Access to Justice, Denial of Justice and International Investment Law

Francesco Francioni*

Abstract

The development of investment arbitration in contemporary international law has helped to consolidate access to justice as a principle of both customary law on the treatment of aliens and human rights law. This development has also contributed to the emancipation of individuals and private entities from the traditional institution of diplomatic protection by opening to them direct access to international dispute settlement mechanisms. At the same time, this development has raised questions whether the far-reaching penetration of foreign investment guarantees into areas of national regulation of public interest should not be counterbalanced by corresponding opportunities for access to justice and the availability of remedies for civil society in the host state. This article examines the relevant recent practice on this matter and argues that access to justice may be a unifying principle to afford protection, both at the substantive and procedural levels, to investors and peoples negatively affected by the investment, both in the territory of the host state and abroad.

1 A Brief Historical Introduction

Denial of justice lies at the heart of the development of international law on the treatment of aliens and of foreign investment. At the same time this notion is inextricably linked to the broader concept of access to justice, understood as the individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection. Intuitively, this

* Of the Board of Editors. This article is part of a larger research project on the role of human rights in international arbitration, funded by the Research Council of the European University Institute (EUI). The author wishes to thank his colleagues Professors P.M. Dupuy and E.U. Petersmann for the cooperative effort in promoting this project and V. Vadi, Ph.D candidate at the EUI, for her valuable research assistance on investment arbitration practice. Email: francesco.francioni@eui.eu.

type of protection is a *sine qua non* for any type of constitutional democracy, where the rule of law and the independence of the courts, rather than the benevolence of the ruler, provide the fundamental guarantees of individual rights and freedoms.

Yet, historically, access to justice has remained problematic for aliens. Even before the formation of the modern nation state, the need for a minimum degree of protection of the life, security, and property of aliens established in or visiting a foreign land had emerged in the late Middle Ages, especially in the context of the flourishing trade between the Italian maritime Republics – such as Venice and Genoa – and the Mediterranean areas under Muslim dominion. In these areas, foreign merchants coming from the Christian world could not expect the protection of the universal system of Roman law which had guaranteed the political and legal unity of the ancient Mediterranean world. On the contrary, they encountered diffidence and marginalization by local authorities and, more fundamentally, they had to deal with the difficulty of reconciling their need for personal and economic security with the rigid system of the personality of the law in the Islamic world. This system, informed by the close interpenetration of Islamic law and religion, was a powerful obstacle to the application of legal guarantees of contractual and property rights of non-Muslims under the *lex loci*.[1]

The pragmatic response to this normative and jurisdictional mismatch was the development of special extraterritorial legal regimes for commercial establishments, trade centres, and warehouses maintained in Muslim lands (*fondaci*) by foreign merchants and the gradual recognition of a system of *in situ* protection of foreign merchants by agents of the foreign power of which they were nationals.[2] This practice constitutes a predecessor to the modern idea of 'free zones' and, more importantly, formed the basis of the early development of consular relations and of the later emergence of that special branch of customary international law that goes under the name of 'minimum standard of treatment of aliens'.

History tells us also that this early model of international protection of foreign economic interests later degenerated into forms of sheer economic dominance and of colonialism by the European Powers. The most radical manifestation of this development was the system of 'capitulations', an extreme form of extraterritorial imposition of foreign law and jurisdiction in the receiving state, which served to exempt their citizens from the sovereignty of the host state. Capitulations were gradually eliminated in the first part of the 20th century and became incompatible with the principle of de-colonization later implemented within the framework of the UN Charter.

But the institution of consular protection remains. Thus there also remains the principle of the 'minimum standard of justice' to be reserved to aliens and their economic interests under customary international law. An integral part of this standard is the principle of 'access to justice'. This principle presupposes that the individual who has suffered an injury in a foreign country at the hands of public authorities or of

[1] On the evolution of International law in the context of the mutual contamination and cultural exchange between the Christian World and Islam see the magisterial analysis by Ago, 'Pluralism and the Origin of the International Community', 3 *Italian Ybk Int'l L* (1977) 3.

