as ordering the reopening of the school, where the tribe is located.

49 All treaties or Rules of Procedure of the regional human rights courts as well as of the UN treaty based system require the exhaustion of local remedies, unless those are not effective or are unreasonably prolonged.
51 Paulsson (n 38 above) 100.
54 eg as in the US Model Bilateral Investment Treaty of 2004, Art 34(1); NAFTA, Art 1135; and Energy Charter Treaty, Art 26(8). The European BITs usually do not contain any restriction concerning available remedies.
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and how investment tribunals deal with it, will be analysed, much of it under the heading of exhaustion of local remedies and ‘denial of justice’ claims. Thirdly, a description of how investment tribunals deal with partially functional equivalents of local remedies in investment law, such as waiting periods, ‘national-court-first-provisions’ and fork-in-the-road provisions in IIAs, will be provided before turning, in Part V below, to a functional analysis.

(1) Remedies used in investment law

In investment law, public law remedies as primary remedies are equally permissible in principle—unless an IIA provides otherwise. Yet, investment tribunals have mostly not used this flexibility in choosing remedies, but award damages only. One reason for this might be that the claims brought are more restricted in scope under an IIA since they are almost always connected to an investment, i.e. a property right or entitlement. Although other rights may be implicated, such as due process rights, ultimately a monetary value is in question.

The ICSID Convention does not restrict investors to pecuniary damages; rather it only states that an award shall deal with every question submitted to the tribunal.ICSID tribunals could therefore use primary remedies and exercise a review function just as national courts do. All awards rendered pursuant to the Convention are binding and pecuniary obligations imposed by that award shall be enforced within the territories of the contracting parties as if it were a final judgment of a court in that state. The enforcement of pecuniary damages is thus (a) more practical and (b) more effective, since a decision with a primary remedy requires the defendant state to act and is not internationally enforceable as a claim for pecuniary damages. This, in turn, gives a strong incentive to claimants to ask only for pecuniary damages. The tribunal is then bound to the rule ne ultra petita; under the ICSID Convention a tribunal would exceed its powers in deciding on a non-requested remedy and put the award in danger of annulment.

Nevertheless, even ICSID tribunals went different ways if so requested. In Goetz v Burundi the tribunal took a two-step approach. The claimant owned

56 ICSID Convention, Art 54(1). This alone as well as the travaux préparatoires do not support a restrictive interpretation. cf Schreuer (n 37 above) 325.
57 On the enforcement, see E Baldwin et al, ‘Limits to Enforcement of ICSID Awards’ (2006) 23 JI Arb 1. 58 See Amerasinghe (n 38 above) 422 et seq.
59 ICSID Convention, Art 52(1)(b). cf Wälde and Sabahi (n 37 above) 1059.
60 Antoine Goetz and ors v République de Burundi ICSID Case No ARB/95/5, Award, 10 February 1999, paras 136–137: ‘Le choix entre ces deux voies, qui l’une et l’autre maintiennent l’action de la République du Burundi dans la légitimité internationale, relève de la décision souveraine du Gouvernement burundais. Si, dans les quatre mois à compter de la notification de la présente
the company AFFIMET incorporated in Burundi, which enjoyed a free zone certificate granting tax and customs exemptions. When the state withdrew this certificate, Goetz claimed under the Belgian-Burundi BIT. The tribunal ordered a two-stage remedy as requested by the claimant. It ordered specific performance, ie the re-issuance of the certificate, in the first place within a limited period of time (four months), followed by payment of monetary compensation in case the state would not comply with the primary remedy, ie specific performance.

This kind of approach would stand for a convergence of investment law and municipal law of state liability in that primary as well as secondary remedies can be used, albeit solely on the international plane. It would allow a state to comply with a primary remedy, ie specific performance or an injunction, ‘voluntarily’ or choose pecuniary damages in case it finds that a primary remedy would infringe its sovereignty. Needless to say, this approach is possible only if the claimant has so requested. The potential of this approach is discussed in Part VI below.

(2) Exhaustion of local remedies and denial of justice

Another question coming up frequently is the problem of interaction of remedies between the municipal and the international plane. Here, a continuum is an apt description on which to base the analysis. On one point of the extreme, there is no local review necessary whatsoever, on the other, the exhaustion of local remedies is required in the form of the finality of a municipal court decision. Although under Art. 26 ICSID Convention, states may require the exhaustion of local remedies, most states do not and most modern IIAs usually dispense with this requirement. In between we find cooling-off or waiting periods, local-courts-first requirements and fork-in-the-road provisions. Those solutions is analysed in Part IV.B(3) below.

Here we will deal with those cases, where local remedies were used by the investor and a misadministration of justice, either in courts or in the administrative procedure, was found. This is the case where there are primary remedies on the national plane first, followed by secondary remedies on the international plane. If local remedies have been used and justice was denied, thus rendering the procedures futile, the investment arbitration fulfils its function as a remedy of last resort. A damage claim would then amount to the use of a secondary remedy in municipal law where other remedies are no longer possible. Denial of
justice claims are substantive claims where the violation of international law lies
in the inadequacy of the procedure as such. A pure violation of international law
through, for example, municipal legislation or a misinterpretation or misappli-
cation of laws by the administration is not enough: here local remedies would be the
way to correct those violations. Following one common, although rather broad
definition, denial of justice means ‘improper administration of civil and criminal
justice as regards an alien, including denial of access to courts, inadequate proce-
dures, and unjust decisions’. 63

The interaction of denial of justice and local remedies has been ‘understudied and
unresolved’. 64 As Don Wallace commented:

One can conclude that the historical deposit of international law is not sufficiently
worked out: that denial of justice through original judicial failure (or for that mat-
er, at the stage of redress) and the local remedies rule have not been knitted to-
gether either conceptually or temporally; nor is it clear how many different judicial
stages may be involved in the combination of the two. 65

