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

standards which the local population deems to be endangered by the investment. This is consistent with Article 42(1) of the ICSID Convention, which provides that, absent stipulation to the contrary by the parties, the Tribunal 'shall apply the law of the Contracting State party to the dispute'. In addition, one could argue that a progressive interpretation of the 'fair and equitable standard', which has been systematically adopted in BITs practice and in regional agreements such as NAFTA, entails that the investor who seeks equity for the protection of his investment must also be accountable, under principles of equity and fairness, to the host state's population affected by the investment. It is hard to conceive of equity as a one-sided concept: equity always requires fair and equitable balancing of competing interests, in this case the interests of the investor and the interest of individuals and social groups who seek judicial protection against possible adverse impacts of the investment on their life or their environment.[23]

The second approach to safeguarding the local population's right of access to justice is recourse to international mechanisms for the protection of human rights, whenever they are available and are open to individual recourse. One of the most important precedents in this context is the decision of the Inter-American Court of Human Rights in *Awas Tingni v. Nicaragua.*[24] This case arose out of a dispute between the indigenous community of Awas Tingni and the government of Nicaragua as a consequence of that government's decision to grant a foreign company a concession for logging in an area claimed by Awas Tingni as ancestral land subject to traditional tenure. After a complex series of cases before Nicaraguan courts, the matter was brought before the Inter-American Commission of Human Rights and subsequently before the Inter-American Court. The result of these proceedings was the cancellation of the logging concession by the Government of Nicaragua and the recognition by the Inter-American Court that under the American Convention on Human Rights the customary right of the Awas Tingni community over the disputed land had to be respected, together with their right to the preservation of their cultural integrity. Nicaragua was found responsible for the violation of Article 25 of the Convention, which guarantees the right of everyone 'to simple and prompt recourse, or any other effective recourse . . . for protection against acts that violate his fundamental rights'.[25]

Another important precedent for local communities' action to counteract the harmful impact of foreign investments is the 2001 case of *Social and Economic Rights Action (SERAC) v. Nigeria*, where the African Commission on Human and Peoples' Rights affirmed its jurisdiction to hear a complaint that foreign oil and gas investments were

[23] On the concept of 'fair and equitable treatment' in foreign investment practice see the detailed study by I. Tudor, *Great Expectations. The 'Fair and Equitable Treatment' Standard in the International Law of Foreign Investment* (2006), PhD Thesis, European University Institute. Generally on the role of equity in international economic law see F. Francioni, 'Equity', in *Max Planck Encyclopaedia of Public International Law* (forthcoming).

[24] The *Mayana (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am Ct HR (ser. C) No. 124 (15 June 2005).

[25] American Convention on Human Rights, signed in San Jose, Costa Rica, 22 Nov. 1969, entered into force 18 July 1978, 9 ILM (1969) 101.

causing serious health and environmental harm to the Ogoni people in the Niger delta. The Commission found that no effective remedies had been made available to the complainants by the Nigerian authorities, and held that the oil exploration and production activities by foreign investors had caused an intolerable level of pollution, severe environmental degradation, and serious health damage so as to threaten the very existence of the Ogoni people.[26] These precedents attest that when remedies are available under human rights treaties, investors' rights do not stand in the way of the recognition of individuals' and groups' right of access to justice. But since access by individuals and groups to international mechanisms of human rights protection remains dependent on specific treaty regimes, this option is of limited use, and mostly available at regional level for the purpose of providing a forum for remedying abuses or wrongful damage caused by the investor to the local population.

A third approach to improving the opportunities of access to justice by the host state's population is through the indirect means of *amici curiae*'s participation in investment arbitration. As is known, the institution of *amici curiae* is a product of common law culture, and more particularly of the United States practice where the adjudicatory function is open to the participation of individuals or entities who, without being parties to the litigation, are capable nevertheless of providing useful factual information and legal insights in addition to those provided by the disputing parties. *Amici curiae* are not interveners in a technical sense, since they do not vindicate their own rights. Their function as instruments of access to justice is only indirect. But to the extent that *amicus curiae* briefs bring into the arbitral proceedings factual and legal considerations concerning the safeguarding of public goods, such as human and environmental health or the preservation of local cultural heritage, they can become a powerful tool to widen the scope of investment arbitration so as to encompass consideration of public policy concerns with regard to the adverse effects of an investment. This is an important rationale for *amici curiae*, in view of the extensive limitation that investment arbitration puts on a host state's sovereignty with respect to a wide range of matters traditionally reserved to the domestic jurisdiction. Such limitations become apparent when we observe that regulatory measures in the field of public health, environmental quality, security, or socio-cultural affairs have become subject to penetrating review by investment arbitration under standards of discrimination, transparency, good faith, and fairness, with a profound impact on the ability of the state to pursue primary public goods and general interests of society. This is why *amicus curiae* participation has become and will remain in the foreseeable future an important feature of the administration of justice in the field of foreign investments.