[2] L. Ferrari Bravo, *Lezioni di diritto internazionale* (1993), at 25.

private entities must be afforded the opportunity to obtain redress before a court of law or appropriate administrative agency. Only when 'justice' is not delivered, either because judicial remedies are not available or the administration of justice is so inadequate, deficient, or deceptively manipulated as to deprive the injured alien of effective remedial process, can the alien invoke 'denial of justice': a wrongful act for which international responsibility may arise and in relation to which an interstate claim and diplomatic protection may be made by the national state of the victim.

So, in its historical evolution, access to justice is inseparable from the 'minimum standard of treatment of aliens'. This is confirmed by the customary rule requiring prior exhaustion of local remedies as a precondition of diplomatic protection. This rule presupposes the international obligation of every state to ensure access to courts to aliens and to administer justice in accordance with minimum standards of fairness and due process.

However, the principle of access to justice, as an integral part of customary international law on the treatment of aliens, guarantees only access to remedial process within the territory and under the law of the host state. Customary international law does not provide for an individual right of access to justice before international tribunals. Nor, by the same token, does it provide a right of access to the courts of a third state, for which, in principle, the alleged mistreatment of an alien in another state remains *res inter alios acta*.

The major leap forward in the field of foreign investment law is represented by the recognition and consolidation of an indisputable right of access to international justice by private investors and by the extension of this right to the courts of third states to the extent that their cooperation is necessary in order to enforce international investment awards.[3] Following the phenomenal development in the past 25 years of bilateral investment treaties, regional trade agreements, such as NAFTA,[4] and, more importantly, investment arbitration, the right of access to justice for the investor has shifted from inter-state claims to the private-to-state arbitration where private actors have direct access to 'international' remedial proceedings without the traditional need for the interposition of their national state in diplomatic protection. This shift of focus has important consequences. First, it undermines the traditional dogma of international law[5] under which only states have international rights and the state intervening to protect its nationals injured abroad asserts its own right rather than the right of the injured person, with the consequence that the claimant state may at its own discretion make use of such right and of the eventual compensation it has been able to obtain. Secondly, and more relevantly for the general theme of this article, the 'internationalization' of the right of access to justice of private actors tends to blur

[3] See Art. 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159. Para. 1 of this Art. provides that '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.

[4] North American Free Trade Agreement between Canada, the United States, and Mexico, entered into force on 1 Jan. 1994, 32 ILM (1993) 289.

[5] *Mavrommatis Palestine Concessions*, PCIJ Rep Series A No. 2, 30 Aug. 1924, at 12.

the traditional boundary between aliens' rights and human rights. This is so because the private actors in which this right is recognized free themselves from the traditional guardianship of their national state and become empowered to assert their individual rights and interests before an international dispute settlement body. This focus on the individual as the title holder of rights is the hallmark of the international law of human rights.[6]

This potential convergence of traditional aliens' rights with human rights in the field of access to justice is the conceptual point of departure for the following analysis, which will focus on three distinct but inter-linked aspects of the operation of the right of access to justice in the field of foreign investment law. The first aspect concerns the extent to which human rights considerations may influence the assessment of the international legality of the host state's interference with the investor's rights and on his ability to obtain judicial or arbitral protection for his investment. The second aspect relates to the emerging claim of access to justice for the host state's population when the operation of the foreign investment is deemed adversely to affect their environment or other societal goods. The third aspect concerns the way in which access to justice may be reconciled with the traditional rule of sovereign immunity when the state of the investment adopts measures with extra-territorial effect that adversely impacts on property rights of foreign investors especially in the field of financial instruments with worldwide circulation. I will examine these three aspects in light of recent arbitral practice.

2 Access to Justice as an Investor's Right

Several recent investment disputes have highlighted that access to justice may continue to be problematic even in the presence of investment guarantees under bilateral or multilateral treaties.