Does exhaustion mean judicial finality in national courts or is an administrative
or judicial failure in earlier stages enough? As we have seen, in municipal state
liability, finality is commonly required to move on to secondary remedies. In a
lot of cases, national procedures precede an ICSID claim, usually, but not only,
because a state contract, for example a licence, is in question. In those cases, often
local, primary remedies are sought first by the investor. Often the state contract
mandates national arbitration (or national judicial review) and more than once
this arbitration was allegedly influenced by national courts or national courts
interfere with the arbitration through their own jurisdiction. The question then
arises of whether a denial of justice or a miscarriage of justice amounts to a breach
of the IIA, either by constituting an expropriation or by violating fair and equita-
ble treatment. Here, a violation of the IIA would not be the ‘original or primary
wrong’ but would be caused by the ‘egregious’ administrative or judicial review,
thus constituting a ‘secondary wrong’. 66

Several cases have dealt with this issue, some of them under the topic of expropri-
ation. In Waste Management v Mexico the tribunal held, in a claim of expropriation,
that:

…the normal response by an investor faced with a breach of contract by its gov-
ernmental counter-party (the breach not taking the form of an exercise of govern-
mental prerogative, such as a legislative decree) is to sue in the appropriate court to
remedy the breach. It is only where such access is legally or practically foreclosed that
the breach could amount to a definitive denial of the right (ie the effective taking of

63 AO Adede, ‘A Fresh Look at the Meaning of the Doctrine of Denial of Justice under
International Law’ (1976) 14 Can YBL 72, 91. 64 Wallace (n 62 above) 682 (footnote omitted).
65 ibid 684 et seq.
66 See on those terms and their critique, Paulsson (n 38 above) 57 et seq.
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the chose in action) and the protection of Article 1110 [NAFTA] be called into play... The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation... Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent.67

A ‘final refusal to pay (combined with effective obstruction and denial of legal remedies)68 could thus constitute expropriation. Also, the tribunal in EnCana v Ecuador, dealing with tax matters, held that primary remedies must come first and be unsuccessful, before a damage claim under international law can be brought.69

On the question of the relationship between denial of justice and the requirement of exhaustion of local remedies, the tribunal in Duke Energy v Ecuador was faced with the question of whether the national judiciary had interfered with a Chamber of Commerce arbitration and thus justice was denied to the investor.70 Since the claimant had not challenged a judicial decision in domestic court, ie had not exhausted the local remedies, the tribunal concluded that the claimants had failed to show that no adequate and effective remedies existed.71 The Loewen tribunal held similarly, that: ‘No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was an available and effective and adequate appeal within the State’s legal system.’72

Similarly, the tribunal in Generation Ukraine held that:

Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the 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

67 Waste Management Inc v United Mexican States ICSID Case No ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, paras 174–175 (emphasis added).
68 ibid para 176.
69 EnCana Corp v Republic of Ecuador LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 194.
70 Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador ICSID Case No ARB/04/19, Award, 18 August 2008, para 392. The relevant Art II (7) of the US-Ecuador BIT reads as follows: ‘Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.’
71 ibid para 402.
72 Loewen Group Inc and Raymond L Loewen v US ICSID Case No ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, para 154.
doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.\textsuperscript{73}

Thus, in case local remedies are pursued, the investor usually needs to exhaust them before a substantive breach of investment law can be claimed. This is functionally equivalent to the use of primary remedies first in national state liability law. Only if there is a denial of justice in an intermediary stage of proceedings, without finality on the national plane, and additionally further remedies would not be effective, there could indeed be an indirect expropriation, thus allowing for damage claims (secondary remedies). The \textit{Saipem} tribunal held as well that: “The requirement of exhaustion of local remedies imposes on a party to resort only to such remedies as are effective. Parties are not held to "improbable remedies".”\textsuperscript{74}

The \textit{Waste Management} tribunal\textsuperscript{75} also discussed a violation of ‘fair and equitable treatment’ under Article 1105 of NAFTA, which is commonly held to include a due process element.\textsuperscript{76} The due process element has traditionally also been considered to be an element of the customary international law standard of minimum treatment.\textsuperscript{77} It hereby followed \textit{Mondev International Ltd v United States}, where the tribunal analysed the applicable standard for \textit{denial of justice}.\textsuperscript{78} The latter, in turn, took the ICJ’s \textit{juridical propriety} standard as set forth in the \textit{Elettronica Sicula} case.\textsuperscript{79} Nevertheless, in \textit{Loewen v United States}\textsuperscript{80} and \textit{Robert Azinian v Mexico}\textsuperscript{81} a violation of fair and equitable treatment was not found, since local remedies were not exhausted. The tribunal in \textit{Jan de Nul v Egypt} held that:

\begin{quote}
...the respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless 'the system as a whole has been tested and the initial delict remained uncorrected'. An exception to this rule may be made when there is no effective remedy or 'no reasonable prospect of success'.\textsuperscript{82}
\end{quote}

\textsuperscript{73} \textit{Generation Ukraine Inc v Ukraine} Award ICSID Case No ARB/00/9, Award, 16 September 2003, para 20,30.

\textsuperscript{74} \textit{Saipem SpA v People's Republic of Bangladesh} ICSID Case No ARB/05/7, Award, 30 June 2009, para 182 (quoting, \textit{inter alia}, the award in \textit{Duke Energy} (n 70 above) paras 399–400, and \textit{Paulsson} (n 38 above) 153–4, who has opined that a 'victim of a denial of justice is not required to pursue improbable remedies’).\textsuperscript{76} \textit{Waste Management} (n 67 above) para 98.

\textsuperscript{75} Quoting, \textit{inter alia}, \textit{SD Myers Inc v Government of Canada} Partial Award, 13 November 2000, \textit{ADF Group Inc v US} Award, 9 January 2003, 6 ICSID Reports 470, and \textit{Loewen v US} (n 72 above).

\textsuperscript{76} \textit{Elettronica Sicula SpA (ELS) (US v Italy)} Judgment of 20 July 1989, ICJ Reports 1989, 15, para 127.

\textsuperscript{77} \textit{Mondev International Ltd v US} ICSID Case No ARB(AF)/99/2, 11 October 2002, paras 126 et seq.