Although this type of participation is still not contemplated in proceedings before the International Court of Justice, petitions for *amicus curiae* intervention have been accepted in the practice of international dispute settlement bodies and, more recently,

[26] For a discussion of this case see Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter', 1 *African J Legal Studies* (2005) 129, at 131.

have been formally codified in the rules of procedure of relevant treaty bodies. First, WTO practice, notwithstanding the absence of specific provisions in the Dispute Settlement Understanding (DSU),[27] has allowed the presentation of briefs by *amici curiae* in a large number of cases on the basis of an expansive interpretation of the rules of procedure. This development, although initially opposed by certain developing countries in the WTO, has been supported by commentators[28] and by the majority of the industrialized WTO Members, notably the United States. Since the *Asbestos* case,[29] the Appellate Body has adopted specific rules and time limits to prevent abuses and undue delays in the dispute settlement procedure.[30]

Acting upon the WTO example, petitions for *amicus curiae* participation have been filed and admitted in investment arbitration, both under NAFTA Chapter 11 and under ICSID. NAFTA tribunals have allowed *amicus* briefs in three cases: *Methanex*,[31] *UPS*,[32] and *Glamis.*[33] All these cases have been decided in the merits. Although it is not clear to what extent the *amicus curiae* participation has influenced, or may influence, the arbitral decision, their briefs have certainly helped to integrate important environmental and social perspectives in investment disputes involving complex public policy interests.[34] In *Glamis*, the NAFTA tribunal has allowed the application for participation as *amicus curiae* by a tribal community – the Quechan Indians. The social group is directly affected by a Canadian company's contested mining investment in Northern California in a desert conservation area near their tribal lands which includes sacred and ancestral sites. In these cases presentation of *amicus curiae* briefs has been accepted in spite of the absence of specific authorizing provisions in NAFTA. Further, this practice has been endorsed by a formal statement of the NAFTA Free Trade Commission on non-disputing party participation of 7 October 2003.[35]

[27] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM (1994) 1197, in force since 1 Jan. 1995.

[28] Boisson de Chazournes, 'Transparency and Amicus Curiae Briefs' [2004] *J World Investment and Trade* 333.

[29] See WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 18 Sept. 2000, and WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 12 Mar. 2001.

[30] For a full account of this practice see Baroncini,'Società civile e sistema OMC di risoluzione delle controversie: gli *amici curiae*', in F. Francioni *et al.* (eds), *Organizzazione Mondiale del Commercio e diritto della Comunità Europea nella prospettiva della risoluzione delle controversie* (2005), at 75.

[31] *Methanex v. United States of America*, Final Award, 9 Aug. 2005, 44 ILM (2005) 1345.

[32] *United Parcel Service of America Inc. (UPS) v. Canada*, Award on the Merits, 24 May 2007, available at: www.naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final_Award_and_Dissent.pdf.

[33] *Glamis Gold Ltd v. the Government of the United States of America*, Notice of Arbitration, 9 Dec. 2003, available at: www.state.gov/documents/organization/27320.pdf.

[34] The petitioners in the *Methanex* case, *supra* note 31, were the International Institute for Sustainable Development, Communities for a better Environment, and Earth Island Institute; in *UPS, supra* note 32, they were the Canadian Union of Postal Workers and the Council of Canadians.

[35] Statement of the North American Free Trade Commission on Non-Disputing Party Participation, 7 Oct. 2003, available at: hwww.ustr.gov.