The most well known, dare I say notorious, case is *Loewen Group v. the United States*[7] concerning a claim by a Canadian company against the United States under NAFTA Chapter 11[8] and alleging discriminatory treatment, expropriation, and breach of fair and equitable standards as a consequence of litigation before the courts of Mississippi. Loewen had been sued by a local business competitor in the funeral industry who complained of predatory behaviour and restrictive business practices by the much

[6] It is significant that also in the ILC Arts on Diplomatic Protection this tendency to take into account the rights of the injured person, beside the traditional right of the state which exercises diplomatic protection, has found an echo in the 'recommended practices' annexed to the Arts: see ILC Draft Articles on Diplomatic Protection (2006), Official Records of the General Assembly, Sixty first Session, Supplement No. 10 (A/61/10).

[7] *Loewen Group Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, 26, 26 June 2003, 42 ILM (2003) 811.

[8] Since 1978, the Administrative Council of the Centre for the Settlement of Investment Disputes has authorized the Secretariat to administer arbitral proceedings concerning investment disputes between Parties to the 1966 ICSID Convention and nationals of states which are not parties to the Convention.

larger Canadian company. During the jury trial, the strategy of the plaintiff was to emphasize the merits of the local business, its commitment to serving the local community, and its struggle against the allegedly predatory practices of foreign corporate competitors. According to Loewen's complaint, the whole trial was pervaded by continuous references to nationality and patriotism – with counsel for the plaintiff likening his client's struggle with his wartime heroic effort against the Japanese.[9] The jury verdict awarded US$500 million to the plaintiff, of which US$400 million constituted punitive damages. An appeal against the decision was possible under Mississippi law; but state law required the posting of a financial bond in the amount of 125 per cent of the award in order before execution of the award could be suspended pending the appeal. Faced with the prohibitive amount of the required bond and the prospect of immediate execution of the exorbitant verdict, Loewen settled the case.

In the ICSID arbitral proceedings against the United States, Loewen alleged violation of the NAFTA anti-discrimination provision under Article 1102, of the principles of minimum standards of treatment of aliens under Article 1105, and of the expropriation provision of Article 1110. The United States' defence was that basically no government measure could be attributed to the United States and that Loewen's loss was solely attributable to the outcome of a civil action between two private companies for which the United States could not be held accountable.

What makes this case so interesting for the purpose of our discussion on access to justice is the rather schizophrenic attitude of the arbitral panel which, on the one hand, expressly recognized the flaws in the administration of justice by the Mississippi court, but, on the other hand, declined to enter into the merits of the case because of the plaintiff's alleged failure to exhaust local remedies in the United States and his inability to satisfy the rule of continuity of claims (Loewen having in the meantime become incorporated in the United States). In the words of the panel,

> the conduct of the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law[10] . . . the trial involving O'Keefe and Loewen was a disgrace. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due . . . the methods employed by the jury and countenanced by the judge were the antithesis of due process.[11]

In a surprising ending to the saga, the arbitral tribunal was at pains to explain why, even in the face of manifest injustice, a remedy could not be granted:

> A reader following our account of the injustices which were suffered by Loewen . . . in the courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all . . . There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? . . . This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision . . . the interest of the international investing community demand that we must observe the principles which we have been appointed to apply and stay our hands.

[9] *Loewen*, *supra* note 7, at para. 61.
[10] *Ibid.*, at para. 54.
[11] *Ibid.*, at paras 119 and 122.

This is an extraordinary statement. What are the principles the panel was appointed to apply? It seems clear that such principles are those clearly expressed in NAFTA Chapter 11: i.e., non-discrimination, prohibition of uncompensated expropriation, and minimum standard of justice under international law. This standard certainly includes access to effective remedial proceedings. But rather than focusing on these principles and standards, the panel preferred to apply a purely formalistic notion of 'denial of justice' coinciding with the absolute finality of abstractly available legal remedies, no matter how uncertain and remote they might have been. What was at stake in this case was the possibility of a petition for certiorari before the Supreme Court of the United States to seek the annulment of the Mississippi verdict. But this remedy was purely speculative. The abstract availability of a domestic law remedy is not an obstacle to the admissibility of an investor's claim under international law. Judicial practice is quite clear on this matter, as one can see from the following cases.