\textsuperscript{78} \textit{Loewen v US} (n 69 above).

\textsuperscript{79} \textit{Robert Azinian, Kenneth Davitian, and Ellen Beca v United Mexican States} ICSID Case No ARB(AF)/97/2, Award, 1 November 1999, paras 97 and 99.

\textsuperscript{80} \textit{Jan de Nul NV Dredging International NV v Arab Republic of Egypt} ICSID Case No ARB/04/13, Award, 6 November 2008, para 258 (footnote omitted).(emphasis in original).
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The common line of the tribunals seems to be that a substantive claim for expropriation or a violation of the fair and equitable treatment standard for denial of justice can only be admitted in case (a) the investor has sought local (administrative or judicial) redress and (b) this was manifestly denied. This denial may take different forms, be it a refusal to access to court to defend legal rights, a refusal to decide, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure, and it must amount to a breach of international law.83 In those cases, expropriation or a violation of the fair and equitable treatment standard may be claimed and damages may be rewarded, notwithstanding the underlying primary cause of action. Thus, if there is a denial of justice, no further claim for primary remedies before national courts is necessary. The investor may then jump to the international plane and seek monetary relief. This deviates from national state liability law in that there a finality of court decisions must usually be present in order to shift to secondary remedies. A denial of justice in national law has to be remedied through primary remedies first. Nevertheless, it does make sense to allow for a substantive breach of the IIA if there is denial of justice, since asking the investor to pursue ineffective remedies would be inefficient. That said, the hurdle for a denial of justice claim needs to be set high if primary remedies are not to be lost too easily in investment arbitration.

(3) Waiting periods, 'local-courts-first' requirements, and fork-in-road-provisions

Under customary international law, a home country generally may not take up diplomatic protection to espouse a private investor’s claim against a host State unless the private investor has first exhausted local remedies. This has changed with IIAs, which have solved this problem, from a functional point of view, in many different ways. As mentioned above, modern IIAs often do not require the exhaustion of local remedies, but they nevertheless contain partially functional equivalents in that they do require the investor to somehow interact with the local administration of justice, allowing the national administration or courts to review the decision in question. This may take the form of cooling-off periods or waiting periods, a local-court-first requirement, or fork-in-the-road provisions. Those partially mirror the function of primary remedies in national state liability law. We will deal with those in turn.

Often, IIAs require that disputes between the investor and the contracting party ‘shall, if possible, be settled amicably’.84 If such disputes cannot be settled amicably the claimant can file a request for arbitration within a certain period (usually three, six, or nine months) ‘from the date of request for settlement’.85 Although there is no judicial review of the measure, the waiting period nevertheless induces the parties to the dispute to reconsider their point of view and enter into

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83 Paulsson (n 38 above) 204 et seq.
84 eg ECT, Art 26(1).
85 eg ECT, Art 26(2).
negotiations. Waiting periods are interpreted differently by tribunals: whereas most tribunals have held that they are not a jurisdictional requirement but are merely procedural, others have held that waiting periods have to be respected before a claim can be brought. In *Ethyl Corporation v Canada*, the Request for Arbitration was delivered only five days after the passage of the involved piece of legislation, although Articles 1118 and 1120 of NAFTA establish a six-month waiting period. The tribunal found that ‘it is difficult to credit the possibility, however, that Canada would through . . . negotiations desist’ from its course. Therefore the tribunal found that ‘no purpose would be served by any further suspension of Claimant’s right to proceed’. Any attempt at exhaustion of the waiting period ‘would have been futile’. As a result, the tribunal found that the waiting period should not be interpreted so as to deprive the tribunal of jurisdiction. Indeed, if a parliamentary law is the contested measure, a waiting-period to induce parliament to revoke its law appears futile.

But the same rationale was followed in other cases where administrative decisions were contested. The tribunal in *Lauder v Czech Republic* found that the claimant had ignored the six-month waiting period set forth in Article VI(3)(a) of the respective BIT. Nevertheless, the tribunal agreed with the ruling in the *Ethyl Corporation* case and found that the ‘requirement of a six-month waiting period . . . is not a jurisdictional provision’. To insist on the waiting period would ‘amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interest of the parties’ especially since ‘there was no evidence that the Respondent would have accepted to enter into negotiation’ with the claimant. Also in *Bayindir v Pakistan* the tribunal found that a requirement to give notice of the dispute for the purpose of reaching a negotiated settlement was not a precondition for jurisdiction. Finally, in *SGS v Pakistan* the tribunal dismissed the waiting period ‘as directory and procedural rather than as mandatory and jurisdictional in nature’. It also held, that it ‘does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration

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88 ibid para 77.
89 ibid para 84.
90 ibid para 84.
91 *Ronald S Lauder v Czech Republic* UNCITRAL, Final Award, 3 September 2001.
92 ibid para 187.
93 ibid para 190. See also *Wena Hotels Ltd v Arab Republic of Egypt* ICSID Case No ARB/98/4, Decision on Jurisdiction, 25 May 1999, 41 ILM 881, 891 (2002): ‘little practical effect other than to delay the proceedings’.
94 *Ronald S Lauder v Czech Republic* (n 91 above) para 188.
95 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras 88–103.
97 ibid para 184.
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at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal’. The only two instances, to my knowledge, in which a tribunal found that non-compliance with a waiting period constituted a bar to claim were Goetz v Burundi and Enron v Argentina. The Wintershall tribunal seemed to be equally sympathetic to this approach, but did not qualify the relevant norm as a mere waiting-period but rather as a local-court-first requirement. Furthermore, the Goetz case can be distinguished considerably by the factual circumstances as well as the wording of the BIT. It should be noted that dispensing too easily with waiting periods deprives investors of the incentive to negotiate in good faith, on the one hand, and deprives governments of time to reconsider their measure, on the other.