As far as ICSID arbitration is concerned, as in NAFTA, no express provision on non-disputing party participation was contained in the 1965 World Bank Convention or in the ICSID arbitration rules.[36] In the early case of *Agua del Tunari v. Bolivia*, *amicus curiae* submission was denied based on the absence of authorization provisions and on a strict interpretation of the 'consensual nature' of ICSID arbitration.[37] However, in several subsequent cases,[38] ICSID Tribunals have changed position and have admitted *amicus* participation in the arbitration proceedings on the basis of a liberal interpretation of Article 44 of the ICSID Convention, which allows residual discretionary powers to the Tribunal on procedural questions not explicitly covered by the Convention or the Arbitration Rules. This jurisprudential development has led to a formal amendment of the ICSID Arbitration Rules,[39] with the adoption in 2006 of a specific enabling provision, the new Rule 37(2), which reads as follows:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; b) the non-disputing party submission would address a matter within the scope of the dispute; c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

This amendment was accompanied by a modification also of Rule 32(2) which allows the presence of external observers at the arbitration hearings. These developments in arbitral practice and the formal opening in the ICSID Rules of arbitration to the participation of representatives of civil society, experts, and NGOs is certainly not a panacea to cure all the existing defects and limits of access to justice in the context of investment arbitration. Yet, it has the unquestionable merit of having permitted the emergence in international law of the idea of civil society as an important participant in the resolution of investment disputes.[40] Such participation is independent of the

[36] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159. The Convention entered into force on 14 Oct. 1966.

[37] *Agua del Tunari SA v. Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 Oct. 2005. The reason for the denial of the admissibility of *amicus* briefs is explained in a letter from the President of the Tribunal attached to the award as Annex III.

[38] *Aguas Argentinas SA, Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/03/19, Order of 19 May 2005; *Aguas Provinciales de Santa Fé SA, Suez Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentina*, ICSID Case No. ARB/03/17, Order of 17 Mar. 2006; *Bywater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order of 2 Feb. 2007. It is interesting to note that all these cases concerned foreign investments in essential public services such as the provision of water.

[39] The Amended Rules and Regulations came into effect on 10 Apr. 2006 and are available at: www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf.

[40] On the concept of civil society and its impact on the development of international law see P.M. Dupuy and L. Vierucci (eds), *NGOs in International Law-Efficiency in Flexibility?* (2008).

interests both of the investor and, in principle, also of the disputing state, and it is capable of giving voice to the interests of specific groups or communities especially affected by the investment or, conversely, to the general interests of the international community which transcend the policy concerns of the host state.

4 Access to Justice for the Protection of Extraterritorial Investors

The third and final aspect of the role of the right of access to justice in the context of international investment law to be examined is the extent to which it may affect state immunity in the event of actions brought before domestic courts by extraterritorial investors. The paradigmatic case is the default on bonds placed on the global market by a state which later faces an economic and financial crisis, and the consequent necessity of rescheduling and reorganizing its public debt with consequent injury to the foreign bond holders.

Default on public debt has a long history in international law. In the 19th century such default was deemed to justify resort to force by the capital-exporting state against the defaulting state. The Drago–Porter Convention of 1907[41] was the first international instrument to place some restraint on such use of force.[42] Later, with the UN Charter and the development of international law in the post-World War II period, the use of force in international relations became unlawful, including for the purpose of recovering money. So, in contemporary international law access to courts or other remedial process, such as arbitration, is essential for the protection of rights of private individuals or entities who have invested their money in financial instruments issued by foreign governments, who need to resort to the global market to finance their economic development.

However, when the governments default, the availability of effective remedies from national courts is restricted by the doctrine of sovereign immunity. This doctrine has been invoked in cases of moratoria or rescheduling of foreign debt by Nigeria,[43] Mexico,[44] Argentina,[45] and many other countries, and has been revived in relation to the worldwide series of cases surrounding the spectacular default on the Argentine bonds following that country's economic crisis of 2001–2002. Thousands of people

[41] Hague Convention II on the Limitations of the Employment of the Use of Force for the Recovery of Contract Debts, signed on 18 Oct. 1907, 36 Stat. 2241; Treaty Series 537.

[42] The Convention did not rule out the use of force for the recovery of money loaned to another country but made its use conditional upon the refusal of the debtor state to accept international arbitration or upon its failure to enforce an arbitral decision on the matter.

[43] See the landmark case, *Trendex v. Central Bank of Nigeria*, British Court of Appeals, Civil Division, 13 Jan. 1977 [1983] *Int'l L Rep* 112.

[44] See the famous case of *Callejo v. Bancomer*, US Court of Appeals for the Fifth Circuit, 8 July 1985, 764 F2d (1985) 1101.

[45] US Supreme Court, *Republic of Argentina v. Weltover*, 12 June 1992, 504 US 607.

who had invested their savings in the defaulted bonds faced the prospect of a transaction with the Argentine government which would have entailed the repayment of a fraction of the value of their investment capital, or seeking justice at the international or domestic level.