In the *ELSI* case – cited by the tribunal to support the view that the local remedies rule is part of customary international law – the International Court of Justice (ICJ) applied this rule subject to the test of reasonableness and effectiveness. In that case, involving a claim by the United States against Italy, the International Court of Justice correctly rejected Italy's claim that the United States investor had failed to exhaust in Italy a theoretically possible action in tort by the parent company, once all civil and administrative actions had already been exhausted by the Italian subsidiary against local and national authorities. The Court applied the rule of exhaustion of local remedies together with the rule of reason, which required that Italy should prove the effectiveness of the further remedy in order to preclude the admissibility of the international claim:

> Italy contends that Raytheon and Matchlett could have based such an action before the Italian courts on Article 2043 of the Italian Civil Code, which provides that 'Any act . . . which causes wrongful damages to another person implies that the wrongdoer is under and obligation to pay compensation for those damages'. . . . In the present case, however it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.[12]

Similarly, in the recent judgment (Jurisdiction) in the *A.S. Diallo* case,[13] the International Court of Justice rejected the respondent state's preliminary objection to the admissibility of the case based on the alleged failure of the investor to exhaust local remedies. The Court flatly stated:

> It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.[14]

[12] ICJ, *Case Concerning Elettronica Sicula Spa (ELSI)*, Judgment 20 July 1989 [1989] ICJ Rep, at paras 61 and 62.

[13] ICJ, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo (PreliminaryObjections)*, judgment of 24 May 2007.

[14] *Ibid.*, at para 44.

This dispute concerned the taking of the assets and the expulsion of a Guinean investor in the Democratic Republic of Congo (DRC) by an order of the Prime Minister[15] of the DRC (at the relevant time Zaïre) in the form of a non-reviewable 'refusal of entry'. This legal characterization of the expulsion measure had the effect of depriving the foreign investor of any possibility of judicial or administrative recourse against the expulsion, which led the Court to conclude that the DRC could not now rely on an error allegedly made by its administrative agencies at the time Mr Diallo was 'refused entry' in order to claim that he should have treated the measure as an expulsion. He was thus justified in relying on the consequences of the legal characterization given by the Zaïrean authorities, 'including for the purpose of the local remedies rule'.

Looking back at *Loewen* in light of the above ICJ precedents, we come to the paradoxical conclusion that the rule of prior exhaustion of local remedies has received more reasonable and flexible application in the context of inter-state claims for diplomatic protection before the ICJ – where the primary focus on states' rights would justify a more rigorous application of the rule and more deference to state sovereignty – than in private-to-state arbitration, where the primary objective is the protection of the private rights of the investor.

Loewen is not only a bad precedent for access to justice; it is also a bad precedent for the investment community, which can hardly benefit from the extreme and unrealistic application of the rule of prior exhaustion of local remedies when the risk of grave loss is imminent and a miscarriage of justice has been acknowledged. All the more so in a case such as this where the alien is facing the threat of the execution of an exorbitant verdict of punitive damages – which remain highly contested in international law – and when further judicial protection is barred by an excessive bond.[16]

Unlike in *Loewen*, the ICSID Tribunal in *Mondev v. United States*[17] made express reference to international law and to international judicial precedents[18] in order to define the boundaries of the right of access to justice and the corresponding scope of the notion of 'denial of justice'. The case again concerned a NAFTA Chapter 11 claim filed by a Canadian company against the United States for the alleged discriminatory expropriation without compensation of the claimants' rights arising out of a commercial real property development contract entered into with the City of Boston and the Boston Redevelopment Authority. When a dispute arose out of the execution of the contract, the investor successfully sought damages before the courts of Massachusetts, only to see the favourable jury verdict reversed by the State Supreme Court on grounds of domestic sovereign immunity of local regulatory authorities. Was the application of the doctrine of statutory immunity of a local authority a denial of the right of access to

[15] *Ibid.*, emphasis added.