We will now turn to the local-courts-first requirement. Obviously, this requirement would align the sequence of remedies with the national state liability. Primary remedies would have to be used first in national courts (if a direct expropriation is not in question) and only then could secondary remedies be used on the international plane. Whereas early IIAs required that the investor should first invoke local remedies by submitting the dispute to the courts or administrative tribunals of the host country, some of them now allow access to international tribunals after the dispute has been before the local courts or administrative tribunals for some fixed period of time, even if the local courts or administrative tribunals have not concluded their proceedings. This fixed period has varied from as little as three months to as much as two years. It is, nevertheless, disputed whether an IIA may require local-courts-first, if the state has no general local remedy reservation under the ICSID Convention. Those local-courts-first requirements have often been deemed to constitute merely waiting periods, which do not pose an obstacle to the jurisdiction of an investment tribunal. But is this assumption correct in the light of the function of remedies?

The local-courts-first requirement in IIAs has been extensively discussed, mainly under the use of a most-favoured-nation (MFN) clause by an investor, who looked

98 ibid para 184.
99 Wintershall AG v Argentine Republic ICSID Case No ARB/04/14, Award, 8 December 2008, para 145.
100 Enron Corp and Ponderosa Assets LP v Argentine Republic ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2006, para 88, observing obiter that: ‘The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.’ (emphasis added).
101 Goetz v Burundi (n 60 above) paras 90–93.
102 UNCTAD, Bilateral investment treaties in the mid-1990s (1999) 93.
103 See for a discussion, Wintershall v Argentina (n 99 above) paras 114 et seq.
104 See only Wintershall v Argentina (n 103 above) para 74 and para 115. Wintershall was not followed then in TSA Spectrum de Argentina SA v Argentine Republic ICSID Case No ARB/05/5, Award, 19 December 2008, paras 98–113.
for a shorter period in third IIAs of the host state by invoking the MFN clause in the basic treaty. The seminal Maffezini decision found that the MFN clause in the Argentina-Spain BIT could be used to take the less strict provisions of the Chile-Spain BIT, since the administration of justice has to be viewed in conjunction with the protection of the right of investors. It thus found that the procedural protection belonged to the same subject matter as substantive investment protection.\footnote{Emilio Agustin Maffezini v Kingdom of Spain ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 54.} The tribunal took a cautious approach in finding that, in spite of the potential of MFN clauses to contribute to the harmonization and enlargement of dispute settlement arrangements: ‘As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations . . . ’\footnote{ibid para 62.} It went on to formulate four public policy considerations which, in its view, would impede an extension of the MFN clause: (1) if there is an exhaustion of the local remedies requirement, since this is a fundamental rule of international law; (2) if there is a fork-in-the-road-requirement, since this could upset the finality of decisions in national courts; (3) if the treaty provides for a particular system of arbitration; and (4) if the parties have agreed to a highly institutionalized system, such as NAFTA.\footnote{ibid para 63.}

The Maffezini tribunal was followed in the Siemens case, where the tribunal rejected the argument of Argentina that ‘its consent to international arbitration is subject to the requirement of bringing the dispute to the local courts in a first stage’.\footnote{Siemens AG v Argentina ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 57.} The tribunal seems not to view the local-court-first rule as a question of consent to jurisdiction, but rather as a procedural question, not constituting a bar to its jurisdiction. Nevertheless, following the Maffezini public policy limit of the exhaustion of local remedies rule, it discussed the argument of the respondent that the eighteen-month period in local courts is a ‘moderate’ version of this said rule, supposed to give local tribunals ‘an opportunity to decide a dispute first’.\footnote{ibid para 104.} Since there is no requirement of a prior decision of a court at any level, but only a passing of time is required, the tribunal found this not comparable to the exhaustion of local remedies rule and also that the issue of a tacit waiver of a general rule of international law would not arise.\footnote{Ibid.} This line of argument was followed in Camuzzi v Argentina,\footnote{Camuzzi International SA v Argentine Republic ICSID Case No ARB/03/7, Decision on Jurisdiction, 10 June 2005, paras 92–98.} the National Grid case,\footnote{National Grid plc v Argentine Republic UNCITRAL, Decision on Jurisdiction, 20 June 2006, para 92.} Gas Natural Tribunal,\footnote{Gas Natural SDG SA v Argentine Republic ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005, para 30.}
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and InterAguas v Argentina, and Suez and Vivendi v Argentina, and TSA Spectrum v Argentina. Only recently has a tribunal deemed an unfulfilled local-courts-first period to be an obstacle to jurisdiction, and it did not allow the invocation of the MFN clause, although the relevant treaty was the same as in the Siemens case, namely the German-Argentinian BIT. The Wintershall tribunal held that the local-courts-first requirement was more than a mere procedural requirement and declined jurisdiction. Thereby, it brought international investment law closer to the logic of remedies of national state liability law, giving national courts the opportunity to review the decision in question and depriving the investor of the incentive to circumvent national courts.

Some IIAs contain so called ‘fork-in-the-road’ provisions (una via electa non datur recursus ad alteram), by which an investor needs to choose between national courts and international arbitration. Once the investor chooses, the choice is final. The Maffezini tribunal accepted that such a provision, which produces finality of remedies, constitutes a matter of public policy. Clearly, this provision gives a strong incentive to the investor to choose international arbitration—with the consequence that the primacy of primary remedies in national law is rendered obsolete by the access to secondary remedies on the international level. This problem is mitigated by the interpretation taken in several cases, where tribunals apply the traditional criteria for determining lis pendens, ie identity of the parties, applicable law, and subject matter. Only if those criteria are fulfilled is the fork-in-the-road provision applicable. This usually means that the investor is not barred from international arbitration and may, without any time restraint, go to international arbitration, if he or she so wishes.