At the international level, the remedies available were diplomatic protection by the national state of the investor or resort to arbitration. The first avenue presented serious obstacles because of the very special feature of the Argentine bonds dispute. First, the claimants, who had never set foot on Argentine soil, had bought the bonds through their banks, and were scattered all over the world, could have been required to exhaust whatever local remedies were available in Argentina as a condition of admissibility of the diplomatic claim under customary international law. This would have presented formidable difficulties and unfair hardship for the claimants. Secondly, even if the claim were held admissible, in the merits hearing the claimant state would have to prove that the bond default constituted an international wrongful act by Argentina under the classical rules on the treatment of aliens. But are such rules applicable to a situation of extraterritorial injury? And if so, could Argentina not invoke financial distress and necessity as a circumstance excluding wrongfulness, as provided for by Article 25 of the 2001 ILC Articles on State Responsibility? The answer to these questions is far from clear, given also the uncertainty which has emerged in arbitral practice with respect to the admissibility of the 'necessity' plea advanced by Argentina in several investment disputes brought before ICSID Tribunals.[46]

Given these difficulties it is not surprising that diplomatic protection has not been forthcoming in the case of the Argentine bonds. Instead, several international arbitration claims have been brought by Italian investors before the ICSID.[47] The claims are based on the 1991 Argentina–Italy treaty on economic cooperation[48] and are currently pending. Although the avenue of international arbitration is more promising than diplomatic protection because of the direct access of injured individuals to an international redress mechanism, it is not clear whether it will yield effective remedies. For one thing, it may be open to dispute whether the purchase of bonds outside the

[46] In *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, the Tribunal held that the defence of necessity was not admissible because the measure adopted by Argentina with regard to the investment was not the only available response to the economic crisis and because the Government had significantly contributed to the materialization of the financial crisis. In *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, instead, the Tribunal conceded the state of necessity, but concluded that such state does not exclude the obligation to compensate the injured investor, because necessity is only temporary and the duty to provide reparation revives as soon as necessity is terminated. Both awards are available at: www.worldbank.org/icsid/.

[47] *Italian Holders of Argentine Sovereign Bonds v. Argentina*, ICSID Case No. ARB/07/5, registered 7 Feb. 2007; *Giordano Alpi and others v. Argentine Republic*, ICSID Case No. ARB/08/9 registered on 28 July 2008, and *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB 07/8 registered on 27 Mar. 2007.

[48] Accordo fra la Repubblica Italiana e la Repubblica Argentina sulla promozione e protezione degli investimenti, 3 June 1988, available at: www.sice.oas.org/Investment/BITSbyCountry/BITs/ARG_Italy.pdf.

territory of the issuing state constitutes an investment under the terms of the ICSID Convention and of the relevant bilateral treaty. Further, questions of dual nationality may render some claims inadmissible. At the substantive level, the defence of necessity remains a potential obstacle.

This brings us back to the question of access to courts and state immunity. In this respect the fate of bondholders' actions against Argentina has been different in different jurisdictions. In Italy, where, ironically, a very large number of private investors have been injured, the courts have consistently declined to exercise jurisdiction on the ground that Argentina was entitled to sovereign immunity under international law. The Italian Court of Cassation in an important decision of 27 May 2005 in plenary session (*Sezioni Unite*)[49] sealed this jurisprudential approach by recognizing that the conduct of the Argentine government had the 'public purpose . . . of protecting the primary need of economic survival of the population in a historical context of very serious national emergency'. On the contrary, in the United States, following the pivotal decision in *Republic of Argentina v. Weltover*,[50] the Supreme Court has consistently held that global bonds issued by Argentina fall within the commercial exception to sovereign immunity.[51] The case law of German courts also stands in contrast to the Italian jurisprudence so deferential to sovereign immunity: the Frankfurt *Landgericht* in a judgment of 14 March 2003 denied immunity on the basis of a careful reconstruction of the customary rule of restrictive immunity and dismissed the plea of 'necessity' on the basis of the argument that, as a norm of customary international law, it may not be applied to the relations between a state and private individuals.[52] Although the latter conclusion by the German court is open to question – since necessity as a circumstance excluding wrongfulness is to be correctly characterized as a 'general principle of law', in the terms of Article 38(1)(c) of the ICJ Statute, and as such applicable to relations between governmental and private entities – its restrictive interpretation of the customary law of immunity as well as the similar interpretation followed in US judicial practice is correct. Both the 2004 UN Convention on State Immunity[53] and the European Convention on the same subject[54] include 'commercial transactions' among the exceptions to immunity. The preparatory work of the UN Convention clearly indicates that the issue of government bonds was considered by the ILC to be unquestionably part of the commercial activities of states.[55] Further, there is no basis

[49] Decision No. 11225, reproduced in *Rivista di diritto internazionale privato e processuale* (2005), at 1094.