[16] For a critical analysis of this case see the forum discussion in 6 *The Journal of World Investment and Trade*, Feb. 2005, with contributions by J. Werner and M. Meldelson, at 80–97.

[17] *Mondev International Ltd v. United States of America*, ICSID (Additional Facility) Case No. ARB(AF)/99/2, Award, 11 Oct. 2002, 42 ILM (2003) 85.

[18] See in particular the reference to the *ELSI* case in *ibid.*, at para. 127.

justice? The ICSID Tribunal provided a negative answer to this question. First, it reiterated the principle that under investment treaties parties have the option to seek local remedies and if, in doing so, they lose on the merits, 'it is not the function of NAFTA tribunals to act as courts of appeals'. Secondly, and most importantly for our discussion, the tribunal adopted a rather restrictive notion of 'denial of justice'. Building on previous arbitral precedents, such as *Azinian v. Mexico*,[19] the tribunal concluded that the exercise of regulatory powers by local government authorities and the application of statutory immunity in respect of the exercise of their official functions could not give rise to a claim of unlawful expropriation under NAFTA.

In spite of this negative outcome, the *Mondev* decision displays a rare consideration of international judicial practice in the determination of the scope of access to justice. Not only does it make express reference to the case law of the International Court of Justice, in particular to the *ELSI* judgment, but it also takes into consideration the human rights standard guaranteed by Article 6(1) of the European Convention on Human Rights.[20] This provision, as is well known, requires that in order to right a wrong a court must be open to recourse and that 'fair and public hearings within a reasonable time by an independent and impartial tribunal established by law' are guaranteed by the state. Ultimately, the award in *Mondev* concludes that Article 6(1) is too advanced to provide a criterion for decision in investment arbitration. However, it is noteworthy that an arbitral award has considered, even *in abstracto,* that a provision contained in a human rights instrument to which neither the respondent nor the national state of the claimant was a party could have provided a criterion for determining the scope of the right of access to justice.

In the view of this writer, a better solution would have been to arrive at the identification of an international standard on access to justice taking into account the law and practice of international human rights bodies – including the European Court of Human Rights – and then to ask whether the functional immunity of the respondent's regulatory bodies could serve a legitimate objective so as to justify an exception to that right in the particular circumstances of the case. This would have helped the consolidation of an international standard on access to justice as a right of aliens and a human right alike, and without compromising the ability to subject this right to restrictions necessary and proportionate to safeguard a legitimate objective, such as the interest of regulatory bodies in pursuing democratically deliberated public policies, without fear of being held liable for their decisions.[21]

[19] *Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States*, ICSID (Additional Facility) Case No. ARB(AF)/97/2, Award, 1 Nov. 1999, 39 ILM (1999) 537, at 552.

[20] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.

[21] If this approach had been followed in *Mondev* it would have been easy for the panel to realize that also in relation to Art. 6(1) ECHR, the European Court has accepted a wide range of procedural and substantive restrictions including immunities of public institutions. For a review of the relevant practice see Francioni, 'The Right of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at 33 ff. In the same volume, see also the specific contribution by Scheinin, 'Access to Justice before Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights', at 135–152.