114 Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006, paras 63–66.
115 Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA and AWG Group Ltd. v Argentine Republic ICSID Case No ARB/03/19, Decision on Jurisdiction, 3 August 2006, paras 65–68.
116 TSA Spectrum de Argentina SA v Argentina Republic ICSID Case No ARB/05/5, Award, 19 December 2008, paras 110–113.
117 Wintershall v Argentina (n 103 above).
118 ibid (n 103 above) paras 114 et seq, 123 et seq.
119 Maffezini (n 105 above) para 63.
120 Similarly Schreuer (n 86 above) 249, who argues that this would put any investor ‘in an intolerable position. The investor would have so sit still and endure any form of injustice passively on pain of losing its access to international arbitration’.
121 eg Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic ICSID Case No ARB/97/3, Award, 21 November 2000, paras 53 et seq; Alex Genin, Eastern Credit Ltd Inc and AS Baltos v Republic of Estonia ICSID Case No ARB/99/2, Award, 25 June 2001, paras 330–335; Eudoro A Olguin v Republic of Paraguay ICSID Case No ARB/98/5, Decision on Jurisdiction, 8 August 2000, para 30; CMS Gas Transmission Co v Argentine Republic ICSID Case No Arb/01/8, Decision on Jurisdiction, 17 July 2003, paras77–82.
122 See Schreuer (n 86 above) 239 et seq.
123 But see now Pantechniki SA Contractors & Engineers v Republic of Albania ICSID Case No ARB/07/21, Award, 30 July 2009, paras 50 et seq, where the sole arbitrator, Jan Paulsson, calls this ‘argument by labelling—not by analysis (at para 61).
V. Theoretical Framework for a Functional Comparison of Primary and Secondary Remedies

In order to conduct a functional analysis, this chapter draws on the theoretical background of economic theory. The seminal article by Guido Calabresi and Douglas Melamed was the first to find a theoretical and systematic underpinning of different forms of remedies in law: property rules, liability rules, and inalienability rules.\(^\text{124}\) Their approach has been analysed in a huge variety of legal issue-areas, including expropriation in municipal law, mainly US law. Yet, it has neither been applied to international investment law, nor to state liability law, with the exception of eminent domain or direct takings.\(^\text{125}\) Inalienability rules, ie rules that prohibit any transfer of rights and entitlements, are irrelevant to our analysis and thus are left out. It is impossible to deliver an in-depth analysis here, but some insights might be interesting for a functional comparison.

Property rules confer on the title holder the power to exclude anybody from interfering with the entitlement and convey the power to dispose of the entitlement at will. All appropriations or takings are endorsed by a set of powerful remedies that encompass injunction, specific performance, and exceptionally super-compensatory damages. They are meant to discourage involuntary transfer of the entitlement and therefore are supposed to be so strong as to make it prohibitively costly to bypass the holder in order to gain access to the entitlement. Voluntary exchange through the market would therefore be the normal and only way of exchanging title. Liability rules, in contrast, remedy non-consensual access to the entitlement by rewarding the holder with pecuniary damages. The goal is to compensate the holder \(\textit{ex post}\) while allowing for non-consensual taking. Calabresi and Melamed have focused on transaction costs as a relevant parameter in order to determine which should be the rule used by a legal system: if transaction costs are low, property rules ought to be used; whereas if they are high, liability rules would be the correct instrument. Property rules are meant to deter trespass, whereas liability rules favour market bypass.\(^\text{126}\) They applied their theory mainly in the areas of property and tort law. Whereas the former can be easily exchanged on the market, in tort it is often impossible to negotiate with the holder of the entitlement—accidents being the prominent example. There is one well accepted exception to the property rule in economic theory: expropriation by the state for...

\(^{124}\) Calabresi and Melamed (n 5 above).

\(^{125}\) See R Epstein, \textit{Takings, Private Property and the Power of Eminent Domain} (1985); WA Fischel and P Shapiro, ‘\textit{Takings, Insurance, and Michelman: Comments on Economic Interpretations of Just Compensation Law Comments’} (1988) 17 JLS 269, with further references; G Dari-Mattiacci \textit{et al} (n 34 above), not using, however, the Calabresi/Melamed approach.

public purposes. Due to the usual high number of land owners, a strong incentive for strategic holdouts for the individual property owner is present. Thus, a liability rule can be the best rule in those cases if no consensus between the parties involved can be reached. There are further examples in which a consensual approach to regulatory measures of the state (especially in the form of general-abstract rules) are impossible not only due to negotiating costs but also due to the strategic holdout problem. Liability rules in regulatory environments thus have a well-founded rationale.

The important point here is that we can equate property rules with primary remedies and liability rules with secondary remedies. Primary remedies, such as specific performance or injunctions, lead to the restoration of the status quo ante; they restitute in integrum. They basically prohibit the state from taking a measure by declaring it illegal or void, or they order the state to restore the status quo ante or create an entitlement (for example by ordering the licensing of an operation). They are therefore a stronger protection of an entitlement than a liability rule. Furthermore, they induce the state to reconsider its decision. Transferring this to the discussion on investment law: does this imply that investment law, by choosing liability rules or secondary remedies, protects investors less strongly than municipal legal orders which place an emphasis on primary remedies for rights violations? This would give a strong argument for the viewpoint of states that primary remedies—or property rules—are not appropriate in investment law as they would be too sovereignty infringing and therefore liability rules should be chosen, but thus weakening the position of investors.

So far so good. But we are nevertheless faced with the paradox that in municipal state liability law, the very same circumstances usually give rise to the requirement to use primary remedies first. The state thus submits itself to the—in principle—stricter regime of property rules and only if those are taken can a right holder claim damages. From a rule of law perspective, this is to be appreciated, since property rights are better protected. Furthermore, property rules activate the internal control system of states. Primary remedies give the possibility to the state to reconsider its decision, either by administrative or judicial review. Both allow for the reconsideration of the arguments of the right holder (right to be heard as a due process right), the necessity for the administration or the courts to give reasons, and the gathering of more information. Those due process requirements not only allow for deliberation by the state organs and for internal error review by different powers—a necessity undisputed in municipal legal orders and a cornerstone of the concept of separation of powers. They can also be viewed as a devise for reaching a consensual agreement first, so to speak a two-step approach; an approach often taken in international law, although not investment law. In addition, budgetary concerns are addressed by property rules.
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As has been outlined above, the huge difference in remedies between national law and investment law is the predominant use of primary remedies in national law (property rules) and the predominant use of secondary remedies in investment law (liability rules). Policy rationales can be found for both and a balancing is needed. It therefore makes sense to ask whether there are functional equivalents for primary remedies in investment law or how a harmonious interaction between the national and the international remedies can take place. We will first discuss some incentives and arguments from the claimant’s side and then consider the arguments from a state’s point of view. The argument here is that protection by primary remedies, i.e. property rules, should be mirrored in international investment law (see section A below). The question then is how to achieve that. The different methods of interaction of primary remedies under national law and secondary remedies under international law described above, will be considered from a functional point of view. Some suggestions are made for the interpretation of IIAs de lege lata (see section B below).