[50] *Supra* note 41.

[51] For reference to the vast number of US judicial decisions on this matter see Bonafé, 'State Immunity and the Protection of Private Investors: The *Argentine Bonds* Case before Italian Courts', XVI *Italian Ybk Int'l L* (2006) 165, at 177.

[52] Landgericht, Frankfurt am Main, *Argentinianleihen-Urteil*, 14 Mar. 2003, No. 294/02, cited in Bonafé, *supra* note 47, at 179.

[53] UN Convention on Jurisdictional Immunities of States and Their Property, UN GA Res A/59/38 (2004), 2 Dec. 2004.

[54] European Convention on State Immunity, signed in Basle on 16 May 1972, CETS No. 74.

[55] See Report of the International Law Commission on the Work of its Fifty-first Session, 1999, UN Doc. A/54/10, at 160.

in international law for holding that an inherently 'commercial transaction' may *ex post* be absorbed within the category of *acta jure imperii* by the adoption of subsequent government measures frustrating the rights of the investors on grounds of public requirements. If this were true, the distinction between *acta jure gestionis* and *acta jure imperii* would be deprived of any useful effect. Finally, it suffices to observe that in the prevailing case law of national courts the characterization of an act of the defendant state as 'commercial' or 'sovereign' depends on the objective nature of the act and not on the purpose underlying its adoption.[56] Again, were this not true, the customary norm on restrictive immunity would lose its value.

The conclusion one can draw from the still unresolved saga of the Argentine bonds is that access to justice by foreign investors who have been injured by the payment default of a foreign government requires a more constructive dialogue between courts of different jurisdictions in order to determine what is the correct balance to be struck between respect for the foreign state's jurisdictional immunity and the need to ensure effective judicial remedies to innocent people who may have been ruined by that state's financial policies. This dialogue has been conspicuously absent in the case of the Argentine bonds. It is submitted that such dialogue is all the more necessary at this advanced stage of development of international investment law[57] for two reasons: first, because it may help clarify the content and scope of the investors' right of access to justice under international law to the benefit of investment arbitrators who often have to grapple with what is the precise meaning of the 'minimum standard of justice' in the treatment of aliens' economic interest; secondly, and more pertinently for the case under discussion, even if the ICSID Tribunal were to uphold the claim of the thousands of bondholders, the question of sovereign immunity would inevitably re-emerge at the moment the claimants tried to enforce the award in the national courts of the appropriate jurisdiction.

5 Conclusion

The impressive development of investment arbitration in contemporary international law has helped consolidate access to justice as a principle which partakes both of human rights law and of investment law. This development has furthered the process of emancipation of individuals and private entities from the fetters of the state by allowing the former to bring claims directly against a state before an international dispute settlement mechanism. The great success of investment arbitration has also raised the question whether the extensive penetration of foreign investment guarantees into areas of national regulation hitherto reserved to domestic jurisdiction should require a corresponding opportunity for access to justice and participation in arbitral

[56] For a comprehensive survey of such case law see Bonafé, *supra* note 47, at 169.

[57] On 'judicial dialogue' in international investment law see, for instance, Vadi, 'Towards Arbitral Path Coherence and Judicial Borrowing: Persuasive Precedent in Investment Arbitration', 5 *Transnational Dispute Management* (2008).

proceedings by representatives of the civil society of the host state. The conclusion reached in this article is that such concern can be met, at the substantive level, by the application in arbitral proceeding of the law of the disputing state to the extent that it pursues legitimate public policy objectives, and by the full application of the fair and equitable standard to the benefit of both the investor and the population affected by the investment. At the procedural level, the current trend towards a more expansive construction of civil society's access to justice is supported by the increasing acceptance of *amicus curiae* participation in arbitration proceedings.

With respect to the specific problem of access to justice of extraterritorial investors – as in the case of the Argentine bonds – this article has emphasized the importance of a dialogue between national courts as a condition for a common understanding of the scope and limits of sovereign immunity as a persistent obstacle to the effective exercise of the right of access to justice.