In this brief overview of the arbitral practice on investors' right of access to justice it is useful to mention also a recent ICSID award which sheds light on the procedural dimension of the right of access to justice. In *Saipem v. Bangladesh*, the claimant, an Italian company operating in the oil and gas industry, complained of a violation of the Italo-Bangladeshi bilateral investment treaty as a consequence of an allegedly unlawful interference with the investment contract by the combined action of Petrobangla, a Bangladeshi public instrumentality, and Bangladeshi courts. The contract concerned the construction of a natural gas pipeline. As the project was significantly delayed because of strong opposition by the local population, a dispute arose over contract performance. Saipem initiated arbitration proceedings under the rules of the International Chamber of Commerce (ICC) and Petrobangla responded by filing an application before the court of Dacha seeking revocation of the ICC's authority to deal with the case. At the same time, Petrobangla applied to the courts for an injunction to stay all further arbitration proceedings. The Supreme Court of Bangladesh granted a restraining order. The IIC tribunal proceeded with the arbitration and awarded damages to Saipem, notwithstanding the Bangladeshi injunction. At this point Petrobangla filed an action before the High Court division of the Supreme Court of Bangladesh seeking the annulment of the award: the Court held that there was no award to annul; the ICC arbitration had proceeded illegally, in violation of the Bangladeshi restraining order, and thus the award had to be considered null and void. Saipem filed an ICSID claim invoking the bilateral investment treaty between Italy and Bangladesh and claiming that Bangladesh had violated its obligations towards the foreign investor under Article 5 of the BIT. The ICSID tribunal has affirmed its jurisdiction, rejecting Bangladesh's preliminary objection to admissibility based on the alleged 'abuse of process' – i.e. seeking to enforce an allegedly invalid ICC award under the guise of an ICSID claim – on the basis of the correct recognition that Saipem's claims simply deal with an allegedly wrongful interference by Bangladeshi courts with the arbitration process and with the investor's ability to obtain judicial protection of his rights.[22] On 30 June 2009 the arbitral tribunal delivered its award on the merits (ICSID Case ARB/05/07). It confirmed that the right to arbitrate under a contract can form the object of expropriation, and, more important for the theme of this article, that a local judiciary's intervention on an arbitral process can amount to a violation of international law when it constitutes a manifest abuse of supervisory powers. The award has not yet been published.

[22] *Saipem Spa v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007. It is interesting to note that in this Decision at paras 130 and 132 the Tribunal made a reference to the case law of the ECtHR to support the finding that rights under judicial decisions are protected property and that court decisions nullifying them may amount to expropriation.

3 Access to Justice by Individuals and Groups Affected by the Investment

The increasing impact of foreign investment on the social life of the host state has raised the question whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to remedial proceedings for individuals and groups adversely affected by the investment in the host state. This question arises especially in circumstances in which the foreign investment has an actual or potential impact on the health, the environment, or socio-cultural values of the host state's population. Under normal circumstances, the right of access to a court for the local population should be guaranteed by the law and the justice system of the host state. However, the peculiar feature of modern investment law is that the host state ultimately delegates to an international mechanism of dispute settlement – ICSID, NAFTA, etc. – the resolution of disputes arising out of the investment within its territory. This delegation undercuts the authority of national courts to deal with investment disputes and makes the judicial protection that they may provide against harm caused by the investor subject to extensive review by compulsory international arbitration. Court decisions in the host state upholding complaints brought by private parties against a foreign investor may be attacked by the investor before an arbitral tribunal on the ground that they constitute wrongful interference with the investment. Thus, how can we in these conditions safeguard access to justice for citizens and social groups who are, or have the well-found fear of being, injured by the investment or by the modalities of its conduct in the host state?

At the substantive level, an answer to this question can be found in the role that the defendant state may play in introducing health, environmental, or social concerns on behalf of its citizens or social groups into the arbitration process. This would permit opening the arbitration to private claims that the host state would endorse in a sort of reverse model of diplomatic protection: the territorial state would espouse the claim of its own citizens against the investor rather than vice versa. This approach has its limits. First, it presupposes that the state is willing to take up the claims of individuals and social groups against the investor. This reproduces the paternalistic model of governmental espousal of private claims which does little to advance the individual right of access to justice. Secondly, the host state may not be interested in bringing health, environmental, or social concerns to bear on the arbitration process, especially when the state has authorized the investment against the wishes of special segments of the population. Thirdly, the terms of reference of the arbitral tribunal may leave little room for the consideration of counterclaims brought on behalf and in the interest of the local population.

This notwithstanding, a certain role can be carved out for the host state as a guarantor of the right of its own population to have access to justice within the mechanism of investment arbitration. First, the host state may demand that the applicable law in the arbitration of the investment dispute include provisions of its own domestic law which bind the foreign investors to the respect for health, environmental, or social