A. Arguments For and Against Primary Remedies in Investment Arbitration

Let us assume that international arbitration is almost always preferred by investors, even if more costly, since the independence (and the avoidance of home bias) of courts is guaranteed.  

Why do claimants not choose primary remedies on the international plane, since those represent the stronger property rules protection? There are several possibilities. From a claimant’s perspective, it might be that the relationship with the state is such that an ‘exit’ is the only option—thus a claimant would only want to request secondary remedies. Nevertheless, one should be aware that the possibility of damage claims also opens a door to moral hazard if the investment is ex post recognized as bad by the management. Nevertheless, an investor might have a strong interest in primary remedies, since they give, in principle, a stronger protection and might give him or her exactly what he or she wants, namely an injunction or an order of mandamus, for example the required licence. Furthermore, national procedures, especially administrative procedures, might use much less time than an international arbitration and are less costly. The combination of primary remedies and an impartial international tribunal might thus also be advantageous from an investor’s point of

127 Admittedly, though, the advancement of a claim before an international tribunal might spoil the relationship to the host state, but we will abstract from that here.
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view with the exception of cases in which a parliamentary law is in question or a denial of justice has taken place.

From a state’s perspective, sovereignty concerns are most frequently cited against primary remedies.\(^\text{128}\) An international tribunal ordering a state to revoke a measure or ordering specific performance would infringe more on national sovereignty than a pecuniary award—pecuniary damages being the most fungible means of expression of a grievance.\(^\text{129}\) It should be noted, though, that this argument is rather new in international arbitration and it is not in conformity with the rest of public international law.\(^\text{130}\) In Enron v Argentina, the only BIT arbitration to date to consider injunctive relief in depth, Argentina took this kind of view and strongly opposed the tribunal’s jurisdiction to grant an injunctive relief which would have prevented Argentina from collecting taxes. It argued that ‘an ICSID tribunal cannot impede an expropriation that falls exclusively within the ambit of State sovereignty; that tribunal could only establish whether there has been an expropriation, its legality or illegality and the corresponding compensation’.\(^\text{131}\)

The tribunal, in contrast, held that ‘in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts’.\(^\text{132}\) Seemingly, states are reluctant to grant tribunals wide powers to use primary remedies. It might be that a primary remedy relief would encounter political or constitutional constraints and concerns in the defendant state.\(^\text{133}\) The ordering of specific performance for courts (to a lesser extent for administrative decisions) is especially problematic from a national point of view for reasons of separation of power or for competence reasons, if the state is a federal state.\(^\text{134}\) Furthermore, a legitimacy problem may arise a fortiori for parliamentary laws: could a parliament be ordered to take back a law which was democratically issued by the order of an international tribunal? From an (international) legal perspective this poses no problem, but it might provoke arguments of legitimacy in the national realm.

\(^\text{128}\) Wälde and Sabahi (n 37 above) 1059; McLachlan et al (n 37 above) 341; Schreuer (n 37 above) 331 is rather sceptical of that argument.

\(^\text{129}\) Wälde and Sabahi (n 37 above) 1059.

\(^\text{130}\) See Amerasinghe (n 38 above) 407.

\(^\text{131}\) Enron Corp and Ponderosa Assets LP v Argentine Republic ICSID Case No ARB/01/03, Decision on Jurisdiction, 14 January 2004, para 76.

\(^\text{132}\) ibid para 81. It referred also to Rainbow Warrior (New Zealand v France) Decision, 30 April 1990, 20 UNR/1A 217, 270 (1990) where the tribunal said: ‘The authority to issue an order for the cessation or continuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force.’

\(^\text{133}\) R Higgins, ’The Taking of Property by the State’ (1982) 176 Recueil des Courts 259, 315 et seq; Wälde and Sabahi (n 37 above) 1059.

\(^\text{134}\) See only the problem with the Avena case where President George W Bush announced compliance in a memorandum stating that the US would ‘discharge its international obligations under Avena’ by having State courts give effect to the decision.’ The Texas Supreme Court did not follow and the US Supreme Court confirmed that ICJ Judgments were not self-executing and determined that the states need not comply with the US’s treaty obligation to give effect to the Avena judgment, see Medellín v Texas 552 US 491 (2008).
Remedies in International Investment Law and National State Liability

Furthermore, states may fear that their laws and regulatory measures are submitted to strict scrutiny by the investment tribunals. It has happened that tribunals review state measures in depth without respecting the same degree of legislative prerogative or administrative discretion as national courts would. The CMS tribunal, for example, held that there was no economic emergency in Argentina (contrary to the national emergency law of Argentina). It confirmed that it would exercise full scrutiny over the judgment of the Argentine government concerning state necessity in connection with economic policy decisions. It did so dismissing the expert opinion of Professor Anne-Marie Slaughter, who proposed that there should be a control for obvious misuse (good faith limits) only, thereby aligning investment law with the level of scrutiny national constitutional courts would apply, at least in economic regulatory issues.

States may thus take a different attitude to remedies, depending on whether a national court or an international tribunal is deciding. But is this differentiation justified? Other international courts clearly issue decisions which make revision of laws as well as administrative acts necessary and there it is well accepted, for example in WTO law. Talks abound about new concepts of sovereignty, and clearly international law and its tribunals might influence the internal legal order more than used to be the case. And are pecuniary remedies really the less intrusive version of remedies? Probably only at first sight and certainly not for poor states. The amount of damages awarded in some cases can be equally sovereignty infringing. Scholars, for that reason, talk about a regulatory ‘freeze’ or even ‘deep freeze’, as developing states in particular might not be in a position to pay pecuniary damages for their regulatory measures and might therefore be caught in a ‘catch 22’. Although an extreme case, the emergency measures Argentina took during its economic crisis in 2000–01 illustrate that issue. An estimated US$80 billion in damages have been claimed in around forty-four originally


B. How to Reintroduce Primary Remedies in Investment Law

There are several abstract possibilities of using primary remedies in investment law: either primary and secondary remedies are used on the international plane, or both are used on the national plane. The latter case would amount to a revolution in international investment law as it stands and there are good reasons not to return to local courts only. The most likely and most efficient way forward is a combination of the national and international levels in the use of remedies.

Are there functional arguments as to why local administration of justice should still play a role in investment arbitration? As outlined above, in most modern IIAs, no exhaustion of local remedies is required. If this were not the case, primary remedies on the national level would be the first option, and only after those had failed, would damage claims on the international level be possible. This would align investment law more with general international law, including human rights law, on the one hand, and national state liability law, on the other. One can assume that restitution would then be the first remedy considered in the national realm and only if this is either not granted or if the remedy is clearly not effective (for example because parliamentary laws are in question), could investors move to the international plane for secondary remedies. We will deal with the denial of justice arguments in the use of local remedies requirement, waiting periods, and the local-courts-first-requirement in turn.

In case local remedies are used, this may be due to the underlying IIA or because a state contract is in question. Here, an interaction between the national and the international level is achieved \textit{de lege lata} already through the means of the concept of denial of justice. If this has taken place, a violation of substantive treaty standards, including expropriation without compensation or a breach of fair and equitable treatment, is found. Where the tribunal finds that no denial of justice has taken place and local remedies need to be exhausted further, \textit{de lege lata}, tribunals deal with this issue in the merits phase of the case. But it is also possible to find a lack of cause of action due to the non-exhaustion of local remedies in the jurisdictional phase. The missing alleged violation of substantive treaty clauses...
could then be dealt with at an earlier stage. This would greatly diminish the time
length of procedures.

One could interpret the usual waiting periods in IIAs as an informal means of
reconsideration of the measure taken, thus allowing for primary remedies and
thus a property rule. From an administrative law point of view, waiting periods
are partially functionally equivalent to an administrative appeal, which gives the
acting agency the possibility of reviewing its own decision. Christoph Schreuer,
indeed, finds that the term ‘waiting period’ is something of a misnomer, as those
periods are not meant to constitute a ‘cooling-off’ period but rather require parties
to take positive steps to resolve their dispute consensually.\textsuperscript{141} Marjorie Whiteman
discusses the usage of local remedies under a duty to mitigate for the claimant.
This seems plausible, since it might well be that review of an administrative deci-
sion in the host state would lead to another, more favourable decision, thus mak-
ing international arbitration obsolete.\textsuperscript{142} Furthermore, one could imagine that at
least administrative procedures need to be finalized before an international claim
can be brought under the waiting-period requirement. This would not require the
complete exhaustion of local remedies, since judicial review would be dispensed
with as a prerequisite. But it would allow at least a minimum of review on the
national plane and would come close to the ripeness doctrine in US takings law.
The decisive criterion in all cases concerning waiting periods as to whether the
parties of a dispute have to comply with the waiting periods is the ‘evident futility
of any negotiations’. Indeed, if negotiations do not promise to resolve the dispute,
for instance because the state does not reconsider its measures at all, any denial
of jurisdiction by an investment tribunal would be formalistic and inefficient.
Nevertheless, an overly quick dismissal of the importance of reconsideration (by
both sides), would be wrong from an administrative law point of view as well as
from an incentive point of view. Transaction costs, one argument for liability rules,
are not a problem in administrative decisions, only with parliamentary laws.

The interpretation of fork-in-the-road provisions as it stands now, ie allowing the
claim on the international plane to proceed anyhow under the \textit{lis pendens} rule,
opens a window for the possibility to ask for primary remedies in administrative
review or in national courts while not losing the possibility to ask for secondary
remedies on the national plane. This is to be appreciated since otherwise inves-
tors lose all incentives to use local remedies. But this comes at a cost. As often
the foreign investor and the national company are not identical—even more so
in cases where minority investors claim damages—there is a danger of double
claiming which is by no means solved procedurally.\textsuperscript{143} Furthermore, pursuing

\textsuperscript{141} Schreuer (n 86 above) 238.
\textsuperscript{143} This problem has been seen in the CMS case (n 135 above) para 469, and solved through the
selling of the shares of CMS in TGN to Argentina.
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primary and secondary remedies at the same time for the identical state measure (even though the matter in dispute from a legalistic point of view is different) can lead to factually contradictory decisions. Institutional provisions for taking care of this problem would be desirable.

The ‘national-courts-first’ requirement found in some IIAs goes a step further and requires investors to use also the national court system but eliminates the danger of overlong proceedings by allowing them to skip those by going to international arbitration. From a functional point of view, the Wintershall decision\(^\text{144}\) has to be appreciated. The requirement of adjudicating, during a certain period of time, in national courts, before international arbitration is available, would put pressure on national courts to adjudicate quickly and efficiently: they would adjudicate under the ‘shadow of international arbitration’\(^\text{145}\) since the investor could still, in case of an unfavourable decision, go to international arbitration. If Rudolf Dolzer\(^\text{146}\) is correct in stating that developing countries see BITs as a ‘tying to the mast’ for good governance device, then one might also assume that the host state’s government tries to ‘bind’ its courts to work more efficiently by putting, for example, an eighteen-month local-courts-first provision in BITs. If this is true, it would be a public policy exception in the sense of Maffezini. Furthermore, due process might be adhered to if national courts know that their decision might come before an international tribunal (especially if the tribunal would award damages whereas national courts would—at least if expropriation is not at stake—issue primary remedies).

The Plama tribunal\(^\text{147}\) noted that: ‘The decision in Maffezini is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view.’\(^\text{148}\) Why this provision is nonsensical can only be guessed at, but my hunch is that the tribunal deemed it highly unlikely that a (first instance) court decision can be reached within a year and a half (otherwise they must assume that national courts never rule favourably for the investor). It is therefore illuminating to draw on the empirical knowledge we have on the length of court procedures. These vary immensely between countries. Poland, Italy, and Slovenia all have procedures taking over two years. However, most countries, including developing ones, stay below one year. The average length of a court proceeding is 234 days to recover bounced cheques, and for the eviction of a tenant the average length is 254 days.

\(^{144}\) Wintershall v Argentina (n 103 above).
\(^{146}\) Dolzer (n 3 above) 972
\(^{147}\) Plama Consortium Ltd v Republic of Bulgaria ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005.
\(^{148}\) As the Plama tribunal notes at para 224. The Suez and Interaguas tribunal (n 114 above) para 65 cited Plama in the same vein.
in court.\textsuperscript{149} Argentina takes 440 days for the eviction of a tenant, which is still less than eighteen months. One should also note that the length does not depend on the development stage of a country: Austria, for example, takes 547 days. Of course, administrative proceedings may take longer (unfortunately there is no data available). But it seems implausible that they take on average more than twice as long. Those results—even though they are tentative—should at least give arbitrators a second thought before they too easily dismiss national courts as an adjudicatory forum and the eighteen months in local-courts-first requirement as nonsensical. If they believe that eighteen months is too short a time within which to issue a decision in a first instance court, what if the local-court-first requirement was twenty-four months? Clearly, in those instances one has to weigh the interest of the investors in getting a decision quickly. But that does not necessarily mean \textit{ex ante} that they only get justice in international arbitration. Not all host state courts are home-biased and badly governed—they may thus get a quick and favourable decision in municipal courts as well (especially since those are adjudicating in the shadow of international arbitration). After all, this is what we expect administrative courts to do: control and limit the exercise of governmental power and this is also what they often do.

All kinds of waiting periods and national-courts-first-requirements make sense from a functional point of view if administrative or other executive decisions are concerned, unless there is a denial of justice. This is due to the review function of (administrative or court) procedures for administrative decisions. Furthermore, they protect property rights, in principle, better than liability claims. They are much less adequate if legislative acts are in question. Here, the sovereignty concerns are not only graver, it is also to be expected that a review of the legislation takes much longer in courts, raising transaction costs considerably. Furthermore, negotiation with the administration or the government is futile for separation of power reasons, if a parliament has decided. Here, therefore, secondary remedies on the international plane seem the best solution, since parliaments seldom revoke their laws, and certainly not in a timeframe acceptable to investors. Property rules are thus not the correct remedy against parliamentary laws; the use of primary remedies on the national plane would be futile; tribunals should therefore dispense, in those cases, with waiting periods or local-courts-first-requirements.

\section*{VII. Conclusion and Outlook}

Whereas nation-states have foremost chosen specific performance or injunction as primary remedies—ie property rules—for their citizens against injuries of the

\textsuperscript{149} Those numbers have been generated by the Lex Mundi Project, a common project of international law firms <http://www.lexmundi.com>. They are subjective indicators generated by questionnaires sent to practitioners.
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state, investment law has taken the way of secondary remedies or liability rules. It thereby deviates from other issue-areas of international law, although, unless otherwise prescribed in an IIA, this does not need to be so. If primary remedies are not only the stronger protection of rights but also have the function of reconsideration of the regulatory action taken by the state, they should not be easily bypassed in investment law. Rather, possibilities of division of labour between the national and the international review of administrative action should be explored:

There are two possibilities to review a claim both in the light of primary and secondary remedies. On the international level, first, tribunals can take a two-step approach. They can request primary remedies first, as in the case of *Goetz v Burundi*, and, in the case of non-compliance, order the payment of damages. Sovereignty concerns of states are mitigated through the choice open to them of either following the injunction or specific performance or paying damages. This would also diminish concerns of regulatory chill due to budgetary difficulties. This argument should not be dismissed too easily in investment law as it has a prominent place in national state liability law. The rationale, of course, applies to both and ever more so with the growing importance of foreign direct investment litigation.

The second option is to reserve the opportunity of secondary remedies to the international level while granting the possibility of primary remedies to the national level. There are several, partially functionally equivalent ways of doing so. *De lege lata*, one is to treat the waiting period and the national-courts-first requirements in IIAs as a jurisdictional matter and not as a procedural expendability. Only if it is clear that no primary remedy will be available and no consensus will be found (i.e., no property protection will be afforded), could the investor then claim damages on the international level.

Strictly drafted or interpreted, fork-in-the-road provisions are an obstacle to this solution as they induce investors to direct their claims immediately to the international level. This deprives the state of the opportunity to reconsider its decision (through administrative or judicial review) and grant primary remedies. A better solution would be to allow for review of a government measure under domestic law (without construing such a challenge as a violation of the BIT protections). This would also allow for preliminary injunctions on the domestic plane. Only when an investor alleges, in a domestic court, that the government has violated a provision of the IIA would the investor be barred from challenging that violation using the IIA’s dispute resolution provisions on the international level. Provisions which ask for an attempt to settle the case in national courts and then allow—after a certain period of time—for international arbitration have two advantages. First, they allow primary remedies to be sought and secondly they take care of the need to settle cases quickly.
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As has been pointed out, the sometimes huge sums awarded as damages have raised concerns of legitimacy in international investment arbitration. That may be the point of raising fundamental questions about the kinds of remedies available to investors and the ‘best forum’ for bringing claims. If investment law is a kind of international administrative law, a harmonious combination and an alignment of the internationalized system of state liability and the national systems seems desirable. The underlying structure of the rationale of primary and secondary remedies is one part of this discussion.